STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No.: 2019AP002341 CR

BRANDON MULVENNA,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF
CRAWFORD COUNTY, CASE NUMBER 18 CT 38
THE HONORABLE
LYNN RIDER, PRESIDING

Respectfully submitted,

BRANDON MULVENNA
Defendant-Appellant

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ISSUE PRESENTED

Was the defendant, "in custody" when he was ordered to place his hands behind his back, he was patted down, read his *Miranda* Rights, handcuffed and placed in the back of a locked squad car?

Trial Court answered: NO

If the defendant was "in custody", did law enforcement have probable cause to arrest him?

Trial Court answered: YES

STATEMENT ON PUBLICATION

Defendant-Appellant understands that pursuant to Wis. Stat. § 809.23(1)(b)4 the decision is not to be published.

POSITION ON ORAL ARGUMENT

Defendant-Appellant does not request oral argument of the issue presented in this case but stands ready to do so if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

STATEMENT OF THE CASE AND FACTS

On May 9, 2018, at approximately 1:30 a.m., Crawford County Deputy Sheriff Tony Berg was dispatched to a residence on 409 South Wacouta Avenue in the city of Prairie du Chien. (R. 45,p.6) Wacouta Avenue is a one way heading northbound. (R.45,8) Dispatch reported a gentleman had tipped over his motorcycle, facing the wrong way. The caller indicated the male had dropped his bike and appeared to be trying to pick it up. (R.45,6) Deputy Berg did not have any information whether that person was operating the motorcycle at that time. (R.45,14,15) Deputy Berg did not have any information upon arrival that the motorcycle was running. (R.45,19) Dispatch further indicated the driver was possibly 10-55, which is code for an impaired driver. (R.45,6) When Deputy Berg arrived on scene, he observed what he believed was a red/orange motorcycle in the northbound only lane of traffic. (R.45,6-7) The motorcycle was a full sized bike, similar to a Harley Davidson. (R.45,9) A male lying in the grass was later identified as Brandon Mulvenna, hereafter, "defendant-appellant."(R.45,8)

The defendant's legs were on the curb and his body was in the grass. (R.45,9) The defendant was on his phone with his elbow propped up on the grass. (R.45,15) It did not appear as though he was involved in a motor vehicle accident. (R.45,15) The motorcycle was right next to the defendant. (R.45,9)

When Deputy Berg arrived, he had his red and blue lights on, (R.45,16) and other officers were present. (R.45,16)

Deputy Berg began interacting with the defendant, asking him for identification. (R.45,10) The defendant did not identify himself, rather continued scrolling through his cell phone. (R.45,10) Deputy Berg noticed an odor of intoxicants, bloodshot eyes, and slurred speech. (R.45,10) The defendant admitted to consuming "a little bit" of alcohol. (R.45,10)

Deputy Berg did not remember whether he asked the defendant to stand up, but he acknowledged that the defendant did get up. (R.45,16-17) At that point, Deputy Berg requested the defendant to place his hands behind his back, but he did not handcuff him. (R.45,18) Deputy Berg then proceeded to pat the defendant down for weapons. (R.45,19) After Deputy Berg conducted the pat down, he then proceeded to read the defendant his *Miranda* rights. (R.45,20) Deputy Berg conceded that during his six (6) years as a police officer, he has been trained to read *Miranda* to someone when they are in custody. (R.45,20-21) Deputy Berg acknowledged he believes *Miranda* is triggered by custody and questioning. (R.45,21) Deputy Berg believed *Miranda* rights were needed because the defendant was not free to go and the fact he could incriminate himself. (R.45,21)

After reading the defendant his rights, the defendant did not admit to driving the motorcycle. (R.45,21) The defendant was told he was being detained. (R.45,12) He was handcuffed and placed into the back of Deputy Berg's squad car. (R.45,21) The defendant could not get out of the squad, as it cannot be opened from the inside of the vehicle. (R.45,22) Once the defendant was placed in the back of the locked squad car, Deputy Berg went and spoke with the reporting

party. (R.45,10) After that conversation, Deputy Berg had reason to believe that the defendant was the driver of the motorcycle, and he proceeded with the OWI investigation. (R.45,10) Deputy Berg believed that after speaking with the witness, he established probable cause to arrest; Berg conceded that he did not believe probable cause for arrest existed prior to talking to the witness. (R.45,19,22) Deputy Berg did not believe he had probable cause, as the defendant did not admit to driving, and the motorcycle was not running. (R.45,19) Deputy Berg asked the defendant to perform field sobriety tests, and the defendant refused. (R.45,11) At that point, the defendant was placed under arrest for OWI (operating while intoxicated). (R.45,12)

On March 14, 2019, the defendant-appellant filed two (2) motions: Motion To Suppress Test Result and Motion to Suppress For Lack of Probable Cause to Arrest. (R.18 and 19) Both motions were heard by the Honorable Lynn Rider on May 20, 2019. Judge Rider denied both motions on that date. (R.45,49)

The Court determined that the defendant was not in custody when Deputy Berg placed him in handcuffs in the back of the squad. (R.45,46) Although the factors to determine custody were not addressed specifically by the Court, the Court found it "totally reasonable" to have someone sit for a few moments while an investigation was finished. (R.45,46) The Court continued finding, that under the totality of the circumstances, the steps taken by Deputy Berg to be "totally reasonable." (R.45,46)

Further, the Court disagreed with Deputy Berg's belief that probable cause did not exist when he placed the defendant in the back of his squad. The Court determined there was probable cause to arrest the defendant. (R.45,46,47)

The Court denied the Motion to Suppress Test Result. That decision is not being appealed.

On September 9, 2019, the defendant entered a no-contest plea to the charge of Operating While Intoxicated 3rd offense in violation of Wis. Stat. §346.63(1)(a). (R.46,12) The Court sentenced the defendant to 95 days jail with Huber privileges, fines and costs totaling $2,622.00, a 27-month revocation of driving privileges, and the installation of an ignition interlock device for 27 months. (R.46,19) Initially, the Court did not stay the sentence. (R.46,22) The Court ordered the sentence to begin immediately and set the matter for a hearing on September 11, 2019. On September 9, 2019, the defendant filed Motion For Relief Pending Appeal pursuant to Wis. Stat. §809.31. (R. 27) On September 11, 2019, the Court reconsidered its decision and stayed the remainder of the sentence pending appeal.(R.47,7) The defendant-appellant filed his Notice of Right to Seek Postconviction Relief on September 18, 2019. This appeal follows.

ARGUMENT

I. A REASONABLE PERSON WHO WAS ORDERED TO PUT HIS HANDS BEHIND HIS BACK WHILE PATTED DOWN, READ HIS MIRANDA RIGHTS THEN HANDCUFFED AND PLACED IN THE BACK OF A LOCKED SQUAD WOULD HAVE BELIEVED HE WAS IN CUSTODY.

The standard to determine the moment of arrest is whether a reasonable person in the defendant's position would have considered himself to be "in custody" given the degree of restraint under the circumstances. *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991) *abrogated on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis.2d 742; *See State v. Wilson*, 229 Wis. 2d 256, 600 N.W.2d 14 (Ct. App. 1999). Under this test, the circumstances of the situation control, including what the police officers communicate by their words or actions. *Id*. Each case focuses on the totality of the circumstances in the record to determine whether a reasonable person in the defendant's position would have believed he or she was under arrest. *See State v. Marten-Hoye*, 2008 WI App 19.

The difference between a *Terry* stop and an arrest is merely one of degree, which makes the determination difficult in some circumstances. *See United States v. Novak*, 870 F.2d 145 (7th Cir. 1989). Given the totality of the circumstances in this case, a reasonable person in the defendant's position would have considered himself to be in custody given the degree of restraint under the circumstances and the words and actions taken by Deputy Berg.

The first consideration in the totality of the circumstances used to determine whether a reasonable person would have considered themselves in custody is the presence of multiple officers. Deputy Berg conceded more than one officer was present at the scene. (R.45,16) The presence of multiple officers is a relevant inquiry concerning whether a reasonable person would consider themselves in custody. *See Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319 (1982) (presence of multiple law enforcement officers considered in determining illegal arrest). *State v. Carroll*, 2008 WI App 161, 314 Wis. 2d 690 (unknown number of squads on scene factor in determining defendant was "in custody").

Second, Deputy Berg ordered the defendant to place his hands behind his back while a pat down was conducted. While the record is bare of any facts that would support the belief that the defendant was possibly armed, a requirement prior to conducting a pat down, under the totality of the circumstances, requesting the defendant to place his hands behind his back and be subject to pat down is simply a brick in the wall of an illegal arrest. *See State v. Buchanan*, 2011 WI 49, 334 Wis. 2d 379 (constitutional requirement for performing a protective search for weapons requires reasonable suspicion that a person may be armed and dangerous).

Third, Deputy Berg read the defendant his *Miranda* rights. Deputy Berg acknowledged that he has been trained to read *Miranda* when a subject is in custody. (R.45,20-21) Deputy Berg testified that *Miranda* is triggered by custody and questioning. (R.45,21) Berg testified that based on the circumstances, he

(Berg) did feel the need to read the defendant *Miranda*. (R.45,21) The Court in *Miranda* defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602 (1966). *Miranda* safeguards attach when a "suspect's freedom of action is curtailed to a 'degree associated with [a] formal arrest.'" *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138 (1984). While *Miranda* is a Fifth Amendment principle, the fact that it is associated with formal arrest is relevant in the totality of the circumstances analysis.

A subject may be subject to a valid *Terry* stop[1], yet may be considered "in custody" for Fifth Amendment purposes, necessitating *Miranda*. The test for custody under the Fifth Amendment is "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." The totality of the circumstances must be considered when determining whether a suspect was "in custody" for the purpose of triggering *Miranda* protections. *See State v. Gruen*, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998).

[1] *Terry v. Ohio*, 392 U.S. 1 (1968). Terry has been codified in Wis. Stat. §968.24, temporary questioning without arrest. "After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped."

When law enforcement reads *Miranda* to a subject, a reasonable person in that situation would absolutely believe he was in custody. The defendant was told he had the right to remain silent and anything he said would/could be used against him in court. If law enforcement informs a person the statement they make will be used against them in court, it is logical to assume the subject has court. A reasonable person would only believe they have court if they have been charged with something.

Further, when law enforcement informs the defendant that he has the right to a lawyer, it is reasonable that a person would assume they have been arrested and charged with a crime. Otherwise, why do they have a right to counsel?

Fourth, the officer then handcuffed the defendant. It is conceded that handcuffs in-and-of themselves do not prove an arrest has taken place. However, handcuffing a subject after ordering him to put his hands behind his back, patting him down and reading him *Miranda*, is one more link in the arrest chain. *United States v. Ienco*, 182 F.3d 517 (7th Cir. 1999) (Court found defendant was "in custody" even though he was never handcuffed). *See Wilson*, 229 Wis. 2d at 11, 12 (defendant was "in custody" when he was prevented from using the bathroom until he was frisked).

The fifth factor is placing the defendant in the rear of a locked squad car. Not only was he placed in the rear of the squad, there is an absence of information regarding the length of time the defendant was forced to sit, handcuffed in the squad. *See Ienco*, 182 F.3d at 521-522 (Court found most compelling factor in

determining illegal arrest was that defendant was locked in squad car unhandcuffed for approximately 30 minutes). *See State v. Carroll*, 2008 WI App 161, 314 Wis. 2d 690 (defendant being placed in the back of squad car while handcuffed, factor in determining defendant was "in custody.")

Sixth, while Deputy Berg told the defendant that he was being detained, he never informed the defendant, it was possible he would be free to leave, after speaking with the witness or after field sobriety tests. *See Florida v. Royer*, 460 U.S. 491, 501, 103 S.Ct. 1319 (officers never informing defendant that he is free to depart, factor in finding defendant was arrested without probable cause).

Those six (6) factors would lead a reasonable person in the defendant's position to conclude that he was in custody. The valid *Terry* stop of the defendant was transformed in custodial arrest.

II. DEPUTY BERG WAS CORRECT WHEN HE TESTIFIED HE DID NOT BELIEVE HE HAD PROBABLE CAUSE TO ARREST THE DEFENDANT WHEN HE PLACED HIM IN THE BACK OF THE SQUAD CAR.

If the Court finds that the defendant was "in custody," the second question which must be answered is, whether probable cause existed for that arrest.

Deputy Berg testified on multiple occasions that at the time he placed the defendant in the rear of his squad, he did not possess probable cause to arrest the defendant. Deputy Berg testified that he didn't have any information regarding whether the defendant was operating the motorcycle. (R.45,14) That was information he obtained later, after he spoke to the witness. (R.45,15)

Deputy Berg testified, "At this point in time (prior to speaking to the witness), I have—he has not admitted to driving, and I have no—and the motorcycle was not running, and I do not have, at this point in time, probable cause in my head to arrest him." (R.45,19) Once Deputy Berg spoke to the witness, he believed he established probable cause, however, not before that time. (R.45, 22) The Court disagreed with Deputy Berg. The Court stated:

> But even if you say okay, he was arrested at that moment, and even under his testimony, he didn't have enough information to believe that this person was the driver, I don't agree with the officer. I think he had enough information at the that time to even arrest him. He had a report of a drunk driver. He had a motorcycle with one person there, laying next to the motorcycle, and I guess the engine wasn't running, but under the circumstances that he had, I think that was enough probable cause to arrest him. (R.45,46-47)

Respectfully, the Court's decision regarding probable cause misses the mark. The elements necessary to sustain a charge of Operating While Intoxicated include: 1) the defendant operated or drove a motor vehicle on a highway and 2) the defendant was under the influence of an intoxicant at the time the defendant drove or operated a motor vehicle. See WIS JI-CRIMINAL 2669. Deputy Berg testified that he had not spoken to the witness until he had already handcuffed and placed the defendant in the squad. Prior to speaking to the witness, Deputy Berg spoke to the defendant (after reading him *Miranda).* The defendant told Deputy Berg he was drinking in downtown Prairie du Chien and was walking from the Fort Mulligans restaurant area. Deputy Berg testified the defendant stated that he walked to the area which he was in, the 400 block. He denied driving the motorcycle. (R.45,11)

Presumably the reason that Deputy Berg did not believe that he had probable cause to arrest before speaking to the witness was because he did not know when the defendant drove the motorcycle to that location. If the motorcycle was driven to that location before the defendant went downtown drinking, and he then walked back and was planning to start the motorcycle, but never did, there is no probable cause to arrest him. What Deputy Berg was attempting to determine from the witness was when did the defendant operate the motorcycle? Had the defendant operated that motorcycle recently? Or, had the motorcycle been parked at that location and only now was the defendant unsuccessful in attempting to operate the motorcycle. Proving operation is a requirement. Proving when the defendant operated that motorcycle is also required. *See State v. Kennedy*, 2014 WI 132, 359 Wis. 2d 454 (once defendant was identified as the driver, physical indicators clearly established probable cause to arrest for OWI Homicide related charges); *See also Village of Cross Plains v. Haanstad*, 2006 WI 16, 288 Wis. 2d 573 (Court found that defendant who never physically manipulated or activated any of the controls of the motor vehicle necessary to put it in motion did not operate a motor vehicle under the drunk driving statute).

At the time the defendant was placed in the back of Deputy Berg's squad, there was zero indication as to when the defendant had operated that motorcycle, whether before or after he had been consuming alcohol. Deputy Berg was correct. Until he had established when the defendant operated the motorcycle, he did not have probable cause to arrest him for Operating While Intoxicated.

CONCLUSION

A reasonable person in the defendant's position would have believed based on the totality of the circumstances that they were "in custody." Further, at the time the defendant was placed "in custody", Deputy Berg, lacked probable cause to arrest the defendant. For the reasons stated in this brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions to grant the defendant-appellant's Motion To Suppress for Lack of Probable Cause to Arrest.

Dated at Madison, Wisconsin, February ____, 2020.

Respectfully submitted,

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Defendant-Appellant

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,842 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief

Dated: February ____, 2020.

Signed,

_____
COREY CHIRAFISI
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CERTIFICATION

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; and
(3) 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Signed,

_____
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CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated:

Signed,

_____

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