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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2018AP665

MARQUETTE COUNTY,

Plaintiff-Respondent,

-vs-

CHRISTOPHER P. BRAY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MARQUETTE COUNTY, THE HONORABLE BERNARD N. BULT PRESIDING, TRIAL COURT CASE NOS. 2016TR2358 & 2016TR2466

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

I. WHETHER THE ARRESTING OFFICER EXCEEDED THE SCOPE OF HIS AUTHORITY TO QUESTION MR. BRAY AT ROADSIDE IN VIOLATION OF *STATE v. KNAPP*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899?

Trial Court Answered: NO. The circuit court found that because Mr. Bray was only subject to a *Terry* stop which did not blossom into a full-blown custody, the arresting officer was permitted to go into a lengthy interrogation of Mr. Bray without concern that the officer was attempting to circumvent the Fifth Amendment to the United States Constitution, Article I, § 8 of the Wisconsin Constitution, or *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents questions of law based upon a set of uncontroverted facts. The issues presented herein are of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the law at issue herein is fully developed, and therefore, publication would do little, if anything, to enhance the relevant body of law.

STATEMENT OF THE FACTS AND CASE

On Tuesday, October 11, 2016, at approximately 11:12 p.m., Sgt. Brian Ropicky of the Marquette County Sheriff's Department was on routine patrol when he observed the vehicle being operated

by the defendant, Christopher Bray, allegedly speeding in excess of the posted limit on STH 23 in the County of Marquette. (R1.)

Sgt. Ropicky detained Mr. Bray's vehicle, and in the course of his initial observations of Mr. Bray, noted that Mr. Bray had an odor of intoxicants emanating from his vehicle and appeared to have "slightly bloodshot" eyes. (R14 at 2.) Ultimately, Sgt. Ropicky had Mr. Bray perform several field sobriety tests, which tests Mr. Bray ostensibly failed. *Id*. Mr. Bray was arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). (R1.)

Before he was in constructive custody, however, Sgt. Ropicky interrogated Mr. Bray extensively regarding numerous matters, all of which were calculated not only to lead to incriminating evidence, but also were designed to develop a timeline for the prosecution regarding the activities Mr. Bray engaged in for that day, and further intended to lead to inconsistencies in the responses by repeatedly asking the same questions at different points in the encounter. (R14.)

Notably, *after* the arresting officer had already made his decision to have Mr. Bray perform field sobriety tests, but *before* he had Mr. Bray begin those tests, he asked Mr. Bray the following questions:

> Q: So you flew in from St. Louis?
>
> Q: And what time? What time did you get in?
>
> Q: You originally told me you were coming from Milwaukee to Wisconsin Dells. You're actually coming from Milwaukee to Oshkosh?
>
> Q: And where did you have your, where did you consume your intoxicating beverages?
>
> Q: Oshkosh? What were you drinking?
>
> Q: How many of them did you have?
>
> Q: Four?

Q: All right. On, umm, you haven't had anything to drink while you were driving or you didn't stop anywhere in between?

Q: . . . What time was your last drink at?

Q: Forty-five minutes to an hour ago?

Q: Okay. So you had it right before you left?

Q: For Wisconsin Dells?

Q: All right. And you said four Spotted Cows, no other drinks or shots?

Q: Okay, and it was like dinner there? Was it with friends or family or . . . ?

Q: Business colleagues?

Q: Where was that at?

(R41 at 6:15 to 8:11.)

Then, after asking Mr. Bray several standardized questions regarding any physical defects or problems which might prevent him from being able to perform the field sobriety tests, the arresting officer again picks up with his interrogation:

Q: Okay. On a scale of like 1 to 10, 1 being completely sober, 10 being the most intoxicated you've ever been in your life, where would you place yourself honestly?

Q: Three or four?

(R41 at 10:24 to 11:4.)

Thereafter, Deputy Ropicky has Mr. Bray perform five field sobriety tests, all of which Deputy Ropicky alleges Mr. Bray failed. (R14, Appendix.) At this point, given what Deputy Ropicky must have considered a "closed case," there is little doubt that Mr. Bray was in constructive custody. Nevertheless, despite the fact that Mr. Bray was in custody, the interrogation by Deputy Ropicky continued

as follows:

> Q: Okay. All right. Umm, just be honest, I mean how much have you had to drink? I mean it appears to me that it was more than four beers.
>
> Q: Just be honest with me. I'm asking you.
>
> Q: Would you say it's more than four?
>
> Q: Four to eight?
>
> Q: Okay, all of the same beer, the Spotted Cow?
>
> Q: Once again, on a scale of 1 to 10, 1 being the most sober you've ever been and 10 being the most intoxicated you've ever been, where would you place yourself, honestly?
>
> Q: Two or three?
>
> Q: All right, as opposed to the I think it was three to four when you first gave me . . . .
>
> Q: So now it's two to three?

(R41 at 21:22 to 23:6.)

On April 3, 2017, Mr. Bray electronically filed a Notice of Motion and Motion to Suppress Evidence Gathered in Violation of Article I, § 8 of the Wisconsin Constitution requesting that the circuit court issue an order suppressing for use any and all evidence gathered by the arresting officer subsequent to the officer's violation of Mr. Bray's right to be free from unconstitutional interrogation as that right is guaranteed by the United States Constitution, Amends. V, IX, and XIV; the Wisconsin Constitution Article I, § 8; and *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. (R14.)

A hearing was held on Mr. Bray's motion on May 2, 2017, at which time the parties agreed, with the Court's consent, that the arresting officer would not testify in order to lay a foundation for Mr. Bray's motion, but rather, the audio portion of the video recording

of Mr. Bray's arrest would be sufficient to establish said foundation. (R19 at 2.)

Upon reaching this agreement, the circuit court ordered that the audio track of the video recording be transcribed by a court reporter, and that Mr. Bray submit a brief in support of his motion thirty days after the transcript is completed. The transcription of the audio track was completed on May 15, 2017. (R41.)

Thereafter, the parties extensively briefed the matter, and the circuit court issued a written decision denying Mr. Bray's motion on the ground that it felt Mr. Bray was never in either actual or constructive custody at the time any of the questioning took place, and therefore, there was no violation of Mr. Bray's constitutional right against self-incrimination. (R24; D-App. at 102-08.)

STANDARD OF REVIEW ON APPEAL

This appeal presents questions of law related to the application of the Fifth Amendment to the U.S. Constitution and Article I, § 8 of the Wisconsin Constitution to an undisputed set of facts. As such, this Court applies constitutional principles to the facts of the case, and in so doing, reviews the facts below independent of the circuit court. *See State v. Klessig*, 211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997); *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984).

ARGUMENT

I. STATEMENT OF THE LAW IN WISCONSIN AS IT RELATES TO INTERROGATION.

A. The Right to be Free From Self-Incrimination Extends to Quasi-Criminal Proceedings, Among Which a Charge of Operating While Intoxicated—First Offense Is Numbered.

The case at bar presents a question regarding the application of the constitutional right to be free from self-incrimination to a circumstance in which the underlying charge is not "purely" criminal, but rather is "quasi-criminal." "Quasi-criminal" cases are those which have the following characteristics, namely: (1) the ordinance is derived from a criminal statute; (2) the defendant is required to enter a plea of guilty, not guilty, or *nolo contendere*; (3) the forfeiture is imposed is intended to be punitive rather than remedial; and/or (4) rules of criminal procedure apply, at least in part. *See, e.g., Milwaukee v. Cohen*, 57 Wis. 2d 38, 48, 203 N.W.2d 633 (1973); *State v. Becker*, 145 Wis. 2d 906, 430 N.W.2d 380 (1988); *State v. Ehlen*, 119 Wis. 2d 451, 351 N.W.2d 503 (1984). In these types of quasi-criminal cases, substantive and procedural constitutional due process applies.

Directly on point with the issue of whether the right to be free from self-incrimination applies to quasi-criminal cases is *Boyd v. United States*, 116 U.S. 616 (1886). *Boyd* involved a civil *in rem* case against an importer who was alleged to have defrauded the federal government of the duties it was owed on certain imported goods. *Id*. at 617. The statute under which the defendant was charged contained a provision which compelled him to produce certain of his private papers and books. *Id*. 634-35. The defendant argued that his Fifth Amendment right against self-incrimination would be violated if he was compelled to produce what the government requested. *Id*. Even though the defendant was not facing a criminal prosecution, the Supreme Court recognized that the

proceedings were of a quasi-criminal nature to which the protections against self-incrimination ought to be extended. *Id*. at 637.

While Mr. Bray is charged with a first offense violation of Wisconsin's drunk driving law, the quasi-criminal nature of such a charge allows for the attachment of constitutional due process rights, which includes the right to be free from self-incrimination as observed in *Boyd*.

B. Law Enforcement Officers May Not Willfully Circumvent a Suspect's Right to be Free From Self-Incrimination Under Either Article I, § 8 of the Wisconsin Constitution or the Fifth Amendment to the U.S. Constitution.

Instructive on the issue of whether law enforcement officers may circumvent the requirement of providing *Miranda* warnings to a suspect is *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. In *Knapp*, the Wisconsin Supreme Court examined whether a suspect's right to be free from self-incrimination under Article I, § 8 of the Wisconsin Constitution was co-extensive with the same right as that right is expressed under the Fifth Amendment of the United States Constitution, and whether the law enforcement practice of interrogating a suspect before *Miranda* warnings need to be given should be condoned without sanction.

In reaching its conclusion on the first question, the *Knapp* court examined at length the long and well-established rights of the states to interpret their constitutions independent of the protections afforded by the federal Constitution. Based upon that history, the *Knapp* court stated that Wisconsin was not required to march in "lock step" with the federally established protections found in the U.S. Constitution, but rather would "not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *Id.* at ¶59, quoting *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

On the second point, the *Knapp* court used strong language to impress upon law enforcement that it would not tolerate deliberate circumvention of the protections afforded by Article I, § 8 of the Wisconsin Constitution. The court unambiguously stated:

> We have recently shown little tolerance for those who violate the rule of law. In *State v. Reed*, 2005 WI 53, P36, 280 Wis. 2d 68, 695 N.W.2d 315, we depicted the Fifth Amendment as providing a shield that protects against compelled self-incrimination. By its very nature, the *Miranda* warnings secure the integrity of that shield--and to be sure, that shield is made of substance, not tinsel. *See Hoyer*, 180 Wis. at 413. Any shield that can be so easily pierced or cast aside by the very people we entrust to enforce the law fails to serve its own purpose, and is in effect no shield at all. Just as we will not tolerate criminal suspects to lie to the police under the guise of avoiding compelled self-incrimination, we will not tolerate the police deliberately ignoring *Miranda's* rule as a means of obtaining inculpatory physical evidence. As we have frequently recognized in the past, what is sauce for the goose is also sauce for the gander.

Knapp, 127 WI ¶72 (citations omitted in part).

There are well-established standards to protect an accused's constitutional privilege against compulsory self-incrimination during police interrogation. *See generally, Miranda v. Arizona* 384 U.S. 436 (1966). Unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of an interrogation, any statement made by the person being interrogated cannot, over his objection, be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary. *See Michigan v. Tucker*, 417 U.S. 433, 443 (1974).

"Interrogation" means direct questioning by the police, as well as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001).

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the United States Supreme Court refused to condone a law enforcement tactic known as "question first, then give the warnings." Specifically, Seibert was a suspect in an arson case who was brought to the police station and asked several questions which were intended to lead to incriminating evidence. After obtaining the answers they sought, law enforcement officers gave Seibert a twenty to thirty- minute break, and then *Mirandized* her and re-asked the questions they had originally put to her. Seibert argued that this technique violated her Fifth Amendment rights, and while the Missouri court of appeals agreed, it also found that only the answers to the first series of questions should be suppressed, while the answers to the post-*Miranda* warning questions would remain admissible. The Missouri Supreme Court disagreed, and suppressed all of the statements, both those which came before the proper warning and those which came after.

The *Seibert* Court ultimately agreed with the Missouri Supreme Court's approach, and found distasteful the law enforcement tactic by which a suspect is questioned first, then *Mirandized* and re-questioned. The U.S. Supreme Court found the Missouri officer's tactic to be nothing more than an "end-run" around the Fifth Amendment which called into question the very voluntariness of the answers to the questions post-*Miranda*. The Court held that "by any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id*. at 610.

II. APPLICATION OF THE LAW TO THE FACTS OF THE INSTANT CASE.

A straightforward and common-sense examination of Sgt. Ropicky's roadside interrogation of Mr. Bray is all that is needed to realize that his questions were utterly irrelevant to determining whether Mr. Bray was, at the time of his initial encounter with law enforcement, operating a motor vehicle while intoxicated. For example, an astute observer of the law could reasonably inquire "Of

what relevance as to whether Mr. Bray was operating a motor vehicle while impaired is the question: 'Were you drinking with family or friends'"? Is Mr. Bray more or less impaired if the response is that he was drinking with "family" as opposed to "friends"?

Likewise, it is hardly relevant at roadside for Sgt. Ropicky to inquire of Mr. Bray where he departed that morning before arriving at the airport in Milwaukee. Questions of this type and that described above serve but one purpose wholly unrelated to the roadside determination of impairment, namely they are calculated to assist the prosecution at trial to develop a more thorough, detailed, complete and cogent story for the jury during the prosecution's case-in-chief. Had Sgt. Ropicky first *Mirandized* Mr. Bray—as an officer does when asking a suspected drunk driver the questions on the Alcohol Influence Report post-arrest—there exists the possibility that Mr. Bray would have declined to answer such questions. In the roadside context, however, Sgt. Ropicky is able to "paint a fuller picture" for the prosecutor's story at trial.

Other types of questions at roadside, including the manner in which they are asked, do not move Sgt. Ropicky any closer to ascertaining Mr. Bray's level of impairment, but do set a trap for Mr. Bray either to be caught in an inconsistency or to give a more favorable response for the prosecution. By repeatedly pressing him to "be honest" each time he asks Mr. Bray the same question regarding how much he had to drink, Sgt. Ropicky is sending a not-so-subtle message to Mr. Bray that he does not believe Mr. Bray's answer to the question and will not accept the answer until such time as Mr. Bray gives him a larger number than he has offered to that point.

The same trap—inconsistency versus favorable answer for the prosecution—is laid when Mr. Bray is asked where he feels he fits into a "scale from 1 to 10" regarding his level of impairment on more than one occasion, and especially when Sgt. Ropicky does not accept his answer the second time around by confronting him with an ostensible inconsistency relative to the first time he asked the question of Mr. Bray.

There are four major problems with Deputy Ropicky's interrogation of Mr. Bray which cause it to contravene the constitutional protections afforded by the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 8 of the Wisconsin Constitution, and *State v. Knapp*, 2005 WI 127. These are:

(A) The fact that certain questions were irrelevant to the stage of investigation Deputy Ropicky was in at the time the questions were asked, but which would be relevant to the development of the case at trial should it proceed to that end;

(B) The fact that questions were repeated again and again for the purpose of eliciting potentially contradictory, and therefore, incriminating answers;

(C) The fact that incriminating questioning continued *after* Mr. Bray was in constructive custody; and

(D) The fact that on its face, the extensive and detailed questioning appears to be the "end-run" about which the *Seibert* Court warned.

Each of the foregoing issues Mr. Bray has with the manner in which he was interrogated by Deputy Ropicky will be addressed in turn below.

A. Certain Lines of Questioning Were Irrelevant to the Stage of Investigation, But Not Irrelevant for the Development of the Case at a Later Time.

Early in his encounter with Mr. Bray, Sgt. Ropicky determined that he was going to have Mr. Bray submit to a battery of field sobriety tests. Sgt. Ropicky's decision was premised upon the fact that Mr. Bray was speeding, his vehicle drifted toward the centerline of the road, he had an odor of intoxicants on his breath, he admitted to drinking, he had "slightly bloodshot and watery eyes," and he had "deliberate speech." (R14, Appendix.)

Despite having concluded that there was enough information upon which to base his decision to administer field sobriety tests,

Sgt. Ropicky went on a "fishing expedition" for further incriminating evidence by asking no less than **sixteen** (16) questions about where Mr. Bray had been coming from, what time his flight landed, whether he had been drinking, how much he had to drink, when he had his last intoxicating beverage, where he was going, whether he had dinner, with whom did he have dinner, *et al.*.

First, Mr. Bray had already admitted that he had been drinking, and in fact, this is one of the considerations Sgt. Ropicky used to justify his decision to have Mr. Bray submit to field sobriety tests in the first place. Asking for further details, therefore, regarding the drinking would only serve to strengthen the County's case against Mr. Bray at a later date as it does nothing to enhance, influence, assist, or otherwise aid Sgt. Ropicky in making a decision he has *already* made, namely: to have Mr. Bray submit to field sobriety tests.

Second, asking Mr. Bray whether he was out with family or friends does not assist the officer in any way regarding any decision he had to make that night—whether it be to administer field sobriety tests on one end of the spectrum or to whether to arrest Mr. Bray on the other end of the spectrum. This line of questioning serves only to assist Sgt. Ropicky in being able to "paint a fuller picture" for the telling of the prosecutor's story at trial.

Third, it is hardly relevant at roadside for Sgt. Ropicky to inquire of Mr. Bray where he flew out of that morning before arriving at the airport in Milwaukee. Questions of this type, like the foregoing, are calculated to assist the prosecution at trial to develop a more thorough, detailed, complete and cogent story for the jury during the prosecution's case-in-chief.

B. Repeatedly Asking the Same Question Serves Only to Elicit Potentially Contradictory Statements Designed to Incriminate the Suspect.

Other types of questions at roadside, including the manner in which they are asked, do not move Sgt. Ropicky any closer to ascertaining Mr. Bray's level of impairment, but do set a trap for Mr.

Bray either to be caught in an inconsistency or to give a more favorable response for the prosecution. By repeatedly pressing him to "be honest" each time he asks Mr. Bray the same question regarding how much he had to drink, or to "be honest" regarding where Mr. Bray thinks he may be on a "scale from one-to-ten" regarding his level of impairment, serves only to (a) send a not-so-subtle message to Mr. Bray that he does not believe Mr. Bray's answer to the question and will not accept the answer until such time as Mr. Bray gives him a larger number than he has offered to that point; and/or (b) cause Mr. Bray to give inconsistent—and therefore ostensibly incriminating—answers to the question in the event Mr. Bray does not recall precisely what he earlier answered.

On no less than **twelve** (12) occasions did Sgt. Ropicky press an issue with Mr. Bray by repeating a question, such as asking about the number of drinks Mr. Bray thought he had or asking him where he thought his level of impairment was on a scale from one-to–ten. Likewise, Sgt. Ropicky presses issues he has with Mr. Bray's answers by trying to elicit higher numbers for both the "scale" questions and the "number of drinks" questions by using the phrase "just be honest with me" (or words similar) on **four** (4) separate occasions.

There is no reason to interrogate Mr. Bray in such a fashion unless one is attempting to obtain an answer which will ultimately incriminate Mr. Bray by either getting him to admit to a "high" number or by causing him to give a variety of answers apparently inconsistent with one another. Incrimination is the *sine qua non* of interrogation and is the very thing the Fifth Amendment and Article I, § 8 of the Wisconsin Constitution are designed to guard against. Doing an "end-run" around these protections is precisely what the *Knapp* and *Seibert* Courts warned against.

C. Even If This Court Declines to Find That Sgt. Ropicky Was Engaged In the "End Run" Forewarned By the Knapp *and* Seibert *Courts, Interrogation Should Have Ceased After Mr. Bray Was In Constructive Custody.*

As noted above, Mr. Bray ostensibly failed five field sobriety tests in addition to other subjective observations of impairment made by Sgt. Ropicky (such as speeding, weaving, having an odor of intoxicants, admitting to drinking, having "deliberate" speech, and bloodshot and watery eyes). There can be no reasonable argument made that there was any chance that Mr. Bray was not in constructive custody at this time under *California v. Hodari D.*, 499 U.S. 621 (1991) and *U.S. v. Mendenhall*, 446 U.S. 544 (1980). (*See* Section III., *infra*, for a discussion of the constructive custody issue.) Such a suggestion would literally be laughable. At a minimum, therefore, all interrogation of Mr. Bray should have ceased. Despite this well-settled and bright-line constitutional rule, however, Sgt. Ropicky nevertheless asked Mr. Bray a series of no less than **nine** (9) questions designed to incriminate Mr. Bray.

These questions included asking Mr. Bray how much he had to drink, what he had to drink, where he thought he was on a scale from one-to-ten in terms of impairment, *etc*.. There is no universe in which such questions could be characterized as anything less than designed to incriminate. Thus, Mr. Bray was either entitled to be *Mirandized* prior to the questions being asked of him, or he was entitled not to have them asked of him at all. The deputy's failure to be obedient to the rigors of the Fifth Amendment and Article I, § 8 is fatal to their use at trial.

D. The Overt and Overall Actions of Sgt. Ropicky In Questioning Mr. Bray as He Did Evidence Sgt. Ropicky's Obvious and Unabashed Attempt to Engage In the Very "End Run" the **Seibert** *Court Warned Against.*

Each of the foregoing categories of questions, and their repeated asking, is done for the purpose of securing answers without any fear that once the Alcohol Influence Report is read and Mr. Bray is actually *Mirandized*, he will decline to be so forthcoming. As indicated above, the United States Supreme Court in cases like *Seibert*, 542 U.S. 600, and the Wisconsin Supreme Court in cases like *Knapp*, 2005 WI 127, have no tolerance whatsoever for law

enforcement practices which encourage the circumvention of the rights protected by both the Fifth Amendment of the U.S. Constitution and Article I, § 8 of the Wisconsin Constitution. So frowned upon are these practices that even non-testimonial, physical evidence gathered after the illegal conduct are subject to the Exclusionary Rule and the Fruit of the Poisonous Tree Doctrine. *See* Section V., *infra*.

It is thus incumbent upon the judiciary to send a clear and unequivocal message to law enforcement officers throughout the State that the protections afforded by the U.S. and State Constitution—whether they emanate from the Fourth, Fifth, Sixth, Ninth, or Fourteenth Amendments to the U.S. Constitution, or §§ 6, 7, 8 or 11 of the Wisconsin Constitution—will not so easily be thwarted or circumvented. The protections afforded by these amendments and sections are inviolate, save a few narrowly-tailored and well-circumscribed exceptions. The "end run" is not such an exception.

When the entire encounter between Sgt. Ropicky and Mr. Bray is viewed as a whole, it becomes clear that the **twenty-seven** (27) incriminating questions asked of Mr. Bray by Sgt. Ropicky were designed but for one purpose, *i.e.*, to assist the prosecution of Mr. Bray for drunk driving by gathering testimonial evidence designed to incriminate him. None of the questions asked of Mr. Bray after he made his first admissions to drinking while still seated in his motor vehicle assisted the officer in further determining whether Mr. Bray was, in fact, incapable of safely operating a motor vehicle; that is what the field sobriety tests and preliminary breath test were designed to do. Each of these categories of questions, and their repeated asking, is done for the purpose of securing answers without any fear that once the Alcohol Influence Report is read and Mr. Bray is actually *Mirandized*, he will decline to be so forthcoming.

III. THE TRIAL COURT'S CONTENTION THAT THERE WAS NOT A "CUSTODY" IS PATENTLY ERRONEOUS.

The circuit court below addressed Mr. Bray's argument that there was a violation of *State v. Knapp*, 2005 WI 127, notably *not* by addressing the contention that the arresting officer far exceeded the scope of permissible questioning with the incriminating probing he undertook of Mr. Bray, but rather, by addressing whether Mr. Bray was ever in custody. (R24; D-App at 102-08.)

The circuit court's assertion that Mr. Bray's detention failed to transform into a constructive arrest *ignores* factors considered by an authority no less than the *United States Supreme Court* as relevant. For example, Sgt. Ropicky was in full uniform, wearing his sidearm; he detained Mr. Bray in a fully marked squad car; he interrogated Mr. Bray extensively regarding his drinking and goaded him repeatedly with comments such as "Just be honest with me" which would lead any reasonable person to understand that they were being investigated for a violation of the law involving alcohol and driving; he asked Mr. Bray whether he had any weapons on him; he frisked Mr. Bray after ordering him to exit his vehicle; he had Mr. Bray perform no less than five field sobriety tests apart from the preliminary breath test; *etc*., and still continued his interrogation of Mr. Bray throughout the entire encounter.

No reasonable person who has failed to pass field sobriety testing and who has been stopped by a law enforcement officer who spends that much time interrogating him regarding his consumption of alcohol is going to believe that he or she is free to leave at this point. Arrest is imminent in any suspect's mind at this time. Thus, *California v. Hodari D.*, 499 U.S. 621 (1991) and *U.S. v. Mendenhall*, 446 U.S. 544 (1980) are satisfied because, as Justice Stewart observed, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554; *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Florida v. Royer*, 460 U.S. 491, 497, 502-04, (1983).

The Supreme Court articulated that custody is a function of "whether the officer's words and actions would have conveyed that [movement was restricted] to a reasonable person." *California v. Hodari D.*, 499 U.S. 621 (1991). The test regarding custody is

further a function of whether the person would objectively feel free to disregard the police and go about their business. *United States v. Drayton*, 536 U.S. 194, 201 (2002). This test must presuppose an innocent person. *Id.* at 202; *Florida v. Bostick*, 501 U.S. 429, 434-36 (1991). Importantly, ***after*** **failing the field sobriety tests** but before finally submitting to the preliminary breath test, Sgt. Ropicky engaged in a detailed and significant exchange with Mr. Bray regarding what he had to drink, under what circumstances he was drinking, how many alcoholic beverages he had to drink, where he felt he was on a scale from one to ten regarding his level of impairment, *et al*. There can be no doubt that in Sgt. Ropicky's mind at the time, having put a suspect through multiple field sobriety tests which he allegedly failed, there was going to be an arrest, and in this regard, the officer's intentions are relevant under Wisconsin law.

In Wisconsin, custody of a suspect occurs "once [a suspect's] ability or freedom of movement [has] been restricted" by law enforcement. *State v. Adams*, 152 Wis. 2d 68, 75, 447 N.W.2d 90 (Ct. App. 1989). The concept of "custody" was further refined in *State v. Hoffman*, 163 Wis. 2d 752, 472 N.W.2d 558 (Ct. App. 1991), when the court of appeals held that once the individual's freedom of movement is restrained, and therefore the person is in custody, the person may further be considered to be under constructive "legal arrest" if, in addition to the restriction of movement, the law enforcement officer intends "to restrain the person" and the person "believes or understands that he is in custody." *Id*. at 761, citing *Adams*, 152 Wis. 2d at 75 n.2. Again, as a point of emphasis, not only would a reasonable person believe himself to be in custody after failing to pass the field sobriety tests administered to him, *but there can be* ***no doubt*** *that Sgt. Ropicky intended to restrain Mr. Bray* which, according to the foregoing authorities of *Hoffman* and *Adams*, is a relevant consideration.

Thus, the test for custody is not as simple as the circuit court pretends it to be, and even if this Court does not view the detailed and extensive questioning at the beginning of Mr. Bray's encounter with Sgt. Ropicky as violating *Miranda-Knapp*, at least from the point after the field sobriety tests and prior to the administration of the preliminary breath test, there must objectively have been a

custody.

IV. THE CIRCUIT COURT UTTERLY MISSES THE POINT OF THE *KNAPP* ADMONISHMENT AGAINST DELIBERATE CIRCUMVENTION OF THE FIFTH AMENDMENT.

Accepting the circuit court's proposition that there is no *Miranda* violation because no custody has been established would permit patently absurd results which would allow for the *Knapp* decision to be circumvented. The court's position, taken to its logical conclusion, has secured a way to protect officers who wish to interrogate suspects without having to *Mirandize* them, and that is this: simply never place the defendant in handcuffs then, as a law enforcement officer, you may question a suspect all you want. You may keep the suspect at roadside for as long as necessary; you may ask whatever questions you wish, no matter how incriminating; you may engage in as much conversation as necessary to discover the evidence you are looking for because, according to the circuit court's position, you have not placed the person in custody. Taking the court's decision at face value utterly ignores every aspect of the *Knapp* decision which warns against such an outcome.

The circuit court overlooked the *Knapp* court's assertion that it would "not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *Knapp*, 2005 WI 127, ¶ 59.

The *Knapp* court made the foregoing observation in order to impress upon law enforcement that it would not tolerate deliberate circumvention of the protections afforded by Article I, § 8 of the Wisconsin Constitution. It bears repeating that the *Knapp* court clearly, unequivocally, and strongly urged that "[j]ust as we will not tolerate criminal suspects to lie to the police under the guise of avoiding compelled self-incrimination, we will not tolerate the police deliberately ignoring *Miranda's* rule as a means of obtaining inculpatory physical evidence. As we have frequently recognized in the past, what is sauce for the goose is also sauce for the gander."

Knapp, 2005 WI 127, ¶ 72 (citations omitted in part). Taking the circuit court's position to its ultimate conclusion, however, would accomplish the very thing the *Knapp* court warned against, namely: circumvention of the Fifth Amendment and Article I, § 8 of the Wisconsin Constitution by simply ensuring that no matter how many probing questions are asked, the officer asks them before the suspect is officially handcuffed. If the acts described by the court as necessary conditions precedent to triggering *Miranda* were required, *Knapp* would be abrogated.

It cannot be gainsaid that the United States Supreme Court found the "end-run" around the Fifth Amendment constitutionally repugnant. The Court recognized that *Miranda* warnings are meaningless and ineffective if law enforcement officer get all of their questioning out of the way prior to formally arresting a suspect. *Missouri v. Seibert*, 542 U.S. 600, 610 (2004).

As noted, Mr. Bray ostensibly failed five field sobriety tests in addition to other subjective observations of impairment made by Sgt. Ropicky (such as speeding, weaving, having an odor of intoxicants, admitting to drinking, having "deliberate" speech, and bloodshot and watery eyes). There is no doubt that Mr. Bray was in custody at this point because no law enforcement officer would allow a suspect who has failed all of the field sobriety tests to simply drive away. To suggest otherwise is an affront not only to this Court's legal judgment but to its common sense as well. At a minimum, therefore, all interrogation of Mr. Bray should have ceased. Nevertheless, Sgt. Ropicky asked Mr. Bray a series of no less than **nine** (9) questions designed to incriminate him *after* this point.

These questions included asking Mr. Bray how much he had to drink, what he had to drink, where he thought he was on a scale from one-to-ten in terms of impairment, *etc*.. Mr. Bray was entitled to be *Mirandized* prior to these questions being asked of him. The deputy's failure to be obedient to the rigors of the Fifth Amendment and Article I, § 8 is fatal to their use at trial and to the evidence developed therefrom.

V. THE REMEDY FOR A VIOLATION OF A SUSPECT'S RIGHTS UNDER ARTICLE I, § 8 OF THE WISCONSIN CONSTITUTION INCLUDES SUPPRESSION OF SUBSEQUENTLY OBTAINED PHYSICAL EVIDENCE PURSUANT TO THE "FRUIT OF THE POISONOUS TREE" DOCTRINE.

Once it is accepted that Sgt. Ropicky's multi-question roadside interrogation of Mr. Bray went well beyond what is considered standard procedure for questioning a suspected drunk driver pre-arrest and germinated into a full-blown interview designed to gather incriminating evidence for the prosecution, the issue becomes: What is the appropriate remedy to encourage law enforcement officers to comply with *Miranda* rather than look for ways to circumvent it? This issue was settled by the *Knapp* court as well. The court held:

> [T]urning to the exclusionary rule, "This state has accepted the doctrine that courts must consider the means used in obtaining evidence and not receive it if obtained by violation of constitutional rights of an accused." *Warner v. Gregory*, 203 Wis. 65, 66, 233 N.W. 631 (1930). Because the goals of the exclusionary rule and fruit of the poisonous tree doctrines are to curb "illegal governmental activity," and because [the United States Supreme Court] announced that *Miranda* is a constitutional rule (which we embrace as concluding *Miranda* is constitutional), we conclude that it is appropriate that the exclusionary rule bars physical fruits obtained from a deliberate *Miranda* violation under Article I, Section 8.

Knapp, 2005 WI 127, ¶ 73.

Obviously, any ill-gotten testimonial evidence obtained by Sgt. Ropicky during his unconstitutional interrogation of Mr. Bray must be suppressed. In addition, however, in order to effectuate the underlying purpose of the *Miranda* Rule and to ensure that law enforcement officers will in the future act with the deference and respect due and owing Article I, § 8 of the Wisconsin Constitution, it is also necessary to suppress the physical evidence obtained in this case under the fruit of the poisonous tree doctrine. Thus, the

preliminary breath test result, the video recording of Mr. Bray's detention and arrest, the Alcohol Influence Report, and the blood test result must be suppressed.

VI. CONCLUSION.

Mr. Bray respectfully requests that this Court reverse the decision of the circuit court below and remand his case with direction to grant his motion to suppress his statements and the physical evidence obtained after his right to be free from self-incrimination as that right is guaranteed by Article I, § 8 of the Wisconsin Constitution.

Dated this 10th day of August, 2018.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 6,580 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on August 10, 2018. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 10th day of August, 2018.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2018AP665

MARQUETTE COUNTY,

Plaintiff-Respondent,

-vs-

CHRISTOPHER P. BRAY,

Defendant-Appellant.

APPENDIX

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