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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

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Appeal No. 2020AP001465

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In the matter of the refusal of Brian Steinert

Forest County

Plaintiff-Respondent ,

v.

Brian Steinert

Defendant-Appellant.

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On Appeal From A Judgment of the Circuit Court

For Forest County, Case No. 20-TR-561

Honorable Leon D. Stenz, Presiding

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Brief of Appellant

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**STATEMENT OF ISSUES PRESENTED**

I. Was S.968.24 violated if there was no probable cause to arrest and the suspect is then transported in handcuffs in a squad car to the Sheriff's Office?

Answered "No" by the Circuit Court.

II. Is a motorist lawfully placed under arrest for purposes of S.343.305(9)(a)5a when the initial arrest lacks probable cause followed by a S.968.24 violation prior to probable cause being acquired for implied consent purposes?

Answered "No" by the Circuit Court.

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument and publication are not necessary.



**STATEMENT OF THE CASE****NATURE OF THE APPEAL**

This is an appeal from the final judgment of the Circuit Court of Forest County, Hon. Leon D. Stenz, presiding; which entered a judgment of conviction for refusing an alcohol test. Mr. Steinert will first show he was improperly arrested for possessing a syringe and needle which S.961.571(1)(b)1 allowed him to have. Alternative grounds for probable cause did not then exist, rendering the 6 mile squad car transport to the sheriff's office outside the ambit of S.968.24's Terry domain. Probable cause was acquired 6 miles later at the Sheriff's Office for implied consent purposes.

Revocation is opposed based upon State v. Anagnos, 341 Wis. 2d 576, 815 NW 2d 675, 2012 WI 64 which construed S.343.305(9)(a)5a as requiring the initial arrest satisfy the Fourth Amendment. Here the initial arrest did not satisfy the Fourth Amendment.

**The Traffic Stop And Paraphernalia Arrest**

Brian Steinert was stopped for a defective passenger headlight (10-5:17) at 10:48 PM Monday June 8, 2020(5-23) by Deputy Connor Johnson. Deputy Johnson **"believed he was under the influence of something"** (10-6:19-20). There was no odor of alcohol or improper driving (10-6:23-24).



Steinert's speech was slow and he appeared to stumble over words (10-6:6-7). Based on previous encounters Deputy Johnson called for K-9 and was writing a warning ticket (10-7:2-10).

The K-9 officers told Johnson they wanted the two occupants out of the car for safety purposes (10-7:2-16).

The vehicle search found nothing (10-9:3-4). A syringe and needle were found on Steinert (10-8:13-16). Steinert was arrested for paraphernalia (10-10:11-12) and placed in handcuffs (10-8:13-22). The syringe and needle are not paraphernalia pursuant to S.961.571(1)(b)1. (5-1,2) (10-17:15-18:4).

At the stop, there were no other charges for which he was placed under arrest. Steinert's comment about using meth 8 ½ hours earlier led Deputy Johnson to believe Steinert was under the influence of meth.

A field sobriety test was contemplated at the Sheriff's office as was a DRE (10-10:3-6). There is an allegation Steinert left meth in the squad car when exiting the squad car at the Sheriff's office (10-10:19-12:10). The Informing the Accused form was read at 12:16 AM (5-7).

#### **The 6 Mile Distance**

Defense counsel alleged the distance between the traffic stop and sheriff's office is about 6 miles (5-2)



evidenced by a map (5-10,11) and the exact GPS location of the stop is in the record (5-23).

At the hearing defense counsel wanted to use that map (10-16:15-16) the State had no objection to the map (10-17:7); upon which the defense continued to rely (10-18:13-16). Initially the Court said the map went in **"apparently by stipulation"** and **"there was no objection to using it"** (10-19:18-22).

The state never disputed the 6 mile distance (10-21:10).

The Court did not consider the map (10-24:15-21) or make any determination as to the distance between the stop and the Sheriff's office. Instead the Court ruled **"any amount of move was reasonable under the circumstances"** (10-25:16-17). The effort of defense counsel to get the map in the record (10:26:12-14) was rejected because defense counsel never used the map (10-26:15-27:10). Defense counsel's request to reopen testimony to ask about the distance was denied (10:27:12-14).

#### **The Oral Decision**

The defendant was lawfully arrested at the sheriff's office for OWI (10-23:3-14). Before that time input from a DRE was desired prior to making a probable cause decision (10-19:23).



At the scene the officers "quite possibly, had probable cause to arrest him at the scene but did not do so" (10-25:20-21). Probable cause to arrest at the scene was not established.

The defendant's argument S.968.24 was violated by squad car transportation to the sheriff's office (5-2) was rejected (10-25:4-18).

Defendant's refusal was found not reasonable (10-25:17-18) and his license was revoked (6).

**ARGUMENT****I. The 6 Mile Trip Required Probable Cause Since The Destination Was The Sheriff's Office.**

The Court's refusal to consider the map was an erroneous exercise of discretion for the reason the object of the stipulation was not carried out. Milwaukee & Sub. Transp. v. Milwaukee County, 82 Wis. 2d 420, 442, 263 NW 2d 503 (1978). Without an in person hearing, the 6 mile destination was previously filed (5-10,11). The State's lack of objection (10-17:7) was considered to be a stipulation (10-19:18-20).

The stipulation was interpreted by the Court to require the defense to take further steps to be able to rely on the 6 mile distance (10-26:15-27:5). The State failed to provide a copy of Informing the Accused and the defense offered its copy for the State's use (10-19:16-17).

The State has no objection to the 6 mile distance and no objection to the defense filing being used by both sides. The Court's position **"any amount of move was reasonable under the circumstances"** (10-25:16-17) is incorrect. State v. Blatterman, 362 Wis. 2d 138, 160, 864 NW 2d 26, 2015 WI 46 ¶26. The 6 mile distance may or may not comply with S.968.24. Id. Since the destination was the



sheriff's office the squad car trip cannot comply with S.968.24 regardless of the actual distance.

Steinert was handcuffed (10-8:20) and taken 6 miles in a squad car. This is a defacto arrest. State v. Pickens, 323 Wis. 2d 226, 240, 779 NW 2d 1, 2010 WI App. 5 ¶27. The initial arrest at the scene for paraphernalia violated State v. Martinez, 210 Wis. 2d 396, 407-8, 563 NW 2d 922 (Ct. App. 1997). A Terry stop is exceeded when a suspect is taken in handcuffs to the police station for questioning. Hayes v. Florida, 470 US 811, 815 (1985).

The Court's conclusion moving Steinert 6 miles in handcuffs complied with Terry (10-25:4-15) was incorrect. This was an arrest not an investigative detention. Blatterman ¶33.

The Circuit Court did not find probable cause existed for any other offense at the scene. **"And quite possibly, had probable cause to arrest him at the scene but did not do so"** (10-25:20-21). Probable cause is based upon probabilities not possibilities. Dane County v. Sharpee, 154 Wis. 2d 515, 518, 453 NW 2d 508 (Ct. App. 1990). Steinert was unlawfully arrested at the scene and seized in violation of the Fourth Amendment by the time he reached the sheriff's office.



The Circuit Court relied upon probable cause to arrest having accumulated prior to 12:16 AM when Informing the Accused was read (5-20) to support the revocation order.

**II. A Motorist Is Not Lawfully Placed Under Arrest For Purposes Of S.343.305(9) (a)5a When The Initial Arrest Violates The Fourth Amendment.**

The dispute between Steinert and the State is if the revocation can be supported by an arrest at the sheriff's office even if the initial arrest 6 miles earlier violated the Fourth Amendment. Application of that portion of S.343.305(9) (a)5a; **"whether the person was lawfully placed under arrest"** to undisputed facts is a question of law. State v. Anagnos, 341 Wis. 2d 576, 586, 815 NW 2d 675, 2012 WI 64 ¶21.

A determination of probable cause at the sheriff's office does not subsume the issue of the legality of the arrest at the scene, Anagnos ¶30-32; or only require an OWI arrest at the sheriff's office, ¶40. If Steinert was seized during an unconstitutional arrest he was not lawfully placed under arrest for purposes of S.343.305(9) (a)5a. ¶41. **"If the court concludes that the defendant was not lawfully placed under arrest, then it has determined the issue set forth in sub (9) (a)5a favorable to the defendant"** ¶43.



Only if all issues at the revocation hearing are determined adversely to the motorist can the license be revoked. ¶25. Since the critical time to apply the Fourth Amendment is at the scene, not 6 miles later, the revocation order must be reversed pursuant to S.343.305(9)(d). ¶43.

**CONCLUSION**

Brian Steinert respectfully requests the revocation order of July 30, 2020 be reversed and remanded with directions to deny further revocation pursuant to S.343.305(9)(a)5a and S.343.305(9)(d).

Respectfully submitted this 21st day of December, 2020.



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## FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is eleven (11) pages.

Dated: December 21, 2020



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Robert A. Kennedy, Jr.  
Attorney For Appellant

CERTIFICATE OF COMPLIANCE WITH RULE §809.62(4)(a)

I hereby certify that:

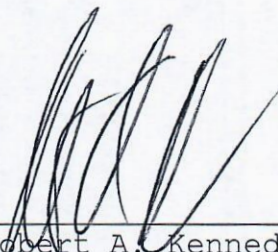
I have submitted an electronic copy of this brief, which complies with the requirements of §809.62(4)(a) and §809.19 (12).

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: December 21, 2020

  
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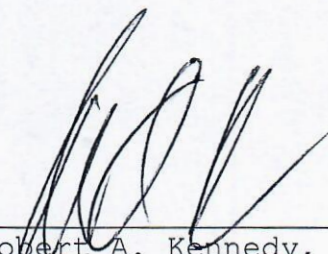
## CERTIFICATE OF MAILING

I certify that this brief together with a separate appendix was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this 21st day of December, 2020. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify one copy thereof were simultaneously served by mail as follows:

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Dated: December 21, 2020

  
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