STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT IV

Appeal No. 2017AP001284
Circuit Court Case No. 2016TR001028

In the Matter of the Refusal of Damian A. Bethke

DANE COUNTY,
Plaintiff-Respondent,

v.

DAMIAN A. BETHKE,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION OF REFUSAL AND ORDER DENYING MOTION TO SUPPRESS ENTERED BY THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE CLAYTON KAWSKI AND THE HONORABLE JILL KAROFSKY PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT DAMIAN A. BETHKE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE WISCONSIN STATE TROOPER DID NOT HAVE LAWFUL AUTHORITY TO DETAIN AND ARREST DAMIAN BETHKE 1

A. Damian Bethke Did Not Waive the Argument That He Was Arrested by the State Trooper. 1

B. The Wisconsin State Trooper Did Not Conduct a Terry Stop; He Immediately Effectuated a Seizure and Arrest 2

C. The Wisconsin State Trooper Did Not Have Probable Cause to Seize and Arrest Damian Bethke 4

1. Bethke's Vehicle Was Not Abandoned. 5

2. An Abandoned Vehicle Does Not Provide Probable Cause for an Officer to Arrest the Owner of That Vehicle 6

3. No Facts Exist to Support a Lawful Arrest of Damian Bethke. 6

CONCLUSION. 8

TABLE OF AUTHORITIES

CASES **PAGE NO.**

State v. Goyer,
157 Wis. 2d 532, 460 N.W.2d 424 (Ct. App. 1990) 3

State v. Young,
2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729 3

Terry v. Ohio,
392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). 2, 3

Tom v. Voida,
963 F.2d 952 (7th Cir. 1992). 3, 4

United States v. Mendenhall,
446 U.S. 544, 100 S. Ct. 1870, 64 L.Ed.2d 497 (1980). 7

WISCONSIN STATUTES

342.40(1m) 5, 6

ARGUMENT

I. THE WISCONSIN STATE TROOPER DID NOT HAVE LAWFUL AUTHORITY TO DETAIN AND ARREST DAMIAN BETHKE.

A. Damian Bethke Did Not Waive the Argument That He Was Arrested by the State Trooper.

The County argues Damian Bethke does not have a claim on appeal to argue an illegal detention and arrest by the Wisconsin State Trooper in this case because it was not "handled at the motion to suppress stage." (Plaintiff-Appellant's Brief, p. 11)(hereafter "County Brief") It was indeed raised by Bethke multiple times at the motion to suppress stage of proceedings. It was raised more than once during the evidentiary hearing on the matter, first at the beginning of the hearing:

> "THE COURT: [W]hat are you asking to be suppressed?
>
> MR. GIESEN: Any evidence following the apprehension of Mr. Bethke by the Wisconsin State Patrol trooper on the morning of January 3rd. It was Mr. Bethke who flagged down the trooper, sought his assistance, and the trooper then took Mr. Bethke into custody. He had no basis to do that. . . .
>
> [H]e saw the trooper's vehicle approach…and he ran out and flagged down the trooper. That was about between 5 and 6:00 a.m. the trooper then took him into custody."

(R.45:4-5) Following the close of testimony, Bethke again asserted to the trial court that the trooper who first contacted and arrested Bethke

had no legal authority to do so, and that was a basis of his motion to suppress:

> "THE COURT: Is the motion based on excluding everything from the first contact forward or from the second contact forward? It's unclear to me.
>
> MR. GIESEN: Both.
>
> THE COURT: Both?
>
> MR. GIESEN: Right. There was not a basis to handcuff, to force Mr. Bethke to the ground and handcuff him and take him into custody."

(R.45:56) As the detention and arrest of Bethke by the Wisconsin State Trooper was unambiguously argued by counsel at the motion to suppress stage of proceedings, it cannot be deemed waived.

B. The Wisconsin State Trooper Did Not Conduct a Terry Stop; He Immediately Effectuated a Seizure and Arrest.

The County contends that the Wisconsin State Trooper was merely conducting a "Terry stop" to investigate the situation when he came upon Bethke. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (County Brief, p. 7) That is not what the trooper did; the trooper did not ask Bethke any questions, did not attempt to elicit a statement from Bethke or find out what was wrong, did not ask Bethke where he was coming from or going, did not ask if he needed help or even what his name was. The trooper, simply put, did not conduct any level of investigation before arresting Bethke. The County

correctly notes that a mere "hunch" is not enough to establish reasonable suspicion. State v. Young, 2006 WI 98, ¶ 22, 294 Wis. 2d 1, 717 N.W.2d 729. However, the County does not even articulate a "hunch" in this case, let alone reasonable articulable suspicion required for its Terry analysis. Terry squarely supports Bethke's claim that a seizure of his person and arrest was made by the trooper:

> "[W]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred."

Terry, supra, 392 U.S. at 34, n. 16.

The County relies on caselaw to excuse the trooper's actions in handcuffing Bethke that are factually distinct from the case at hand. For example, it cites State v. Goyer, 157 Wis. 2d 532, 538, 460 N.W.2d 424 (Ct. App. 1990), for the proposition that an officer "may physically restrain a suspect who attempts to walk away from an investigation." (County Brief, p. 8) Bethke never tried to walk away from an investigation. To the contrary, Bethke walked *toward* the trooper seeking help, walking toward an investigation. Bethke wanted to speak with the trooper and gave the trooper no indication otherwise at any point prior to the officer commanding him to the ground, putting his knee in Bethke's back and handcuffing him.

The County then cites Tom v. Voida, 963 F.2d 952, 958 (7th Cir.

1992) where the court found "handcuffing justified where suspect was fleeing police and his actions required the measure." (County Brief, p. 9) Again, no one was fleeing or trying to flee in this case. Bethke is the one who flagged down the trooper. Bethke initiated the contact. Bethke walked toward the trooper as he approached, waving his hands above his head to get the trooper's attention. All evidence points to the fact that Bethke's actions could only be described as the *opposite* of fleeing. The officers that evening were not out searching for a fugitive or a person suspected of having committed a crime; they were looking for a lost, missing person in the cold winter night. Any suggestion that Bethke would have fled the scene is unsupported by the evidence and not a reasonable inference from the facts surrounding that interaction.

C. The Wisconsin State Trooper Did Not Have Probable Cause to Seize and Arrest Damian Bethke.[1]

The County bears the burden to show that the arresting trooper had probable cause to arrest Damian Bethke. The County relies almost

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1 The State enters territory outside the scope of Damian Bethke's appeal when it discusses probable cause for an arrest of Bethke by a Dane County Sheriff's deputy hours after Bethke's initial encounter with the Wisconsin State Trooper. (County Brief, Section II, pp. 10-15) The basis of Bethke's appeal is the illegal seizure of his person and arrest effectuated by a Wisconsin State Trooper immediately upon Bethke making contact with law enforcement on January 3, 2016. For that reason, Bethke does not need to address Section II of the County's brief. Conduct by other officers subsequent to Bethke's initial arrest by the state trooper was not raised or briefed by Bethke in his appeal. Since those issues were not raised or briefed by Bethke, they are not before this Court, so this Court should not address them.

solely on the fact that a vehicle belonging to Bethke was found off the side of a country road as support for the proposition that a traffic law had been violated ("abandoned vehicle") and therefore an arrest was proper. However, Bethke's vehicle was never abandoned and regardless, the presence of an abandoned vehicle does not provide officers probable cause to arrest any person.

1. Bethke's Vehicle Was Not Abandoned.

The officers found an empty truck and saw fresh footprints walking away from where the truck was parked. The County makes an inaccurate leap of logic in its interpretation of the facts as applied to law. That is, that any vehicle without an occupant, without a "note" left behind or "other indication of eventual return", is an abandoned vehicle per Wis. Stat. § 342.40(1m). (County Brief, p. 6) To be abandoned is not simply to be without a physically present owner. Rather, the legislature sought to define the term by providing parameters, such as whether or not a car has been left for "more than 48 hours." Wis. Stat. § 342.40(1m). Here, the evidence was undisputed that the truck was unattended some time after midnight for only a maximum of a few hours. (R.45:9; App. 17) It was therefore not 'abandoned' as defined in Wisconsin law.

2. An Abandoned Vehicle Does Not Provide Probable Cause for an Officer to Arrest the Owner of That Vehicle.

The only remedy available by law for an allegedly abandoned vehicle is to tow it. The legislature does not even allow a monetary forfeiture because the statute concerning abandoned vehicles is a violation in rem and carries no penalty against a person. Wis. Stat. § 342.40(1m). For a full discussion on this, please see Argument I of Appellant's opening brief.

3. No Facts Exist to Support a Lawful Arrest of Damian Bethke.

The Collective Knowledge Doctrine the County leans on does not absolve the arresting trooper's unlawful actions in this case. At the time the trooper forced Bethke to the ground, put his knee in his back, and handcuffed him, the only knowledge that *any* officer in the area had was that there may be a missing person and that there was an unattended truck parked off the roadway for perhaps a few hours. Based on that knowledge, *no* officer had probable cause at that time to place Bethke under arrest, so any knowledge imputed to the arresting trooper still does not transform the illegal detention and arrest of Bethke into a lawful one.

Damian Bethke was under arrest the moment the State Trooper

placed him on the ground, put his knee into Bethke's back to hold him in place and placed handcuffs on him. The trooper himself called in to dispatch that he had placed Bethke "in custody." (R.45:16; App. 19) As cited by the County, in United States v. Mendenhall, 446 U.S. 544, 552, 100 S. Ct. 1870, 64 L.Ed.2d 497 (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." (County Brief, p. 8)

The trooper's arrest of Bethke was not only unlawful but also not necessary in order to ensure Bethke would not leave the scene; he was the one who flagged the trooper down. The single question posed by the trooper, asking whether or not he had a truck parked off another county road, Bethke answered immediately, affirmatively and in full cooperation. The County asks the question – What was the officer to do, short of placing Bethke on the ground and handcuffing him? "[S]imply let Bethke go on his way without at a minimum determining whether further medical or law enforcement intervention was unnecessary?" (County Brief, p. 5) The County hit the nail on the head there; the trooper absolutely should have talked to Bethke to determine if he needed medical attention. That was Bethke's goal in flagging him down, he needed help. The trooper did not do that though. The County

goes on to posit that it is "not reasonable to expect the State Trooper to locate Bethke and then let him go on his way…" (County Brief, p. 9) What was not reasonable was for the trooper to encounter a person flagging him down and immediately seize him and place him under arrest and call in to dispatch that he had someone in custody. It would have been reasonable for the trooper to talk to Bethke and have a conversation with him as to why he was waving his hands, flagging down the trooper in a way a person does when they are seeking assistance.

CONCLUSION

Based upon the record herein and the foregoing authorities and arguments, Damian A. Bethke respectfully requests that this Court enter an order reversing the order of the trial court denying Damian Bethke's Motion to Suppress and vacating Damian Bethke's refusal conviction.

Respectfully submitted this 31st day of January, 2018.

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CERTIFICATION ON FORM

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font. The length of this brief is 2,387 words.

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CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(12), STATS.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Section 809.19(12), Stats.

I further certify that the 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.

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