STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2018AP1209-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MOSE B. COFFEE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Winnebago County Circuit Court,
the Honorable John A. Jorgensen, Presiding.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

FRANCES REYNOLDS COLBERT
Assistant State Public Defender
State Bar No. 1050435

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
colbertf@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

UNITED STATES CONSTITUTION

OTHER AUTHORITIES

ARGUMENT

Under the Totality of the Circumstances, It Was Not Reasonable to Believe That Evidence of the OWI Was in the Vehicle and More Specifically That It Was at the Bottom of "a Bag Full of Stuff," Wedged Behind the Driver's Seat.

This case presents two questions: (1) Was it reasonable to believe that there would be evidence of OWI in Mr. Coffee's car; and (2) If yes, was it reasonable to believe that evidence of the OWI would be at the bottom of "a bag full of stuff," wedged behind the driver's seat? Under the Fourth Amendment and *Arizona v. Gant*, 556 U.S. 332 (2009), the answer to both these questions has to be no.

(1) The object of the search in this case was open containers of alcohol.

The state does not refute or argue erroneous the factual finding that Mr. Coffee's arrest was alcohol related and "the thing that would be searched incident to this arrest under *Gant* would be …any containers containing alcohol…" (43:90; App. 131). *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.,* 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Therefore, when analyzing the reasonability of the search, it is clear the object of the search was evidence of drinking.

(2) Wisconsin does not have a *per se* rule that says it is always reasonable to believe that evidence of drinking will be in the vehicle after an arrest for an OWI.

Although undeveloped, the state appears to be arguing for the adoption of a *per se* rule that would permit the search of a vehicle in every OWI arrest regardless of the facts known to the officer. This is exactly the kind of bright-line rule that was rejected in *Gant*. *Gant,* 556 U.S. at 345. Indeed, in numerous contexts our courts have reiterated "the Fourth Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances, eschewing bright-line rules and emphasizing instead the fact-specific nature of the reasonableness inquiry." *State v. Sumner,* 2008 WI 94, ¶20, 312 Wis. 2d 292, 752 N.W.2d 783. It is well established that reasonableness is "not gauged by an officer's 'inchoate and unparticularized suspicion or 'hunch'[.]" *State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305 (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

The state argues: "Here, unlike a speeding or a seat belt violation, the law Coffee broke … involves both the vehicle and an intoxicant … Hence, the police had a reasonable basis to believe that evidence of intoxicants might be found in the vehicle." Response Brief at 10. In other words, because the presence of an intoxicant would be physical evidence, as opposed to traffic violations which never involve

physical evidence, there is a reasonable belief that evidence might be found in the car. This limited argument fails both logically and legally.

First, the state ignores the fact the crime of OWI is in no way dependent on whether someone is currently possessing alcohol. When someone is arrested for an OWI, it is reasonable to believe that at some point prior to the arrest, the driver consumed enough alcohol to become intoxicated. Without more information however, there can be no reasonable inference about where that alcohol was consumed. The state, who has the burden to show the legality of the search, (*State v. Smith*, 131 Wis. 2d 220, 240–41, 388 N.W.2d 601 (1986)), offered no testimony regarding the percentage of OWI arrests in which open alcohol is discovered in the vehicle or anything else about the likelihood an OWI arrestee possesses evidence of drinking in the car at the time of arrest.

Due to the ubiquitous nature of alcohol, common sense directs that in most OWI arrests, there is not open alcohol in the car. The legality and public availability of alcohol make an OWI arrest distinctly different from a possession of drugs arrest. *See Gant*, 556 U.S. at 343 (specifically referencing drugs as an example of an offense that would create a reasonable belief evidence of the arrest might be found in the vehicle). If the crime of arrest is possession of drugs, then law enforcement forcibly had probable cause to believe the accused was currently possessing illicit drugs. In this situation, it is reasonable to believe drugs would be in the vehicle; a *per se* rule makes sense.

The crime of OWI does not lend itself to this kind of blanket rule, however. To be sure, it is not hard to think of circumstances under which it would be reasonable to believe evidence of drinking would be in the car after an OWI arrest. For example, if police actually saw the driver drinking, saw open intoxicants in plain view, observed furtive movements or nervousness, or obtained an admission, any of these could create a reasonable belief that there was evidence of drinking in the car. If the driver was underage or had another apparent motive for not consuming alcohol in public, this might also be a factor in the totality of the circumstances analysis. None of the above factors, however, nor any others, suggested Mr. Coffee had been consuming alcohol in his car. All the officers had was a hunch that there might be open intoxicants and a hunch does not amount to a reasonable belief.

Wisconsin has previously declined to adopt the *per se* rule proposed by the state and should not do so in this case[1]. *State v. Hinderman,* 2014AP1787-CR unpublished slip op. ¶13, (Ct. App. Feb. 12, 2015). If

[1] Other jurisdictions around the country have also rejected a *per se* rule for OWI search incident to arrests. *See e.g. U.S. v. Taylor*, 49 A.3d 818, 827 (D.C. Cir 2012) (holding that because "there was nothing in particular - no tell-tale sign - to suggest that [the defendant] had been drinking in his vehicle," it was not reasonable for the police to believe "that evidence of the offense of arrest would be found there."); *U.S. v. Reagan*, 713 F. Supp.2d 724, 732 (E.D. Tenn. 2010) (finding "it is not reasonable to believe that evidence of DUI is inside the passenger compartment of a vehicle based solely upon the nature of the charge or the existence of evidence that the vehicle's driver is intoxicated.").

this court were to adopt a *per se* rule that every OWI arrest always creates a reasonable belief that there is evidence of drinking in the car, it would represent a significant departure from deeply rooted Fourth Amendment jurisprudence as well as common sense. Due to the complete lack of any particularized facts that suggests open alcohol containers were in Mr. Coffee's car, the search of the vehicle was unlawful and the evidence obtained from the search should be suppressed.

(3) Assuming officers had authority to search the vehicle (an assumption Mr. Coffee disputes), it was unreasonable to extend the scope of the search to rummaging through a bag wedged behind the driver's seat.

Simply having authority to search the entire vehicle does not equate to blanket authority to search all containers in the vehicle. There has to be a reasonable belief that the particular place searched will contain the "object of the search." *U.S. v. Ross,* 456 U.S. 798, 799 (1982) (defining the scope of probable cause vehicle searches). Notably, while the state contends that *Hinderman* is factually distinguishable, it does not argue that *Hinderman* misapplied the law. *Hinderman* was decided in favor of the defendant on the premise that there are limits to the scope of a search incident to an arrest and there must be a reasonable belief that a particular container searched inside the vehicle might contain the evidence sought.

The state points to two facts to support its position that the search of the bag was reasonable: (1) Mr. Coffee was intoxicated and (2) Mr. Coffee was in the driver's seat. Response Brief at 9. Again, this falls short of specific particularized facts needed to support a reasonable belief that there was open alcohol in the bag.

The only facts that could possibly contribute to the officer's belief that he might find evidence of drinking in the bottom of the bag behind the driver's seat were captured on the body camera video. There were no nuances or credibility issues to be resolved regarding what the officer did or did not see. In fact, the officer repeatedly deferred to the video in his testimony because he could not recall the details of the search. (43:69-70). Therefore, this court should review the video *de novo* as it has in in other similar cases. *See e.g. State v. Reed*, 16AP1609-CR, unpublished slip op., ¶5 n.2 (Ct. App. March 23, 2017)[2] (citing *State v. Jimmie R.R.,* 2005 WI App 5, 232 Wis. 2d 138, 606 N.W.2d 196) (applying a *de novo* review of facts in a suppression issue where body

[2] Petition for Review granted March 14, 2018, 380 Wis. 2d 350.

camera evidence documented the interaction with law enforcement).[3]

The state mischaracterizes the circuit court's statement that it was "[h]ard to see everything on the video, but, you know video doesn't reveal everything. We have to rely on officers as well, their training and experience." (43:58). This statement was in reference to the video of the field sobriety tests and has nothing to do with the search of the bag or the issues on appeal.

If the court declines to apply a *de novo* standard of review, this court should hold the finding that Mr. Coffee "could easily put his hand behind the seat of the car to conceal something" is clearly erroneous. (43:92); *State v. Arias,* 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748. It would have been highly unlikely that Mr. Coffee could have jammed any contraband under all the wires, electronics and other "stuff" piled on top on the mason jar. First, open glasses of wine or bottles of beer would have been difficult to stash in the bag and would have been noticed upon opening the bag. Even if the alcohol was in a resealable container, due to the tight space behind the driver's seat and the amount of "stuff" he

[3] The use of body cameras has become more widespread and increasingly impacts the criminal justice process. *See e.g.* Fan, Mary D., *Justice Visualized: Courts and the Body Camera Revolution,* UC DAVIS L. REV., Vol. 50, No. 3 (Feb 2017) *available at* https://lawreview.law.ucdavis.edu/issues/50/3/Articles/503_Fan.pdf. Due to the changing nature of the role technology plays in policing, it makes sense that this court adhere to the policies behind the discretionary rule rather than a blind application.

would have had to cover it with, it is unreasonable to believe that Mr. Coffee could have done this while driving or after being pulled over without the officers noticing any furtive movements.

Lastly, the state's discussion of *State v. Smiter,* 2011 WI App 15, 331 Wis. 2d 431, 793 N.W. 920, is inapposite. Response Brief at 10. *Smiter* stands for the proposition that law enforcement need not discontinue a search once they find something of evidentiary value. In Mr. Coffee's case, no evidence was found until the officers got to the bottom of the bag. Mr. Coffee has conceded that if the rummaging through the bag was lawful, the continued search of the trunk was lawful based on the discovery of the contraband in the bag. The state's discussion of *Smiter* does not add to the analysis.

In sum, the search of the bag was not based in a reasonable belief that it would turn up evidence of the OWI. The officer was not looking for evidence that Mr. Coffee had just been drinking; he was digging through Mr. Coffee's personal belongings on the off chance he might find contraband. This was a fishing expedition on an inchoate hunch and as such, the evidence from the unlawful search should be suppressed.

CONCLUSION

For the reasons stated, Mose B. Coffee respectfully requests that the court reverse his convictions and remand to the circuit court with instructions to permit him to withdraw his no-contest pleas.

Dated this 26th day of November, 2018.

Respectfully submitted,

FRANCES REYNOLDS COLBERT
Assistant State Public Defender
State Bar No. 1050435

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
colbertf@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,813 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 26th day of November, 2018.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 26th day of November, 2018.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender