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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 2019-AP-2341 CR**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRANDON MULVENNA,

DEFENDANT-APPELLANT.

**APPEAL FROM THE CIRCUIT COURT OF CRAWFORD COUNTY,
CASE NO 18 CT 38
THE HONORABLE LYNN M. RIDER, PRESIDING**

STATE'S RESPONSE BRIEF

STATE OF WISCONSIN
Plaintiff - Respondent.

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument as the parties' arguments can adequately be addressed by their briefs. The State does not request publication as the issue presented involves no more than an application of a well-settled rule of law to a recurring fact situation.

STATEMENT OF ISSUES

The Defendant presents two issues; first, whether the Defendant was "in custody" when he was ordered to place his hands behind his back, read his Miranda rights, handcuffed, and placed in the back of a locked squad car. Second, whether law enforcement had probable cause to arrest the defendant, if the Defendant was "in custody."

The State asserts the issue, properly considered, is simply whether probable cause existed for the Defendant's arrest.

STATEMENT OF FACTS AND CASE

On May 9, 2018, at approximately 1:30 a.m., Deputy Tony Berg, of the Crawford County Sheriff's Department, was dispatched to a report of an individual who had tipped-over his motorcycle and appeared to be attempting to reorient the motorcycle. (R.45 at 6:3-20) While he was en route, dispatch advised Deputy Berg the individual also appeared to be attempting to leave the scene. (R.45 at 7:15-19). When Deputy Berg arrived at the scene, he saw the Defendant sitting right next to the motorcycle which was lying on the roadway's curb. (R.45 at 9:1-7). The Defendant refused to disclose his identity to Deputy Berg; however, Deputy Berg

was able to identify the Defendant as being the registered owner of the motorcycle. (See R.45 at 10:4-10). Deputy Berg smelled intoxicants coming from the Defendant, who also had bloodshot eyes and slurred speech. (R.45 at 10:11-14). The Defendant admitted to consuming some alcohol. (See R.45 at 10:14-17).

Deputy Berg then patted the Defendant down, read him the *Miranda* advisement (R.24 at video-stamp 02:20-04:00). During the *Miranda* advisement, the Defendant appeared unsteady on his feet and stumbled around. (R.24 at 03:30-04:00). The Defendant did not invoke his right to counsel or to decline to answer questions and denied that he had been operating the motorcycle (R.45 at 11:25; R.24 at 04:00-04:30). Deputy Berg hand-cuffed the Defendant and advised the Defendant that he was being detained, but not placed under arrest, while Deputy Berg continued his investigation. (R.24 at 05:30-06:40). Deputy Berg placed the Defendant in the back of his squad car so Deputy Berg could make contact with the woman who made the report to dispatch. (R.24 at 06:00-07:00). That woman later directly identified the Defendant as the person who was operating the motorcycle. (See R.45 at 10:18-24).

LAW

Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. State v. Lange, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 391–

92, 766 N.W.2d 551, 555. Probable cause is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” Id. at ¶ 20. When the facts are not disputed, whether probable cause to arrest exists in a given case is a question of law that this court determines independently of the circuit court but benefiting from their analyses. Id. In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience. Id.

ARGUMENT

The Defendant’s argument that he was placed under arrest before Deputy Berg received information from the woman who made the report to dispatch positively identifying the Defendant as the operator of the motorcycle is something of a red herring because ample probable cause existed to believe the Defendant was both intoxicated and the operator of the motorcycle prior to the point in time the Defendant even argues that he was placed under arrest. Deputy Berg was dispatched and arrived at the scene at approximately 1:30 a.m., a time that often coincides with increased instances of intoxicated operation of motor vehicles. The Defendant was the only person around the early-morning scene, and he was found sitting or lying in close proximity to the motorcycle that was registered in his name. Prior to his arrival at the scene, Deputy Berg was advised the operator of the motorcycle was apparently attempting to right the motorcycle and possibly leave the scene. All of this information made it reasonable for Deputy Berg to conclude that the Defendant was probably the person who had been operating and attempting to right the

motorcycle. The Defendant's bloodshot eyes, slurred speech, unsteady standing posture, the odor of intoxicants coming from his person, and the Defendant's admission to having had something to drink, in addition to the fact that there was something of a motorcycle accident that led the citizen to make the report to dispatch, are all sufficient for Deputy Berg to reasonably conclude the Defendant was probably under the influence of alcohol. See State v. Lange, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 391–92, 766 N.W.2d 551, 555.

For the above-stated reasons, the trial court was correct in determining there was probable cause to believe the Defendant had been operating the motorcycle while under the influence (See R.45 at 46:20-25) even if the arrest occurred at the moment the Defendant wishes this court to conclude. When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest. See e.g., State ex rel. McCaffrey v. Shanks, 124 Wis.2d 216, 236, 369 N.W.2d 743, 667-68 (Ct.App.1985). It is inconsequential that Deputy Berg testified that he subjectively believed he lacked probable cause to arrest the Defendant prior to receiving confirmation from the woman who made the call to dispatch, as the determination of probable cause to arrest is an objective one. See Deputy Berg's testimony that he did not believe he had established probable cause to arrest really speaks to the competing inference between the Defendant's denial as to operation and all of the other evidence that strongly indicated that he was probably the

operator of the motorcycle. The trial court was legally and factually justified in making the conclusion and ruling it did.

The State does not concede that the Defendant was under arrest when he was placed, hand-cuffed, in the back of the Deputy's squad car, but even if he was, probable cause for the arrest existed, in advance. The State believes, consistent with the trial court's ruling, that the Defendant was merely detained to permit Deputy Berg to further his investigation. The use of handcuffs or other restrictive measures does not necessarily render a temporary detention unreasonable, nor does it necessarily convert that detention into an arrest. See e.g. State v. Vorburger, 2002 WI 105, ¶ 64, 255 Wis.2d 537, 648 N.W.2d 829. Deputy Berg was justified in briefly securing the Defendant and maintaining the status quo of the scene while he addressed the details of the caller's observations, at her front porch and home, away from the roadside, where the Defendant had been. Deputy Berg was particularly justified given that he had received information that the Defendant may have been attempting to flee the scene, prior to Deputy Berg's arrival.

While Deputy Berg's further investigation led to confirmation of the Defendant's operation by the witness who called dispatch, that was an additional piece of information that was not only unnecessary, as an additional "building-block" to support a proper finding of probable cause, that further investigation was also not the fruit of an illegal arrest, even if the Defendant's argument as to the time of the arrest was correct. Deputy Berg would clearly have been able to independently acquire the information the caller provided, wholly apart from any

detention or arrest. There is simply no connection between the Defendant's detention and the additional information Deputy Berg received from the caller, and Deputy Berg certainly had authority to pose questions to the caller. Tainted evidence may be admissible through the independent source doctrine if the State can show it was also obtained by independent, lawful means. State v. Anker, 2014 WI App 107, ¶ 25, 357 Wis. 2d 565, 580, 855 N.W.2d 483. Such evidence may also be admitted through the inevitable discovery doctrine, which holds that evidence need not be suppressed if the State can prove the "tainted fruits inevitably would have been discovered by lawful means." Id.

CONCLUSION

The Circuit Court correctly found and ruled that sufficient probable cause existed for the Defendant's arrest prior to the moment the Defendant argues he was placed under arrest. There was adequate probable cause that the Defendant was under the influence of an intoxicant and that he had been operating the downed motorcycle. Confirmation of the Defendant's operation from the witness may have been useful, or even necessary, to support a trial conviction, but it was not necessary to establish probable cause for the Defendant's arrest. Even if the Defendant is correct that witness confirmation, as to operation, was necessary to support probable cause, the discovery of that witness confirmation was in no way tainted by the law

enforcement conduct of which the Defendant complains. The decision of the Circuit Court should properly be affirmed.

Dated at Prairie du Chien, Wisconsin, April 17, 2020.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif-font with the Times New Roman font, double spaced. The length of this brief is 1,841 words.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on this date.

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