STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRANDON MULVENNA,

Defendant-Appellant.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF CRAWFORD COUNTY, THE HONORABLE LYNN RIDER, PRESIDING

Respectfully submitted,

BRANDON MULVENNA
Defendant-Appellant

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BY: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. THE DEFENDANT WAS "IN CUSTODY" UNDER THE TOTALITY OF THE CIRCUMSTANCES AT THE TIME HE WAS PLACED IN THE REAR OF THE SQUAD CAR

The State believes the question regarding whether the defendant was "in custody" before Deputy Berg received information from the woman, (Ms. Collum), who made the report positively identifying the defendant as the operator of the motorcycle, is a "red herring" because probable cause existed for the arrest at the time the defendant was placed into custody. That is a new position for the State. During the argument portion of the motion hearing, the State argued the following:

> Now, if he would not have talked to Ms. Collum and said you're under arrest, we're going in, we might have a situation where there is not probable cause to make an arrest because he didn't have any information that he's operating a vehicle. (R.45,42) (emphasis added).

Although the State does not concede "custody", its entire argument revolves around the premise that the use of handcuffs or other restrictive measures did not necessarily render the temporary detention unreasonable, nor does it necessarily convert that detention into an arrest. (Brief at 8) The State argues that the defendant was merely detained to permit further investigation. There is no argument made supporting that position. In fact, in its argument to

the trial court, the State conceded it was reasonable the defendant felt like he was arrested or "in custody[1]." (R.45,42)

The defendant has conceded that handcuffs, in-and-of themselves, do not prove an arrest took place. If, however, the law is followed, and the totality of the circumstances are considered, handcuffing the defendant is but one of many factors. The State has chosen to ignore the remaining factors.

Six factors have been presented for consideration in determining whether, under the totality of the circumstances, a reasonable person in the defendant's position would have considered himself "in custody." Here, there was the presence of multiple officers. The defendant was ordered to place his hands behind his back while patted down for weapons. The defendant was read his *Miranda*[2] rights, handcuffed, placed in the rear of the locked squad car, and he was never informed he might be able to leave if he successfully completed field sobriety tests. Considered as a whole, these factors would lead a reasonable person to consider himself "in custody."

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[1] The full statement on this point is as follows: "Now, this is before he talked to Ms. Collum. That is fine. He says, here's what I'm going to do. I'm going to detain you. I'm going to put you in the back of my squad car, and he's handcuffed, and he's placed in the back of a locked squad. He may very well think he's under arrest or definitely in custody. I am not going to deny that. But he didn't arrest him. He said I detained him to do a little more investigation."

[2] *Miranda v. Arizona*, 384 US 436 (1966).

What other reasonable inference could be drawn when an officer tells a subject that he has the right to remain silent and anything he says can and will be used against them in court? The officer followed up by telling the subject he had the right to a lawyer and if he cannot afford a lawyer, one will be appointed for him. Then, after reading *Miranda*, the officer handcuffed him and puts him into the back of a locked squad car. There is no reasonable person in such circumstances who would not think he or she is in custody.

II. THERE WAS PROBABLE CAUSE TO BELIEVE THE DEFENDANT WAS IMPAIRED. HOWEVER, THERE WAS NOT PROBABLE CAUSE TO BELIEVE HE WAS IMPAIRED WHEN HE OPERATED HIS MOTORCYCLE.

The elements necessary to establish a person has violated the drunk driving laws require (1) the defendant operated or drove a motor vehicle on a highway; (2) the defendant was under the influence of an intoxicant at the time he drove or operated a motor vehicle. See WIS JI-CRIMINAL 2669 (emphasis added).

"Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." *See State v. Kennedy*, 2014 WI 132,¶21, 359 Wis.2d 454.

Deputy Berg's opinion alone doesn't carry the day on the issue of whether probable cause exists; it is an objective test. *See State v. Lange*, 2009 WI 49, 359 Wis.2d 383. In this case, however, Deputy Berg happens to be correct.

On his approach to the scene, Deputy Berg did not have any information through dispatch that the defendant was operating his motorcycle. He had information the defendant appeared to be trying to pick the bike up. (R.45,6) When Deputy Berg arrived, the motorcycle was not running. If it was, that would clearly establish operation. *See* Wis. Stat. §346.63(3)(b); "'operate' means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put in motion".

The motorcycle did not appear to have been involved in an accident, (R.45,15) which would have also assisted in establishing time of operation. *See State v. Curtis*, 2019 WI App 26, 387 Wis.2d 686, 928 N.W.2d 810 (unpublished decision) (witnesses' statements regarding identification of driver who police did not see operating a motor vehicle, which had been involved in an accident, factor in establishing probable cause to arrest).

At that point, Deputy Berg agreed he did not have information that the defendant had been operating the motorcycle. (R.45,15). Deputy Berg conceded, "at this point in time, 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)

After *Miranda* rights were read to the defendant, there was no admission of when he drove. In fact, the only information Deputy Berg had about time of operation came from the defendant. The defendant informed Deputy Berg that he was drinking downtown in the City of Prairie du Chien and was walking from the Fort Mulligans restaurant area. The defendant stated that he walked to the area where the officer contacted him. The defendant had denied driving the motorcycle. (R.45, 11)

Deputy Berg was confronted with a situation where the caller to dispatch did not confirm observing when, or if, the defendant was actually operating the motorcycle. Rather, the defendant was attempting to pick up his motorcycle and/or leave the scene. (R.45, 7) Upon arrival, the motorcycle was not running, and it did not appear to have been recently driven, like being in an accident. (R.45,15) There is no information that Deputy Berg ever attempted to touch the motorcycle to determine if it was warm to the touch, which would establish the motorcycle was recently started. *See State v. Cain*, 2011 WI App 58, 332 Wis.2d 806, 798 N.W.2d 321 (investigation of hit and run charge included officers feeling

defendant's vehicle which was warm to the touch to determine it was recently operated) (unpublished decision).

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) Deputy Berg was correct. Without information as to when the defendant drove that motorcycle, there is nothing to show he drove while under the influence. Granted, the motorcycle got there somehow, but Deputy Berg had not ascertained when or who drove it there. And most importantly, Deputy Berg had no way of assessing if that person was impaired when they drove it there. Those questions needed to be answered by Deputy Berg before probable cause was established. As previously mentioned, the State appears to have conceded that point, agreeing Deputy Berg did not have any information the defendant was operating the vehicle prior to speaking to the witness. (R.45,42)

This situation is no different than a person who is clearly intoxicated parked in front of someone's residence sitting in his or her vehicle. If the resident calls law enforcement, believing the person in the vehicle is intoxicated, and the subject is sitting in the vehicle with the keys in his or her pocket and the vehicle not

running, without more, the person is not operating while intoxicated. To make such a determination, several questions must first be addressed. Did he or she just drive there and park? Did he or she walk from a bar back to that location? Had that person operated the vehicle after consuming intoxicants?

The Court in *Kennedy* provided numerous examples of situations where law enforcement officers considered various factors in determining probable cause to arrest. They all have one important thing in common. They all established a specific time of operation. *Id*. at ¶22. (citing *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091 (1984); erratic driving and stumbling out of vehicle provided probable cause; *State v. Wille*, 185 Wis.2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994); bloodshot eyes, odor of intoxicants, slurred speech together with motor vehicle accident or erratic driving; *State v. Babbitt*, 188 Wis.2d 349, 357, 525 N.W.2d 102 (Ct. App.1994); odor of intoxicants, motor vehicle accident and defendant's statement he had "to quit doing this" provided probable cause).

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 the deputy

established when the defendant operated the motorcycle, he did not have probable cause to arrest him for Operating While Intoxicated.

Finally, in its brief the State argues for the first time that the independent source doctrine or inevitable discovery might be applicable in this case, citing *State v. Anker*, 2014 WI App 107, 357 Wis.2d 565, 855 N.W.2d 483. The only time that theory was mentioned at the trial level was when the prosecution argued that theory in a different motion, which has not been appealed[3]. (R.45,44) The defendant believes the proper place for those arguments to be made is the circuit court. *Id*. at ¶27. This Court should not be burdened with dealing with arguments not raised in the trial court.

[3] Defendant filed a Motion To Suppress Test Result which was denied on the same date as the probable cause motion. The defendant has not appealed that motion.

CONCLUSION

Any reasonable person in the defendant's position would have believed based on the totality of the circumstances that he or she was "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 defendant-appellant's original brief and this reply 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, May 18, 2020.

Respectfully submitted,

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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 point 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 2231 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: May 18, 2020.

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: May 18, 2020.

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TABLE OF CONTENTS