STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2018 AP 001382
Green County Circuit Court Cases 2017 TR 001733,2017 TR 001914

COUNTY OF GREEN,

Plaintiff-Appellant,

vs.

JOEY JAY BARNES,

Defendant-Respondent.

ON APPEAL FROM THE ORDER FOR DISMISSAL ENTERED IN THE CIRCUIT COURT FOR GREEN COUNTY, THE HONORABLE THOMAS VALE, PRESIDING.

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

Laura M. Kohl
Assistant District Attorney
Green County, Wisconsin
Attorney for Plaintiff-Appellant
State Bar No. 1053447

Green County Justice Center
2841 6th Street
Monroe, WI 53566
Telephone: (608) 328-9424

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED **PAGE(S)**

ARGUMENT

I. BARNES RELIES ON INCORRECT FACTS

Among several shaded or incomplete statement of fact, Barnes makes several errors in his recitation of facts.

Barnes argues that "[n]either Deputy Kanable, nor Deputy Nimtz, questioned him regarding when he began drinking or when he stopped drinking"(Barnes' Br. 2, citing R.21 at 14 and 60.) This is incorrect. In the record, on the very page cited by Barnes, Nimitz testifies that Barnes told him his last beer was at 8:15. (R. 21 at 60.) Additionally, this is supported by the video evidence, in which, again, Barnes told Nimtz that his last drink was probably about quarter after eight. (R.25 at 5 min 50 sec.) The dispatch was about 8:51 p.m. and Barnes admitted he was coming from a bar near Madison. Barnes' factual assertions that the deputies didn't 'establish an alcohol curve' or the particular locations where they were when they smelled alcohol (Barnes' Br. 6.) are at best irrelevant given that the officers did in fact have information that he drank, was coming from the bar, and when he last drank. No 'establishment of a curve' or further information they did not possess would be required.

Barnes states “Deputy Nimtz provided conflicting testimony as to whether he observed any signs of intoxication at the scene of the accident.” (Barnes’ Br. 2 citing R. 21 at 45,69.) This is inaccurate. In reviewing the Record as cited, Nimtz’ testimony is consistent that he smelled the odor of intoxicants and believed Barnes’ speech was somewhat slurred on the scene, and that he observed bloodshot eyes at the hospital. In addition to numerous other indicators testified to elsewhere, his testimony as cited does not conflict.

Barnes states that the area is “known to be commonly associated with accidents” (Barnes’ Br. 2, citing R.21.) Although the citation is generally to a transcript in the record over 100 pages long, the actual testimony seems to be that the crash occurred on Highway 69 between Gutzmer Road and Washington Road in the straight stretch between two curves. (R.21:13.) Deputy Kanable agrees with Barnes’ counsel’s characterization that over the past years there have been numerous accidents on that section of road and they have not all been caused by alcohol (R.21:13) and Deputy King expresses awareness that there are maybe a couple of accidents there. (R.21:105.)

Barnes' brief makes the factual assertion that "each private examination room is limited to one patient per room and are designed to protect patient privacy" (Barnes' Br. 4.) Again, no designer of the room, nor hospital staff testified or stated what the rooms were originally designed for or how they were used, this is again simply a speculative and subjective lay belief and not a legal determination of the privacy rights at issue.

Barnes states that Deputy Nimitz, and shortly after Deputy King, entered without permission. (Barnes' Br. 5.) This is at best misleading, as they clearly both had, at a minimum, implied permission from hospital staff and at the point Deputy King entered, Deputy Nimitz already had express permission to "come back in." (R.25, 3 min 03 sec.)

II. BARNES ARGUES THAT THE OFFICER MADE AN ILLEGALLY LENGTHY *TERRY* STOP, A FINDING NOT SUPPORTED BY THE FINDINGS MADE BY THE TRIAL COURT, AND AN INCORRECT ASSESSMENT OF IF/WHEN BARNES WAS SEIZED

Barnes does not appear to engage with any of the County's legal arguments regarding whether the circuit court erred in determining that Barnes was seized by law enforcement during their attempt to complete the Horizontal Gaze Nystagmus test with Barnes, including any of the

particular factors that have been found to be relevant in a situation where the defendant does not wish to leave, such as were listed in *United States v. Hill,* 199 F.3d 1143, 1147-48 (10th Cir. 1999).

Instead, Barnes' argument as to the unreasonably long Terry stop complained of in his reply brief rests on the argument that he was seized, and continued to be seized from the time that Deputy Nimtz first arrives at the scene of the accident to when he was placed under arrest. (Barnes' Br. 13.) It is unclear how Barnes thinks Deputy Nimtz' arrival at the scene constituted a stop or seizure of Barnes, or how this seizure continued throughout the times when law enforcement was not in the same location as him and had given no directives regarding him and thought he was free to leave. It is also unclear why these interactions are stops or seizures at all, let alone why they are "in the same *Terry* stop." (Barnes' Br. 14.)

This argument is contrary to Barnes' original motion and his position in the circuit court, which admitted that there was no improper seizure on the scene. (R.7, R.11:2.) This is also contrary to the finding by the trial court that Barnes was not stopped or seized until the HGN test. (R.22:32.) It is true that the circuit court made a brief

and muddled reference to extending the stop (R.22:30.), but no reasoning for how these facts would constitute a continued seizure are provided by either the trial court or Barnes. Again, on a motion to suppress evidence due to unlawful seizure, the defendant has the initial burden to establish that a seizure subject to Fourth Amendment protection occurred. *Gray v. State*, 243 Wis. 57, 63, 9 N.W.2d 68 (1943). The County has already argued that no seizure occurred at the time of the HGN, and there is no evidence nor any argument presented that would support a seizure at the scene continuing through the arrest.

As stated in the County's brief, "When a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. " *Brendlin v. Cal.*, 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Barnes' brief simply asserts that "the totality of circumstances *may* have affected the voluntariness of Mr. Barnes' responses." (Barnes' Br. 15, emphasis added) but there has been no basis for this apparent fragility in the record. Barnes did not testify that he felt he could not

decline. The video does not appear to show that Barnes did not feel he could not decline, in fact it showed that he was happy to comply throughout. The trial court even stated that “If it was me laying there I would have said no, go away. Mr. Kind would have. Probably a lot of people would have. If this individual is not assertive enough he is assuming that I’m stuck here.” (R.22:26-27.), and neither the trial court nor Barnes’ brief analyze the legal factors or give any reason to distinguish Barnes’ reaction from “a lot of people” in his position.

III. BARNES FAILS TO DISTINGUISH *STATE V. THOMPSON* OR SUPPORT THAT BARNES HAD A REASONABLE EXPECTATION OF PRIVACY IN THE EMERGENCY ROOM

Barnes attempts to distinguish his ‘vast’ and ‘substantial differences’ in circumstances from *State v. Thompson* with the following (Barnes’ Br. 12):

1) Thompson’s emergency room and operating room were ‘non-private areas where patients had no right to exclude others from entering.’ The only attempt to provide a distinction is the statement that there are walls, a curtain and a door, and Barnes was receiving private, individual medical treatment. (Barnes’ Br. 12,24.) In *Thompson*, the court gives limited description of the emergency room involved: “Hospital staff directed the

officer to the emergency room where Thompson was receiving treatment. Thompson was unconscious, and still suffering from seizures.... Most of Thompson's clothing had been removed and was on the floor, along with a pager and a $100 bill." (*Thompson* at 182.) And of the operating room involved: "Hospital staff provided the officer with operating room clothing, and the officer entered the operating room and observed the surgery." (*Id.*) There is no reason to believe that either of these events were occurring in a hallway or open area, or that his items were thrown on a communal floor, but instead presumably in separated areas of the hospital designed to treat patients with emergency needs or to complete operations, which would most certainly have walls and even *closed* doors if they require special clothing. Additionally, it appears that Thompson was receiving at least as 'private, medical treatment' as Barnes. There is no evidence in the record, nor pointed to in Barnes' brief that he had a right to exclude others. It is simply asserted from thin air. The repeated statement that Barnes' emergency room is more like a hotel room than Thompson's emergency room is baseless. Additionally, as we see throughout the video, hospital staff, not Barnes, directs the officers

where to go, tells them when to leave, and tells them they can re-enter.

2) Barnes argues that it matters what type of offense law enforcement is investigating. Whether Barnes has a reasonable expectation of privacy has nothing to do with whether police are investigating suspected criminal conduct or what was likely a civil forfeiture. To whatever degree there is a distinction present, it is irrelevant for this inquiry.

3) Barnes argues medical staff gave specific permission to enter Thompson's operating room. Although it is not directly stated in *Thompson*, something like that probably did occur when they "provided the officer with operating room clothing." However, first, *Thompson* only says hospital staff 'directed' law enforcement to his emergency room, which is true of staff in Barnes' case. Additionally, there is ample evidence that law enforcement was given implied permission to enter the emergency room in Barnes' case. Second, hospital staff did give express permission to Nimtz to enter Barnes' emergency room before he made contact with Barnes as clearly reflected in the video of the incident: After asking him to step out for a medical procedure, they then

allowed him back into the room (R.21:28.) stating “You can come back in.” (R.25, 3 min 03 sec.) There appears to be no distinction here at all with regard to the permission to enter by hospital staff. As the *Thompson* court states: “Furthermore, the consent for the officer to be present was given by hospital staff and a supervising physician, who had at least common, if not exclusive, authority over the premises. The consent of someone with authority over the premises would support a valid search, even if it were an area deemed private.” *Thompson* at 192.

4) Barnes’ attempt to distinguish who performs a seizure is not a real distinction and is also irrelevant to this inquiry of whether there was a reasonable expectation of privacy in the location.

5) Barnes argues that Thompson was unconscious, while he was conscious. As already addressed, this is a bad distinction for Barnes, as he had every opportunity to exhibit the subjective expectation of privacy of the first prong, and utterly failed to do so. Although Barnes attempts to now argue that he could have closed the curtain or asked someone to do so for him, the record is completely devoid of such testimony. While Barnes now

argues in his brief “it is impossible to know whether Mr. Barnes himself closed the curtain or doors, or instructed someone to do so” (Barnes’ Br. 22.), it would have been entirely possible for Barnes to testify to that fact, or to present evidence from those he directed, if it were true. Again, “[t]he burden is on Thompson, as the one claiming Fourth Amendment protection, to show that the search was illegal and that he had a reasonable expectation of privacy in the premises or property.” *Thompson* at 185. Additionally, it is inconsistent with the entire rest of the video in which hospital staff are repeatedly opening and closing the curtain and Barnes never directs anyone. (R.25.) The first prong is squarely against Barnes, and this attempted distinction only makes his position weaker than Thompson’s.

Again, the analysis of the reasonable expectation of privacy in the ‘emergency room’ in Thompson is directly on point as to any reasonable expectation of privacy in the ‘emergency room’ Barnes was in. No relevant distinction is made, except those that are not helpful to Barnes. Also, again, neither the subjective beliefs of officers nor defense counsel’s repeated naming of it as a “private examination room” are, or could be, determinative.

IV. BARNES APPEARS TO CONCEDE SEVERAL UNREFUTED ARGUMENTS

Barnes does not in any significant way respond to or refute the County's arguments regarding 1) whether the circuit court applied the incorrect legal standard in finding that law enforcement did not have 'probable cause' to request the HGN, 2) whether the circuit court applied the incorrect standard for excluding consideration of law enforcement's observations during the HGN test and in determining whether they had probable cause to request a blood sample from Barnes, and 3) whether the circuit court had legal authority or basis for the remedy ordered including dismissal of the charges.

The first point appears entirely unaddressed.

As to the second point, the County's arguments are not addressed as to the standard used by the court and the objective question of whether probable cause would exist with the observations of the HGN, as the trial court did *not* find that the Deputy was testifying *falsely* as to that observation. Barnes states that the circuit court "correctly called into question Nimtz' credibility" (which it did not directly do) because he was "unclear as to

whether his observations during the investigation provided him probable cause to request a search warrant." (Barnes' Br. 16.) His *uncertainty as to whether his observations provide probable cause* is irrelevant, and in fact expected for an officer who is still in field training, as the legal determination is for the court based upon his factual observations, not how he would apply the law to them. How confidently an officer feels he has probable cause is not a factor, nor does it impact whether he did or did not observe the things his body camera footage directly shows.

Barnes also does not address the County's argument that probable cause to request the blood draw existed even absent the HGN. The County analogized the evidence present here and visible on body camera footage even without relying on any testimony from Nimtz to the probable cause as found in *State v. Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996). Again, whether probable cause to arrest exists based on the facts of a given case is a question of law to be reviewed independently of the trial court. *State v. Truax,* 151 Wis. 2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

As to the third point, there is still no explanation provided, nor any legal support given, for why the

suppression of evidence entitled the trial court to dismiss the cases, simply assertion that it was 'correctly dismissed.'(Barnes' Br. 16.) The only authority cited by Barnes for a remedy is for suppression. (Barnes' Br. 16.)

If a respondent does not respond to or refute an argument presented in the appellant's brief-in-chief, the argument is "deemed admitted." *State v. Chu*, 2002 WI App 98, ¶41, 253 Wis.2d 666, 643 N.W.2d 493 (Ct. App. 1979).

CONCLUSION

Based on the above analysis, this court should reverse the trial court's apparent suppression of evidence and dismissal of the matters.

Dated this 19th day of December, 2018, at Monroe, WI.

Respectfully submitted:

_____

Laura M. Kohl
Assistant District Attorney
Green County, Wisconsin
Attorney for Plaintiff-Appellant
State Bar No. 1053447

Green County Justice Center
2841 6th Street
Monroe, WI 53566
Telephone: (608) 328-9424

CERTIFICATION OF FORM AND LENGTH

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

> Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _13__ pages.

Signed,

_____
Attorney Laura M. Kohl
State Bar Number 1053447

CERTIFICATION OF MAILING

I certify that on this 19th day of December, 2018, pursuant to sec. 809.80(3)(b) and (4), the original and nine copies of the Reply Brief of Plaintiff-Appellant were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Defendant-Respondent via United States first-class mail in properly addressed, postage paid envelopes.

Signed,

_____
Attorney Laura M. Kohl
State Bar Number 1053447

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of sec. 809.19(12) of the Wisconsin Statutes. I further certify that this brief conforms to the rules contained in Sections 809.19(12)(f) and 809.19(13)(f) of the Wisconsin Statutes that the content of the electronic copy of the Plaintiff-Appellant's reply brief is identical to the content of the paper copy of the Plaintiff-Appellant's reply brief.

Dated this 19th day of December, 2018.

Signed,

_____

Attorney Laura M. Kohl
State Bar Number 1053447