STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2018AP665

MARQUETTE COUNTY,

Plaintiff-Respondent,

v.

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 OF PLAINTIFF-RESPONDENT

Respectfully Submitted,

MARQUETTE COUNTY
77 W. Park St
P.O. Box 396
Montello, WI 53949
(608) 297-3020

By: Chad A. Hendee
District Attorney
Marquette County, Wisconsin
State Bar No. 1036138

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STATEMENT OF ISSUE FOR REVIEW

Did Sergeant Ropicky violate Bray's rights by not given the *Miranda* warnings during his questioning on the side of the road during a traffic stop that resulted in Bray's arrest for Operating While Intoxicated? The circuit court found that he did not.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Marquette County recognizes that this appeal, as a one judge appeal, does not qualify under this Court's operating procedures for publication.

Hence, publication is not sought. The County does not seek oral argument as the briefs should adequately present the issues on appeal.

STATEMENT OF CASE

I. PROCEDURAL BACKGROUND

Bray appeals the circuit court's decision denying his motion to suppress that was filed on April 2, 2017. The parties stipulated to a transcript being created of the video recording between Bray and Marquette County Sergeant Brian Ropicky for use by the court. After briefing by the parties,, the circuit court denied Bray's motion on October 30, 2017. (R. 24) Subsequently, Bray was found guilty of OWI and PAC, both as first offenses and this appeal resulted.

II. FACTUAL BACKGROUND

On October 11, 2016, at approximately 11:12 p.m., Sergeant Brian Ropicky of the Marquette County Sheriff's Office observed a vehicle being driven by the defendant-appellant, Christopher Bray, traveling at 70 miles per hour in a 55 mph zone on STH 23 in Marquette County, Wisconsin. (R1.)

Sergeant Ropicky stopped Bray's vehicle and made contact with him. (R16.) This interaction lead to Sergeant Ropicky conducting standardized field sobriety testing on Bray, Bray submitting to a preliminary breath test, and eventually being placed under arrest. (R16 and R41 generally)

Bray focuses on the various questions Sergeant Ropicky asked Bray while on the side of the road. However, while Bray focuses completely on the "interrogation" by Sergeant Ropicky, what Sergeant Ropicky said to Bray as he got him out of the vehicle are important as well. He stated, "..ask you to shut the vehicle off and step out of the vehicle for me. Just walk back to the front of that squad car. You're not under arrest." (R41 at 4:8 to 4:9) Shortly after, he stated, "Umm, I would like you to perform some field sobriety tests for me to make sure you're safe to drive. If you're safe to drive, we'll get you on your way, all right?" (R41at 5:17 to 5:20)

The first interaction between Sergeant Ropicky and Bray while he was still in his vehicle lasted approximately 1 minute, 51 seconds (1:51)[1] and the second interaction from when Sergeant Ropicky makes contact on his second approach until Bray is informed he is under arrest lasted approximately twenty one minutes, twenty four seconds (21:24)[2]. (R16)

ARGUMENT

Bray spends much time and effort arguing that Sergeant Ropicky violated Bray's rights under Article I, § 8 of the Wisconsin Constitution or the Fifth Amendment to the U.S. Constitution or pursuant to the Wisconsin Supreme Court's holdings in *State. Knapp*, 2005 WI127, 285 Wis. 2d 86, 700 N.W.2d 899. In doing so, he argues that Sergeant Ropicky's questions,

[1] This is based on review of R16, Stream 0, the County approximates the first contact to last from from 1:47 until 3:38.
[2] This is based on review of R16, Stream 0, the County approximates the second contact to last from 8:45 until 30:09.

both in quantity and manner created a custodial interrogation. Thus by this argument, because Sergeant Ropicky did not provide the necessary warnings under *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Bray's right not to be compelled to incriminate himself was violated. However, no matter how clear he may believe it is, or how laughable to him a contrary finding may be, the reality is that Sergeant Ropicky's actions never raised to the level of placing Bray in custody, either actual or constructive.

I. THE *MIRANDA* REQUIREMENT DOES NOT ATTACH WHEN THERE IS NO CUSTODY.

The general rule is that a *Terry* stop is not a *Miranda* custody situation—there is no requirement that a person be advised of the *Miranda* warnings before being questioned during a Terry stop—a person during a *Terry* stop is not in custody for *Miranda* purposes. *Maryland v. Shatzer*, 559 U.S. 98, 112, 130 S.Ct. 1213, 1224 (2010). As the circuit court noted in its decision the interaction between Sergeant Ropicky and Bray is a classic *Terry* stop situation. In *State v. Houghton*, 2015 WI 79, 364 Wis.2d 234, 868 N.W.2d 143 the Court summarized the facts and holding of the Court in the *Terry* case:

> *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is the seminal case on reasonable suspicion as justification for conducting investigatory stops. In *Terry*, the defendant was convicted of carrying a concealed weapon. Id. at 4, 88 S.Ct. 1868. The arresting officer, a veteran detective with almost 40 years of experience, confronted Terry and his associates after observing them engage in a pattern of suspicious behavior. *Id.* at 5–7, 88 S.Ct. 1868. After speaking to the men briefly, the

> detective grabbed Terry, spun him around, and performed a pat down search. *Id.* at 7, 88 S.Ct.1868. The search revealed a .38 caliber revolver in Terry's coat pocket. *Id.* Terry moved to suppress the evidence, arguing that the detective lacked probable cause to conduct the search. *Id.* at 7–8, 88 S.Ct. 1868. The Supreme Court affirmed Terry's conviction, holding that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22, 88 S.Ct. 1868. In order to justify such a seizure, police must have reasonable suspicion that a crime or violation has been or will be committed; that is, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S.Ct. 1868. This "reasonable suspicion" standard was understood to be a lower standard than probable cause. *See id.* at 35–36, 88 S.Ct. 1868 (Douglas, J., dissenting).

2015 WI at ¶¶ 20, 21, 364 Wis.2d at 246-47. It would appear that Bray would concede that the interaction between him and Sergeant Ropicky began as a *Terry* stop. In fact, he has not contested the basis for stop of the vehicle or even the ability for Sergeant Ropicky to conduct further investigation, namely standardized field sobriety testing.[3] The question would then be did Sergeant Ropicky's actions and questioning of Bray transform this from a *Terry* stop to a custodial interrogation requiring *Miranda*. While Bray argues it does, the answer to that question has to be no.

The courts have been clear that even during a valid *Terry* stop, a defendant may be considered "in custody" for Fifth Amendment purposes and entitled to *Miranda* warnings before questioning. *State v. Morgan*, 254 Wis.2d 602, 617, 648 N.W.2d 23, 2002 WI App 124, citing *State v. Gruen*, 218 Wis.2d 581, 594-96, 582 N.W.2d 728 (Ct. App.1998). The fact that a

[3] See Defendant-Appellant's brief, p. 11

defendant is questioned during a *Terry* stop is not dispositive on the *Miranda* custody issue. *Gruen*, 218 Wis.2d at 596. The question is not solely whether or not the defendant was being detained pursuant to a *Terry* stop or had been arrested for Fourth Amendment purposes. *Gruen*, 218 Wis.2d at 593. An officer's obligation to administer *Miranda* warnings to an individual attaches only where there has been a restriction on the individual's freedom so as to render him or her "in custody." *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

In *Gruen* one of the issues the court covered was how to determine if a particular *Terry* stop is or is not a *Miranda* custody situation. The court, in addressing this "how to" issue, stated:

> An examination of the totality of the circumstances includes such relevant factors as the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. *See State v. Leprich*, 160 Wis.2d 472, 477, 465 N.W.2d 844, 846 (Ct. App. 1991); In exploring the degree of restraint, courts have also considered as relevant factors:
> (1) whether the defendant was handcuffed;
> (2) whether a gun was drawn on the defendant;
> (3) whether a *Terry* frisk was performed;
> (4) the manner in which the defendant was restrained;
> (5) whether the defendant was moved to another location;
> (6) whether the questioning took place in a police vehicle; and
> (7) the number of police officers involved.

218 Wis.2d at 594-96. The only of these seven enumerated factors that is present in this case was that Sergeant Ropicky conducted a *Terry* frisk of Bray. (R41 at 5:24 to 6:13.) Bray was not handcuffed, Sergeant Ropicky never drew his gun, he was never placed in the squad car or moved to another location other than getting out of his car and walking back by the

squad car and Sergeant Ropicky was the only officer. (R41) While it was definitely true that Sergeant Ropicky was not going to simply allow Bray to walk away before his investigation was done, he also told him he wasn't under arrest and noted that once he makes sure he was safe to drive that he was going to get him on his way. (R41 at 4:8 to 4:9 and 5:17 to 5:20.)

The U.S. Supreme Court also dealt with the question of whether an officer must provide a *Miranda* warning on traffic stops in the 1984 case *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). In this case, the defendant was observed by a Trooper weaving in and out of traffic. Upon being stopped, he had difficulty standing and the Trooper concluded that the defendant was going to be taken into custody. However defendant was not told this and he was asked to perform a field sobriety test. During this time, the Trooper asked the defendant how much he had to drink and the defendant provided incriminating information. *Id.* at 423. The Court dealt with the question of whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered "custodial interrogation." *Id.* at 435.

In finding that *Miranda* warnings were not required, the Court noted that "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) which quoted *Terry v. Ohio*, 392 U.S., at 29. *Id.* at 439. The Court went on to say "Typically, this means that the officer may

ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released." *Id.* at 439-440. The Court also recognized the concern raised by Bray that "to 'exempt' traffic stops of the coverage of *Miranda* will open the way to widespread abuse." *Id.* at 440. The Court responded however that they were "confident that the state of affairs projected by respondent will not come to pass. It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' *Id.* quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam).

The Court of Appeals 2nd District dealt with the question of whether a person is "in custody" during an OWI investigation for *Miranda* purposes in *State v. Wortman*, 2017 WI App 61, 378 Wis.2d 105, 902 N.W.2d 561. In that case, the court found Wortman was not in custody when he was stopped by an officer blocking his path with a squad car with lights activated as he tried to walk away from the scene of an accident. Wortman was brought back to the scene of the accident made admissions about his drinking history and after field sobriety testing, was placed under arrest. *Id.* at ¶2.

After finding that the officer had conducted an investigatory stop, the court noted "a formal arrest, in contrast, "'is a more permanent detention that typically leads to 'a trip to the station house and prosecution for crime,'" and requires probable cause to suspect that a crime has been committed." *Id.* at ¶7, quoting *State v. Young*, 2006 WI 98, ¶22, 294 Wis.2d 1. The court went on, "We determine whether a person has been arrested by questioning whether a 'reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances.'" *Id.* quoting *State v. Swanson*, 164 Wis.2d 437, 447, 475 N.W.2d 148 (1991), overruled on other grounds by *State v. Sykes*, 2005 WI 48, ¶ 27, 279 Wis.2d 742, 695 N.W.2d 277.

The court in *Wortman* found that the officer had the legal authority to briefly speak with Wortman regarding the accident and extend the stop based on the additional factor supporting reasonable suspicion. The court noted that "a reasonable person in Wortman's shoes would not have considered himself under arrest until such time as he was formally arrested and placed in handcuffs." *Id.* at ¶11. In the case before the court, there was never any such display or placing to handcuffs on Bray. A reasonable person in his position would believe that upon taking care of the tests, he was going to be allowed on his way.

II. SERGEANT ROPICKY'S ACTIONS DID NOT CREATE A CUSTODIAL INTERROGATION REQUIRING *MIRANDA*.

The question before this court really boils down to whether or not Sergeant Ropicky's actions transformed this traffic stop from a *Terry* stop interaction, to an extended stop for the purpose of investigating a possible OWI, all the way to creating a constructive custodial situation based on his questioning of Bray. The answer to this question is no.

"Interrogation" for *Miranda* purposes is express questioning, as well as any words or actions on the part of the police (other than those normally attendant to arrest and custody) "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Cunningham*, 144 Wis.2d 272, 277, 423 N.W.2d 862 (1988) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

The County concedes that some of the questions by Sergeant Ropicky including those regarding drinking history, specifically how much he drank and when, were reasonably likely to elicit an incriminating response from the suspect. Also in fairness, the requests by Sergeant Ropicky for Bray to "be honest with him" do at least give some indication that he was not believing the answers that Bray was providing. However, Sergeant Ropicky was conducting a valid investigation into the possibility of Bray operating under the influence and his questions don't rise to the level that Bray felt he was in custody.

Bray doesn't appear to be arguing that in every OWI investigation, an officer must provide *Miranda* warnings during their contact prior to asking any questions that are relevant to their investigation. Instead he points to "twenty-seven (27) incriminating questions" asked by Sergeant Ropicky that were an "end run" around the protections provided to Bray. (Defendant-Appellant Brief at 15.) He also makes the assertion that

> 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 suspects' mind at this time.

(Defendant-Appellant's Brief, p. 16.) However, nothing in the record supports this assertion. Sergeant Ropicky specifically told Bray that he was not under arrest, he told him that once they could make sure he was safe to drive that he would get him on his way. (R41 at 4:8 to 4:9 and 5:17 to 5:20.)

The questions by Sergeant Ropicky were in fact a moderate number to try to obtain information confirming or dispelling his suspicions. The reality is that while Bray wishes to paint this interaction as some extended torturous interrogation by Sergeant Ropicky, the majority of them were simply trying to confirm or dispel his suspicion that Bray was under the influence. As the *Berkemer* Court noted, Bray was not obliged to respond. In fact, a simple response of "I've already told you that" to any repeated questions would have been appropriate and would not have resulted in

anything different. The actions taken by Sergeant Ropicky do not reach the "degree associated with formal arrest" and a reasonable person in Bray's position would know that. The length of time the two interacted is also not egregious with the first interaction at the window of his vehicle being less than 24 minutes. (see footnotes 1 and 2.)

III. KNAPP AND SEIBERT ARE DISTINGUISHABLE AND SHOULD NOT GUIDE THIS COURT

Bray rests much of his argument to the court on the *Knapp* case. This case is completely distinguishable from this case and should not be followed. The *Knapp* case involved a homicide case where Mr. Knapp was on probation and an apprehension request was put out for him. *Knapp* at ¶6. Upon seeing Knapp through the window of residence, the officer told Knapp to open the door because he had a warrant for his arrest. Knapp picked up a phone to call his attorney. He then hung up, the officer entered, Knapp told the officer he was trying to call his attorney, and then was arrested and taken to the police station where he was interrogated without ever being read the *Miranda* warnings. *Id* at ¶7.

There is no correlation between the facts of *Knapp* and this case. Bray points out that the Wisconsin Supreme 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." (Defendant-Appellant Brief, p.8) However, where the Court

had reason to strongly note they "won't tolerate the police deliberately ignoring *Miranda*'s rule as a means of obtaining inculpatory physical evidence," there is no such violation here. Bray wants this court to see the questioning by Sergeant Ropicky on an OWI stop as being the same as a person being told they are being arrested, being arrested and taken to the police station, and then being interrogated without any *Miranda* warnings. This analogy simply does not fit.

Similarly, Bray also argues that the U.S. Supreme Court's ruling in *Missouri v. Seibert*, 542 U.S. 600 (2004) controls here in that the Supreme Court refused to condone a tactic by law enforcement of "question first, then give the warnings." Again, the situation that was dealt with in Seibert is very different from the facts before this court. In Seibert, the defendant was arrested at 3 a.m. while at a hospital and taken to the police station and left alone in an interview room for 15 to 20 minutes. The Officer then questioned her without *Miranda* warnings for 30 to 40 minutes before taking a break and then reading Miranda and essentially getting similar statements after *Miranda*. *Id.* at 604. Bray's argument is that like the situation in Seibert, Sergeant Ropicky was getting "the good stuff" in violation of *Miranda* with the knowledge that the questions on the alcohol influence report, read to someone after rights are read, may not be answered after a person's rights are given. This argument again ignores the point that

Bray was not in custody on the side of the road prior to being placed under arrest.

The Wisconsin and U.S. Supreme Courts were rightfully strong in their admonitions regarding the violations in *Knapp* and *Seibert*. Unfortunately for him, the facts of this case do not rise to a level even close to those dealt with in those cases. Bray was never in custody for purposes of *Miranda* until he was placed under arrest.

IV. EVEN IF THIS COURT FINDS A VIOLATION, REMEDY IS NOT SUPPRESSION OF ALL EVIDENCE.

Bray argues that the appropriate remedy here is suppression of not only any statements that he made but also the preliminary breath test result, the video recording of his detention and arrest, the Alcohol Influence Report, and the blood test result. He bases this on the concept of the fruit of the poisonous tree doctrine. However, if this court does find that at some point of the investigation by Sergeant Ropicky, that the interaction turned to a custodial interrogation implicating *Miranda*, the appropriate remedy would be to suppress any statements Bray made in response to those questions. The County would contend that the exclusionary rule proposed by Bray is better suited in cases meant to curb "illegal governmental activity" and is meant to punish intentional actions. The actions by Sergeant Ropicky do not come anywhere close to that level. Even if the court agrees with Bray that the level or content of Sergeant Ropicky's

questions altered the interaction to one that required *Miranda*, it doesn't change the original observations he made or his observations of the field sobriety tests. If this court finds there was a point of custodial interrogation implicating Miranda, the statements after that would rightfully be suppressed and nothing more. There is still more than sufficient probable cause that leads to the blood sample being drawn from Bray.

CONCLUSION

For the above stated reasons Marquette County requests that the court find that the trial court correctly denied Bray's Motion to Suppress and affirm its ruling.

Respectfully Submitted this 12th of September, 2018.

MARQUETTE COUNTY

By _____
Chad A. Hendee
District Attorney
Marquette County, Wisconsin
State Bar No. 1036138

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.18(8)(b) and (c) for a document produced with a proportional serif font. The length of this entire document is 3636 words.

Dated this 12h day of September, 2018.

By: _____

Chad A. Hendee
District Attorney
Marquette County, Wisconsin
State Bar No. 1036138

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 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 12th day of September, 2018.

By: _____

Chad A. Hendee
District Attorney
Marquette County, Wisconsin
State Bar No. 1036138