STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001284--CR

In the matter of the refusal of Damian A. Bethke:

DANE COUNTY,
Plaintiff-Respondent,

v.

DAMIAN A BETHKE,
Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The County believes that neither oral argument nor publication is necessary as the arguments are fully developed in the parties' briefs and the issues presented involve the application of well-settled legal principles.

STATEMENT OF THE ISSUES

Did the police have the requisite reasonable suspicion to make an investigatory stop of Bethke? Did the police have the requisite probable cause to arrest Bethke?

The trial court answered both questions yes.

STATEMENT OF FACTS

On January 3, 2016, Dane County Sheriff's deputies were dispatched to 3079 Sunnyside Street in the Town of Pleasant Springs (R.45:9). Deputy Benjamin Wepfer learned that a male, identified as Damian Bethke, was missing (R.45:9, 12). That male had been out with his girlfriend and other friends (R.45:9). The deputy received information about Bethke's pickup truck and its location (R.45:9-10). The dispatch occurred around 4:00 a.m. (R.45:9). The night was cold (R.45:10).

Deputies found the truck along County MN and a set of footprints leading from the truck into a field (R.45:9-10). In addition to county deputies, two Village of Cottage

Grove police officers and a Wisconsin State Trooper were out looking for Bethke (R.45:10). Bethke flagged down the Wisconsin State Trooper (R.45:47). Via loud speaker, the Trooper asked Bethke if he was the owner of the pickup truck and Bethke confirmed (R. 45:47).

Deputy Wepfer eventually received a radio transmission that the male subject was located (R.45:11). Deputy Wepfer responded to the male's location (R.45:11). The deputy made contact with Bethke in the back of an ambulance (R.45:12). Bethke was not handcuffed at that time (R.45:16).

Deputy Wepfer observed that Bethke's eyes were bloodshot, and he detected a moderate odor of intoxicants coming off of Bethke's breath (R.45:13). Bethke told Deputy Wepfer that Bethke had been out with friends drinking at a bar in McFarland (R.45:13). On the way back, Bethke's truck slid on some ice and crashed into a snow bank (R.45:13). Deputy Wepfer recalled Bethke stated this occurred around 1:00 a.m., and that Bethke stated he had three drinks with the last drink around midnight (R.45:13).

Bethke refused to participate in field sobriety testing (R.45:13-14). Bethke refused to provide a preliminary breath test sample (R.45:14). Subsequently,

Deputy Wepfer placed Bethke under arrest for Operating while Intoxicated (R.45:14).

Bethke filed a Motion to Suppress any evidence, statements, or observations obtained by law enforcement officers during and following the stop, detention and arrest of the defendant at approximately 6:02 a.m. on January 3, 2016, and all evidence derived from that stop, detention and arrest (R.6:1). The trial court denied Bethke's motion in its entirety (R.9:1-6).

ARGUMENT

I. THE WISCONSIN STATE TROOPER HAD REASONABLE SUSPICION TO INVESTIGTE A VIOLATION OF TRAFFIC LAW.

A. Applicable Law.

An investigatory or *Terry* stop is a "seizure" within the meaning of the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Young*, 2006 WI 98 ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. Such a stop is constitutional if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Young*, 2006 WI 98 ¶20. An investigatory stop permits police to briefly detain a person in order to ascertain the presence of possible criminal behavior, even though there is no probable cause to support an arrest. *Id.* (citation omitted).

Whether reasonable suspicion exists is a question of constitutional fact, triggering a two-step standard of review. *State v. Powers,* 2004 WI App 143, ¶ 6, 275 Wis. 2d 456, 685 N.W.2d 869. First, the trial court's findings of fact are to be upheld unless clearly erroneous, and second, whether those facts constitute reasonable suspicion are reviewed de novo. *Id.*

Reasonable suspicion is evaluated in light of the officer's experience and the totality of the circumstances present. *State v. Richardson,* 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). The reasonable suspicion justification for a stop is a common sense inquiry balancing the interests of society in solving crime with insulating members of that society from unreasonable intrusions. *Id.*

The test for determining the existence of reasonable suspicion is an objective one and takes into account the totality of the circumstances. *State v. Williams,* 2001 WI 21, ¶ 22, 241 Wis. 2d 631, 623 N.W.2d 106. The standard for an investigatory U. S. Constitutional Fourth Amendment intrusion is less than for an arrest, though reasonable suspicion cannot be based merely on an inchoate suspicion or hunch. *State v. Washington,* 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305. In determining whether an officer has the requisite reasonable suspicion, a court looks at the facts known to the officer at the time, together with any rational inferences drawn from those facts. But an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. *Id.*

A fair summary of the applicable law is that reasonable suspicion is subject to an objective inquiry based on the totality of the circumstances. While reasonable suspicion requires less than the probable cause necessary for an arrest, it requires more than an unparticularized suspicion or hunch. An officer is not required to eliminate all possibilities of innocent behavior before initiating a Fourth Amendment intrusion; it is a common sense balancing between the interests of the public in solving crime with the reasonableness of the intrusion.

B. Application of Facts to the Law.

Bethke argues that the Wisconsin State Trooper lacked an objectively reasonable suspicion of a violation of law to justify the seizure of Bethke (Bethke's brief at 12). Bethke reasons that after he flagged down a passing State Trooper, that State Trooper had no basis to detain Bethke and further investigate because the Trooper did not ask Bethke for his name, and did not assess Bethke's medical condition or approach Bethke prior to detaining Bethke.

The totality of the circumstances shows that the Wisconsin State Trooper had reasonable suspicion to detain Bethke. Bethke complains that the State Trooper did not

conduct a sufficient investigation at the time Bethke made contact with the Trooper (Bethke's brief at 14). However, the collective knowledge doctrine is well established in Wisconsin law; the police are considered a unit and when there is police-channeled communication to the stopping officer, the stopping officer is viewed as having the same knowledge as the officer who investigated the situation. The collective knowledge doctrine was first adopted in the probable cause to make an arrest context. *State v. Mabra,* 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974), and later extended to reasonable suspicion stops in *State v. Pickens,* 2010 WI App 5, ¶¶ 11-12, 15-17, 323 Wis. 2d 226, 779 N.W.2d 1. Therefore, if Dane County Sheriff's deputies searching for Bethke had reasonable suspicion to stop Bethke, then the Wisconsin State Trooper working with the deputies in the search had the same reasonable suspicion.

Deputies received information that Bethke was missing. Deputies located Bethke's pickup truck. It was off the road. Deputies found footprints leading from Bethke's truck. Deputies, Cottage Grove officers, and a Wisconsin State Trooper were out looking for Bethke. The Wisconsin State Trooper then located a subject who confirmed he was the owner of the pickup truck, who turned out to be Bethke.

Knowing that he (though the record does not identify the Wisconsin State Trooper by name, the Trooper is referred to as "he" in the underlying record) had located a missing person that various law enforcement officers were seeking out in the wee hours of a cold winter's morning, it makes perfect sense that the Trooper would detain that person until the situation could be sorted out. The record shows that Bethke was reported missing and his truck was found without Bethke present and with footprints leading into a field. It is not reasonable to believe that the State Trooper who located Bethke would simply let Bethke go on his way without at minimum determining whether further medical or law enforcement intervention was unnecessary. This is particularly true considering that Bethke flagged down the State Trooper.

Law enforcement also had reasonable suspicion to investigate a violation of traffic law. Specifically, law enforcement found Bethke's truck along the road without its driver. Bethke complains that there is no evidence that his pickup truck had been abandoned (Bethke brief at 7-9). However, as noted by the trial court, "By confirming that the abandoned Ford was his, Mr. Bethke provided a law enforcement officer information that allowed the officer to

conclude that it was likely that Mr. Bethke committed a violation of Wis. Stat. § 342.40(1m).”(R.9:4).

While that statute sets out time periods for determining when an abandoned vehicle will be “deemed abandoned and constitutes a public nuisance,” the first sentence of subsection (1m) sets out a subjective test. While abandonment was not the focus of testimony at the motion hearing, there is sufficient information in the record to support the notion that Bethke’s pickup truck was left unattended on a public highway for such time and under such circumstances as to cause the vehicle to reasonably appear to have been abandoned. Friends reported Bethke missing. Bethke’s truck was along the side of the road in a rural area. It was not parked in a parking spot. The pickup truck was unattended. It was early morning hours in the dead of winter. Bethke left the pickup truck and there is nothing in the record to indicate he left behind a note or other indication of eventual return. There were footprints leading away from the pickup truck in the early morning hours when it would be unusual for anyone to have business to attend to in a farm field. All of this information supports a reasonable conclusion that Bethke’s pickup truck was abandoned, i.e., that it was likely Bethke

had committed a traffic violation. However, Bethke was not placed under arrest by the State Trooper for that violation, at most he was the subject of an investigatory stop conducted by the State Trooper.

C. The Trooper's seizure of Bethke was a *Terry* stop, not an arrest, and was supported by reasonable suspicion.

The Wisconsin State Trooper's seizure of Bethke was a reasonable *Terry* stop. The Trooper was out searching for an individual reported missing who had left a pickup truck behind on the side of the road. Bethke approached and waived down the Trooper. Bethke confirmed to the Trooper that he was the owner of the relevant pickup truck. The Trooper detained Bethke until Dane County deputies arrived to complete the investigation.

The seizure of Bethke was reasonable. Bethke was found during a search for a missing man who was suspected of abandoning his vehicle - who evidently did not wish to get police involved in his plight when it originally occurred - and Bethke confirmed he was the owner of that particular vehicle. The Trooper observed Bethke, the object of his search, who was out on foot in the cold early hours of a January morning after being reported missing

after leaving his truck on the side of the road. Given that knowledge, the State Trooper was justified in detaining Bethke after Bethke made contact.

The State Trooper's actions did not transform the stop into an arrest. Whether or not the Trooper handcuffed Bethke is not determinative. Assuming the Trooper handcuffed Bethke, that was simply a show of authority to compel Bethke to remain on scene pending the completion of the investigation. *See United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (a police-citizen encounter becomes a seizure when the law enforcement officer "'by means of physical force or show of authority'" in some way restrains the liberty of the citizen) (quoted source omitted). Significantly more egregious uses of force have generally been found to have been consistent with a *Terry* stop. *See, e.g.*, *Jones v. State*, 70 Wis. 2d 62, 70, 233 N.W.2d 441 (1975) (an officer's drawing a weapon to effectuate a stop does not necessarily transform it into an arrest); *State v. Goyer*, 157 Wis. 2d 532, 538, 460 N.W.2d 424 (Ct. App. 1990) (an officer may physically restrain a suspect who attempts to walk away from an investigation). Under the circumstances here, the Trooper's actions were a reasonable way to freeze the situation pending investigation.

Furthermore, use of handcuffs does not necessarily transform a *Terry* stop into an arrest. *State v. Swanson*, 164 Wis. 2d 437, 448-49, 475 N.W.2d 148 (1991), *abrogated on other grounds by State v. Sykes*, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277; *see also Tom v. Voida*, 963 F.2d 952, 958 (7th Cir. 1992) (handcuffing justified where suspect was fleeing police and his actions required the measure). Here, the State Trooper had contact with Bethke in a rural area, in the early morning hours, while an active search was underway. The State Trooper reasonably decided that handcuffing Bethke prior to placing him into a squad car until further investigation could be done was necessary.

Finally, taking Bethke to an ambulance, alerting Dane County deputies, and waiting for those deputies to arrive to conduct further investigation was reasonable. The State Trooper needed to alert the Dane County Sheriff's deputies that he had detained the individual they were looking for, and also needed to medically clear Bethke given the cold night he had been exposed to. It is simply not reasonable to expect the State Trooper to locate Bethke and then let him go on his way prior to Dane County deputies responding on scene given the search that was underway, Bethke's

physical state, the cold weather of a January morning, and Bethke being on foot.

II. LAW ENFORCEMENT HAD PROBABLE CAUSE TO ARREST DAMIAN BETHKE FOR OPERATING WHILE UNDER THE INFLUENCE OF AN INTOXICANT.

A. Introduction to this Issue.

Bethke claims that he was illegally arrested by a Wisconsin State Trooper (Bethke brief at 16). However, in the underlying Motion to Suppress, Bethke stated that he was arrested "by law enforcement authorities on January 3, 2016 at 6:02 a.m." (R.6:2). The motion stated, "The McFarland Fire Department EMS treated Damian Bethke for hypothermia at 5:22 a.m., prior to his arrest" (R.6:2). Counsel for Bethke referred to "apprehension" of Bethke by the Wisconsin State Patrol Trooper (R.45:5), but to Bethke being "arrested," by deputies (R.45:6). Therefore, at the motion hearing, the interaction between Bethke and the Wisconsin State Trooper was treated as an investigatory stop, and the later interaction between Bethke and the deputies was treated as an arrest. The Circuit Court analyzed the suppression motion using the reasonable suspicion standard for the interaction with the State Trooper, and the probable cause standard for the

interaction with the deputies (R.9:4-6). Given how these issues were handled at the motion to suppress stage, any claim by Bethke on appeal that he was arrested by a Wisconsin State Trooper should be deemed waived.

B. Applicable Law.

"In reviewing an order granting or denying a motion to suppress evidence, this court will uphold a circuit court's findings of fact unless they are clearly erroneous." *State v. Secrist*, 224 Wis. 2d 201, 207, 589 N.W.2d 387 (1999). Whether those facts constitute probable cause is a question of law that this Court reviews de novo. *Id.* at 208.

A warrantless arrest is unconstitutional unless the arresting officer has probable cause to suspect that a crime has been committed. *Young*, 2006 WI 98, ¶ 22. "Probable cause requires that an arresting officer have sufficient knowledge at the time of the arrest to 'lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.'" *Id.* (quoting *Secrist*, 224 Wis. 2d at 212).

Just as a hunch is not enough to establish reasonable suspicion, reasonable suspicion is not enough to establish probable cause. *Young*, 2006 WI 98 ¶ 22. "Inevitably, the

lines between hunch, reasonable suspicion, and probable cause are fuzzy, with each case requiring an examination of the facts." *Id.* (footnote omitted). Nevertheless, probable cause is a less exacting standard of proof than establishing guilt "'beyond a reasonable doubt or even that guilt is more likely than not.'" *Id.* (quoting *Secrist*, 224 Wis. 2d at 212). "Whether probable cause exists in a particular case must be judged by the facts of that case." *Secrist*, 224 Wis. 2d at 212.

C. Application of Facts to the Law.

Bethke complains that the State Trooper did not have probable cause to arrest Bethke claiming that the record is devoid of any facts known to the State Trooper that could allow him to conclude that Bethke had committed any crime. Bethke is mistaken. First, Bethke confuses the arrest by a Dane County Sheriff's deputy and the interaction with the Wisconsin State Trooper. As explained in Section I *supra*, Bethke's interaction with the Wisconsin State Trooper was a *Terry* Stop, not an arrest. Second, after contacting Bethke in the back of an ambulance, Dane County Deputy Wepfer placed Bethke under arrest for Operating while Intoxicated based on articulable facts (R.45:16). Deputy Wepfer made

the arrest after he observed Bethke and was aware of the following:

- Bethke’s eyes were visibly glazed over and bloodshot;
- Bethke had a moderate odor of intoxicants coming off of his breath;
- Bethke stated he had been drinking with friends at a bar in McFarland and on the way back his truck slid on ice and crashed into a snow bank around 1:00 in the morning;
- Bethke said he had approximately three drinks and his last drink was around midnight;
- Bethke declined field sobriety tests when requested by law enforcement;
- Bethke declined to provide a sample into a Preliminary Breath Test (PBT) unit when requested by law enforcement.

(R.45:13-14). The totality of this information would lead any reasonable officer to believe that Bethke had committed the offense of Operating while Intoxicated at the time he last operated his pickup truck on County MN.

"[P]robable cause eschews technicality and legalisms in favor of a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" *State v. Kiper*, 193 Wis. 2d 69, 83, 532 N.W.2d 698 (1995) (citation omitted). The common sense inferences from all of the circumstances here led Deputy Wepfer to the reasonable conclusion that Bethke committed the crime for which Deputy Wepfer arrested him. Bethke's arrest was supported by probable cause.

Finally, Bethke's claim that he was illegally arrested by the Wisconsin State Trooper is a red herring. Even if the investigatory stop turned into an arrest unsupported by probable cause, Bethke cannot obtain the relief he seeks because the State Trooper had reasonable suspicion to detain Bethke until the Dane County deputies arrived. Thus, Deputy Wepfer would have conducted the same investigation of Bethke whether the State Trooper seized or arrested Bethke because Bethke was not free to leave either a detention or an arrest. If the State Trooper improperly arrested Bethke, that arrest did not produce any evidence independent of the subsequent police investigation or other "fruits of the poisonous tree" requiring suppression. All

of the evidence of Bethke's guilt flowed from Deputy Wepfer's investigation, not from the State Trooper's temporary seizure. Hence, to accept Bethke's position is to endorse the proposition that the State Trooper should have left Bethke in the cold January morning after locating him during a search for Bethke and after Bethke flagged down the Trooper. That is not reasonable.

Nothing about the State Trooper's or the Dane County Sheriff's deputy's interactions with Bethke required the suppression of evidence that officers obtained in the investigation. Hence, the trial court did not err in denying Bethke's motion to suppress. This court should affirm.

CONCLUSION

For the foregoing reasons, the County respectfully asks that this court affirm the judgment of the circuit court.

Dated this 16th day of January, 2018

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 16 pages.

Dated: _____.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of January, 2018.

_____

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