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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2020AP000907

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

Timothy M. Argall,

Defendant-Appellant.

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN CALUMET COUNTY CIRCUIT COURT
THE HONORABLE JEFFREY S. FROEHLICH, PRESIDING
Trial Court Case No. 2019CT000015

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent believes that the written briefs presented will adequately present the relative positions of the parties, and therefore, oral argument is not requested. Publication may be appropriate because currently there are no published cases that directly address the specificity necessary to entitle a trial court defendant to an evidentiary hearing when filing a motion to suppress a traffic stop, detention and arrest.

STATEMENT OF THE CASE

At a motion hearing held before the circuit court on June 27, 2019, the court took testimony from two witnesses relate to three cases. One case was City of Chilton versus Timothy M. Argall, 2019FO000016. The City of Chilton was represented by Burnett, McDermott, Jahn, King & DesRochers, LLP, by Attorney Gary Jahn. The second was County of Calumet versus Timothy M Argall, 2019TR000278. The County of Calumet was represented by Assistant District Attorney Douglass K. Jones. The third case was State of Wisconsin versus Timothy M. Argall, 2019CT000015. The State of Wisconsin was represented by Assistant District Attorney Douglass K. Jones. As to all three case Timothy M. Argall was represented by John Miller Carroll Law Office, by Attorney Tyler Fredrickson.

City of Chilton versus Timothy M. Argall, 2019FO00016 remains an open case in the circuit court. County of Calumet versus Timothy M. Argall, 2019TR000268, is a closed case and was not appealed to the Wisconsin Court of Appeal. State of Wisconsin, 2019CT000015, is the case involved in the current appeal. In the current appeal the Defendant –Appellant has not contested reasonable suspicion for the traffic stop, reasonable suspicion for requesting field sobriety tests or probable cause for arrest to arrest for a criminal operating under the influence.

ARGUMENT

The State is not asserting that there were grounds for a search of the defendant's person prior to arrest for OWI, absent defendant's consent to search.

I. TIMOTHY M. ARGALL CONSENTED TO A SEARCH OF HIS PERSON

A. The Officer's Request To Search Was Reasonable.

The Wisconsin Supreme Court in *State v. Wright*, 2019 WI 45, 386 wis.2d 495, 926 N.W.2d 157 (2019) addressed the purposes and nature of a traffic stop. In Wright, ¶¶ 8-10, the court stated:

> ¶8 A traffic stop constitutes a seizure for Fourth Amendment purposes. The United States Supreme Court has described a routine traffic stop as more akin to a Terry stop than a formal arrest. It has held that, like a Terry stop, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic

> violation that warranted the stop and attend to related safety concerns."
>
> ¶9 The "mission" of a traffic stop includes: (1) addressing the traffic violation that warranted the stop; (2) conducting ordinary inquiries incident to the stop; and (3) taking negligibly burdensome precautions to ensure officer safety. Authority for the seizure ends when these tasks are, or reasonably should have been, completed.
>
> ¶10 This is not to say, however, that police action unrelated to the traffic stop's mission necessarily violates the Fourth Amendment. To the contrary, the Supreme Court has recognized "that the Fourth Amendment tolerate[s] certain unrelated investigations that [do] not lengthen the roadside detention." In other words, "[t]he seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.'

In State v. Brown, 2020 WI 63 (2020), a decision released in July, the Wisconsin Supreme Court applied the reasoning from Wright and State v. Floyd, 2017 WI 78, 377 Wis.2d 394, 898 N.W.2d 560 (2017) to a traffic stop in Fond du Lac. The officer in Brown testified he had no subjective belief that the suspect possessed a weapon or that the stop was high risk. The officer after asking the driver to step from the car asked to search the driver. The Court in Brown, at ¶31, stated:

> ¶31 Finally, Brown challenges Officer Deering's request to search Brown's person. As we discussed in Floyd, while a frisk can be a severe intrusion, "a request to conduct such a search cannot." 377 Wis. 2d 394, ¶28. Deering's request for consent to search Brown in order to verify that Brown had no weapons was constitutionally permissible as a negligibly burdensome inquiry related to officer safety.

B. The Defendant Consented To A Search Of His Person

In the present case Officer Scharbarth after the defendant put his hands in his pockets on a cold night (Transcript at 16:5&6) asked to pat down the defendant and the defendant consented. (Transcript at 14:22&23) The officer would then ask about a hard object and the defendant told her it was a pot pipe. (Transcript 14:25 to 15:3) At the conclusion of the evidence and arguments, the trial court found that the officer asked for consent to search and was given consent by the defendant. (Transcript 53:21-23) The trial court went on to find that the officer asked about the hard object and the defendant admitted it was used for smoking marijuana. (Transcript at 54: 1-3). Applying the facts of this case to the reasoning in *Wright, Floyd and Brown*, the State asserts that the request was appropriate and the search was proper.

INEVITABLE DISCOVERY

Prior to the request for permission to pat down and the execution of the pat down, Officer Scharbarth was in the process of commencing field sobriety tests. Officer Scharbarth stopped the defendant's vehicle for failure to have headlights on during hours of darkness. (Transcript page 11) During the initial encounter and while the defendant was still in his vehicle Officer Scharbarth observed slurred speech, glossy red and yellow eyes and odor of intoxicants. (Transcript page 12)

Also prior being asked to step out of the vehicle to perform field sobriety test, the defendant stated he had four to six beers. (Transcript 13:9) Armed with the above information the officer had a reasonable articulable suspicion that the defendant was impaired and was pursuing evidence related to impairment, principally field sobriety tests.

The performance of field sobriety tests resulted in sis of six clues on the horizontal gaze nystagmus (HGN) test. (Transcript 19:17-18) On the walk and turn test the defendant exhibited five of eight clues. (Transcript 21:3-6) On the one leg stand the defendant exhibited two of four clues. (Transcript 22:1&2) When asked, the defendant submitted to a preliminary breath test (PBT) and exhibited a reading of 0.201, which is approximately two and one half times the legal limit. (Transcript 22:12-22) Based upon the performance of field sobriety tests the defendant was placed under arrest for operating under the influence. At the conclusion of the evidence and arguments, the circuit court stated:

And, quite frankly, even if the court were to take anything having to do with that piece of paraphernalia out of the equation, the officer had sufficient justification to put the defendant through the field sobriety test, and the field sobriety tests and PBT were sufficient for probable cause to arrest him. (Transcript 57:14-19)

In 2016, the concept of inevitable discovery was addressed by the Wisconsin Supreme Court in State v. Jackson, 2016 WI 56, 369 Wis.2d 673, 882

N.W.2d 422 (2016). The court in Jackson was asked to address whether a "good faith" requirement should be added to the traditional three-pronged analysis for inevitable discovery. The court left intact a three-pronged analysis. The court in Jackson at ¶ 42, approved of the three-pronged test as an exception to the exclusionary rule:

> ...To establish that the evidence would have been inevitably discovered, the State must demonstrate, by a preponderance of the evidence, that: (1) there is a reasonable probability the evidence in question would have been discovered by lawful means but for the police misconduct; (2) the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) prior to the unlawful search the government also was actively pursuing some alternative line of investigation.

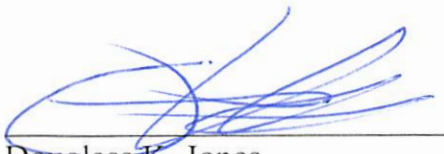
In the present case there is almost a certainty that the pipe would have been discovered in the search incident to arrest on the OWI. At the time of the search the officer had sufficient independent evidence to continue with field sobriety testing. The field sobriety test firmly support the arrest. Assuming that this court finds that the trial erred in finding that the search was pursuant to consent. The State has clearly establish that the facts fall firmly within the exclusionary rule exception of inevitable discovery.

CONCLUSION

The trial court found that the search was a consent search and also that the concept of inevitable discovery applied. The State asserts that the record supports

those findings. The State further asserts that there is no connection between the pipe and the criminal conviction for operating under the influence. The State respectfully requests that the court affirm the conviction.

Respectfully submitted this 2nd day of September, 2020.



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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. The length of this brief is 1483 words.

Dated this 2nd day of September, 2020.

Douglass K. Jones
Assistant District Attorney
State Bar #1001559

CERTIFICATION 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 the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 2nd day of September, 2020.

Douglass K. Jones
Assistant District Attorney
State Bar No. 1001559

APPENDIX 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 s. 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 first names and last initials 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 2nd day of September, 2020.

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