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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2021AP355-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

CALEB J. WATSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, BRANCH I, THE HONORABLE L. EDWARD STENGEL PRESIDING, TRIAL COURT CASE NO. 20-CT-4

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE CONDITIONS SURROUNDING MR. WATSON'S INITIAL DETENTION WERE UNREASONABLE UNDER *STATE v. QUARTANA*, 213 Wis. 2d 440, 570 N.W.2d 618 (1997), IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 11 OF THE WISCONSIN CONSTITUTION?

> Circuit Court Answered: NO. The circuit court found that the inclement weather conditions on the night of Mr. Watson's detention permitted law enforcement officers to transport him to the Plymouth Police Department for field sobriety testing. *See* August 31, 2020 Order, D-App. at 103.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue herein rarely complicates any case involving impaired driving. It is of such an uncommon occurrence that publishing this Court's decision would likely have little impact upon future cases, especially given that the common law, in its present incarnation, provides clear direction with respect to the issue raised by Mr. Watson.

STATEMENT OF THE CASE

Mr. Watson was charged in Sheboygan County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle With a Prohibited Alcohol

Concentration—Third Offense, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on January 4, 2020. R1 & R2.

Mr. Watson retained private counsel and thereafter filed a pretrial motion alleging that his right to be free from an unreasonable seizure under *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (1997), was violated when the arresting officer in this case transported him from a publicly-exposed location to the secured Plymouth Police Department out of public view. R19.

A hearing on Mr. Watson's motion was held on July 27, 2020, before the Circuit Court for Sheboygan County, the Honorable L. Edward Stengel presiding. R69. The State called a single witness, the arresting officer, Brock Peters, to testify. R69 at 3:19 to 29:12. Oral argument was held on the motion after the hearing. R69 at 30:13 to 35:10. Ultimately, the circuit court denied Mr. Watson's motion, concluding that his transportation to the Plymouth Police Department was reasonable given the inclement weather conditions. R69 at 38:3-12.

It is from the adverse decision of the circuit court that Mr. Watson now appeals.

STATEMENT OF FACTS

On January 4, 2020, the above-named Defendant, Caleb Watson, was stopped and detained in Sheboygan County by Deputy Brock Peters of the Sheboygan County Sheriff's Office for possibly being involved in a disturbance at a private residence. R69 at 4:4-6.

Deputy Peters first encountered Mr. Watson on foot in the middle of Hwy. 57. R69 at 4:25 to 5:2. After making inquiries of him regarding his potential involvement in the disturbance reported at the private residence, Deputy Peters patted Mr. Watson down and secured him in the rear, locked portion of his squad after informing him that he could offer him a ride home once he spoke with the reporting party to determine whether Mr. Watson had, in fact, been involved in the disturbance. R69 at 5:11 to 6:10.

Upon making contact with the owner of the residence who reported the disturbance, other deputies arrived from the Sheriff's Office and discovered a Chevy Malibu in a ditch east of the residence which, it was learned, was registered to Mr. Watson. R69 at 8:13-22.

Deputy Peters subsequently became concerned that Mr. Watson may have operated his motor vehicle while under the influence of an intoxicant because he ostensibly observed that Mr. Watson had an odor of intoxicants about his person and had slurred speech. R69 at 9:25 to 10:14. Based upon these observations, the deputy decided he was going to have Mr. Watson submit to field sobriety tests. R69 at 10:15-17.

Initially, the deputy was going to transport Mr. Watson to the Kwik Trip in Plymouth to perform the field sobriety tests to afford him the "best opportunity" to do the tests, however, officers of the Plymouth Police Department convinced Deputy Peters to transport Mr. Watson to the Plymouth Police Department for testing. R69 at 10:23 to 12:6. Notably, part of the reason that it was decided that Mr. Watson should be taken to the Plymouth Police Department was because "[n]obody [would be] watching. It would strictly just be officers and the defendant." R69 at 12:5-6.

Prior to transporting Mr. Watson, Deputy Peters had him exit the rear of his squad whereupon he questioned him regarding how long he had been walking. R69 at 18:11-14. When the deputy believed he had not received a truthful answer, he accused Mr. Watson of lying to him. R69 at 18:7-10. Shortly after this conversation, the deputy placed handcuffs on Mr. Watson and secured him in the rear of his squad. R69 at 19:10-12.

Mr. Watson was then taken to the Plymouth Police Department for field sobriety testing, and upon failing the field tests, was formally arrested for operating a motor vehicle while under the influence of an intoxicant. R1.

For purposes of this appeal, it is relevant for the Court to be made aware of the following additional facts, to wit: the temperature

on the night of Mr. Watson's detention ranged between twenty-nine and thirty-three degrees; it was not snowing; it was neither sleeting nor raining; the roadway was clear of snow and ice; other roads were close by which had ample room on the shoulder for purposes of performing field sobriety tests; and Deputy Peters admitted that it was not uncommon for him to conduct OWI investigations outside in winter conditions. R69 at 22:10 to 24:3. Mr. Watson was transported from the scene of his initial detention 6.9 miles to the Plymouth Police Department. R69 at 25:15-17.

STANDARD OF REVIEW ON APPEAL

This appeal presents a question of constitutional fact. As such, this Court upholds the lower court's findings of fact unless they are clearly erroneous, but independently reviews whether those facts meet the constitutional standard. *State v. Samuel*, 2002 WI 34, ¶ 15, 252 Wis. 2d 26, 643 N.W.2d 423.

ARGUMENT

I. FOCUSING THE ISSUE PRESENTED.

Despite the fact that the instant case is directly on point with the concerns identified in the *Quartana* decision relating to the transmogrification of *Terry* stops into constitutionally unreasonable detentions, the circuit court nevertheless did what is typical of many courts faced with *Quartana* issues, namely: it chose only to examine the "local vicinity" portion of the *Quartana* holding without examining whether the other factors incident to Mr. Watson's detention, such as his being transported to a secured police facility out of public view, transformed it into an unconstitutionally burdensome seizure. D-App. at 103. In other words, instead of approaching this issue from the proper perspective, *i.e.*, with a presumption that the right to be free from unreasonable seizures is paramount and must be well secured, the lower court instead approached this matter from the perspective of allowing a law enforcement officer to do what was most convenient for him. It is the State, and *not* Mr. Watson, who should bear the burden of establishing reasonableness. The lower court's decision, like many

lower courts approach these issues, is cut from a fabric of deference to the officer instead of to the defendant's constitutional rights.

II. THE CIRCUIT COURT ERRED WHEN IT FAILED TO RECOGNIZE THAT MR. WATSON'S DETENTION EXCEEDED THE SCOPE OF WHAT IS DEEMED REASONABLE UNDER *STATE v. QUARTANA*, 213 Wis. 2d 440.

A. The Federal Perspective on the Permissible Scope of Investigatory Detentions.

Terry v. Ohio, 392 U.S. 1 (1968), permits law enforcement officers to temporarily detain individuals in order to investigate whether a violation of the law is afoot. This is otherwise known as an "investigatory detention," and it occupies a level of encounter between private citizens and law enforcement officers just above a "simple encounter" in which no constitutional protections are afforded the individual because they are not being detained in any fashion, and just below a full-blown "custody" or formal arrest which requires probable cause because the individual is not free to leave. *Id*.; *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982); *Henry v. United States*, 361 U.S. 98 (1959).

Several decisions of the United States Supreme Court which examine when the degree of restraint employed by law enforcement officers has exceeded the permissible scope of an investigatory detention and transformed the same into a constructive custody are implicated in the issue presented to this Court for its consideration. Chief among these is *Florida v. Royer*, 460 U.S. 491 (1983). In *Royer*, the defendant was observed at the Miami International Airport by two Florida detectives who believed he fit a "drug courier profile." *Id*. at 493. The detectives approached Royer and asked him to speak with them. *Id*. at 494. He expressly consented to do so, and the three of them went into a room approximately forty feet away which was described as a "large storage closet." *Id*.

After arriving in the room, the luggage Royer had checked was retrieved and the officers asked Royer if he would allow them to search it. *Id*. He produced a key for the same, and a search was conducted which found marijuana. *Id*. Royer was charged with

felony possession of marijuana, and prior to his trial, moved for suppression of the evidence on the ground that he had been unreasonably restrained under the Fourth Amendment. *Id.* Royer was convicted, and on appeal, argued that his "involuntary detention had exceeded the limited restraint permitted by *Terry v. Ohio*, 392 U.S. 1 (1968)." *Id.* The Florida Court of Appeals agreed and the State thereafter pursued reversal in the Supreme Court. *Id*. at 495.

The *Royer* Court framed the question before it as whether "the 'confinement' in this case went beyond the limited restraint of a *Terry* investigative stop, ..." *Id*. at 501. In beginning its analysis of this issue, the Court observed that the stop of Royer, the turning over of his airline ticket and driver's license to the detectives, and his questioning by two detectives constituted a cognizable investigatory detention of his person. *Id*. at 501-02. Also relevant to the Court's inquiry is that Royer was never told that he was free to leave and board his plane if he so chose. *Id*. at 503. Importantly, the *Royer* Court also observed that:

> **The record does not reflect any facts which would support a finding that the legitimate law enforcement purposes** which justified the detention in the first instance **were furthered by removing Royer to the police room** prior to the officers' attempt to gain his consent to a search of his luggage. As we have noted, had Royer consented to a search on the spot, the search could have been conducted with Royer present in the area where the bags were retrieved by Detective Johnson and any evidence recovered would have been admissible against him.

Id. at 505 (emphasis added).

Similarly, in *United States v. Verrusio*, 742 F.2d 1077 (7th Cir. 1984), the Seventh Circuit Court of Appeals concluded that removing a suspect from a public area to a ten-by-twelve foot room out of public view by law enforcement personnel transformed an otherwise reasonable encounter under the Fourth Amendment into a custodial circumstance which violated the defendant's rights. *Id*. at 1079-80. The *Verrusio* court stated:

> [S]ometime during the early part of Verrusio's detention in that 10 by 12 foot inner office, Verrusio became under arrest and the full panoply of his constitutional rights were triggered. . . . **The point of *Royer* is that in airport cases police exceed the limits**

> **of the investigative stop (the *Terry* stop rule) when they remove the suspect from the open areas of the airport into a small police room for further investigation**, and in particular do so to get him to let them search his luggage. When they proceed in a manner that would leave the average person with the belief that he is not free to depart, their investigative stop matures into an arrest, ...

Verrusio, 742 F.2d at 1079-80 (emphasis added). In supporting its conclusion that removal from a public location to one which is secured and out of public view constitutes an unreasonable detention, the *Verrusio* court relied upon other of its prior precedents by distinguishing the very public nature of the detentions in those cases from the one presented in Verrusio's case. These are worth quoting here:

> Last year in *United States v. Cordell*, 723 F.2d 1283 (7th Cir. 1983) this court decided that even when an airport encounter turns into a detention, it still doesn't necessarily mature into a seizure for which probable cause is needed. **Cordell at the time of his encounter was still in a large public area of the airport**. It would be presumed that he felt free to turn and walk away.
>
> More recently in *United States v. Morgan*, 725 F.2d 56 (7th Cir. 1984), **a case in which the defendant was in a busy public area**, this court determined from the general conduct of the police that Morgan could have felt free to have turned and left, but rather she remained and gave her consent to the search. We concluded that the encounter had not turned into a seizure.

Verrusio, 742 F.2d at 1080 (emphasis added).

Regarding the custodial nature of detentions which occur at police stations and thereby require full-blown probable cause to arrest, the U.S. Supreme Court in *Dunaway v. New York*, 442 U.S. 200 (1979), noted that:

> [T]he detention of [Dunaway] was in important respects indistinguishable from a traditional arrest. **Appellant was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room**. **He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.** The application of the Fourth Amendment's requirement of

> probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that Appellant was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, *see Cupp v. Murphy*, 412 U.S. 291 (1973), obviously do not make Appellant's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause.

Dunaway, 442 U.S. at 212-13 (emphasis added).

What can be distilled from all of the foregoing cases is that a *Terry* stop may not be enlarged to the point of becoming a custodial arrest solely for the purpose of investigating the potential existence of a crime. Among the relevant considerations considered by the courts above are: (1) was the individual transported to the alternate location by law enforcement; (2) was transport to a confined, institutional setting out of public view; and (3) was the individual informed he was free to leave? These considerations will be examined in Section II.C, *infra.*

B. The Wisconsin Perspective on the Permissible Scope of Investigatory Detentions.

The Wisconsin Legislature has codified the *Terry* stop in Wis. Stat. § 968.24 which allows for the temporary detention of a suspect "in the vicinity where the person was stopped." The question of what constitutes "the vicinity where the person was stopped" was settled in *State v. Quartana*, 213 Wis. 2d 440.

The *Quartana* court concluded that both *Terry* and § 968.24 allowed for an individual to be removed from the scene of their original detention to another location so long as that removal to another location was "reasonable" under the auspices of the Fourth Amendment. *Quartana*, 213 Wis. 2d at 448. In determining constitutional reasonableness, the *Quartana* court identified *several factors* which should be considered, but chief among these was that the detention continue to be of a *public nature*. It observed:

> Quartana was not transported to a more institutional setting, such as a police station or interrogation room. *Cf. Royer*, 460 U.S. at 502-03 (arrest where defendant taken to a small room out of public view in airport terminal and interrogated); *Hayes v. Florida*, 470 U.S. 811, 815, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985) (arrest where defendant taken to police station); *Dunaway v. New York*, 442 U.S. 200, 207, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979) (arrest where defendant taken to police station and placed in interrogation room). Instead, Quartana was transported back to the scene of the accident that he had earlier left and his detention was "brief in duration and public in nature." *See Swanson*, 164 Wis. 2d at 447, 475 N.W.2d at 152.

Quartana, 213 Wis. 2d at 450.

The *Quartana* court further admonished that "[a]s courts, we must guard against police misconduct *through overbearing or harassing techniques* that tread upon people's personal security without the objective evidentiary justification the Constitution requires." *Id*. at 448 (citations omitted; emphasis added).

As part and parcel of the *Quartana* court's test to assess whether a temporary investigative detention has transmogrified into an arrest, the court indicated that it "must determine, given the totality of the circumstances, whether a reasonable person in the suspect's position would not have considered himself or herself to be in custody given the degree of restraint under the circumstances." *Id.*at 449-50, citing *State v. Swanson*, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). The "degree of restraint" analysis includes an examination of whether the trappings of an arrest, such as the act of handcuffing an individual, are employed.

Besides the *Quartana* court's indication that among the relevant factors for determining whether law enforcement officers have exceeded the permissible scope of an investigatory detention is whether the individual is being transported to a more institutional setting such as a police station, the *Quartana* court also indicated that whether the deputy's actions would be considered a significant restrain on the subject's liberty is another among the factors to be considered. *Quartana*, 213 Wis. 2d at 450-51.

C. Application of the Law to the Facts.

Assuming, *arguendo*, that Mr. Watson's removal from the scene of his initial detention was warranted given the weather conditions, it is both the place to which he was removed and the manner in which it was accomplished that makes his detention under the Fourth Amendment unconstitutional.

One could treat the factors identified in the federal and state common law decisions on this issue as a "checklist" of sorts. Going through these factors one at a time reveals that there is but one, and only one, rational conclusion which can be reached, namely: Mr. Watson's detention was made constitutionally unreasonable *vis a vis* the means, manner, and method by which the law enforcement officer in this case executed it.

First, the record is devoid of any evidence that Mr. Watson was not told that he would be free to leave if he passed the field sobriety tests. The closest the record comes is that he would be given a ride home if he was determined not be involved in the initial disturbance call. R69 at 6:4-7.

Second, Mr. Watson was **handcuffed**. R69 at 19:10-12. There is certainly no need to further explain how handcuffing an individual is a trapping of custody and not simply of an investigatory detention. The handcuffing in this case is made all the more egregious by virtue of the fact that they were placed on him *after* Deputy Peters accused Mr. Watson of lying to him about how far he had walked. R69 at 18:7-10. To a lay person, being handcuffed and secured in the rear of a sheriff's squad after being accused of lying to a law enforcement officer surely seems like an arrest or at least a punishment of sorts.

Third, during transport, Mr. Watson had been **secured in the locked, rear seat** of the deputy's squad. R69 at19:6-9. There is a reason that law enforcement officers refer to this portion of their vehicle as "the cage" and it is not one which is indicative of being free of confinement.

Fourth, Mr. Watson was taken to a **locked and fully secured police station** to perform his field sobriety tests. R69 at 19:10-12. The only way to gain entry to the police department at night is through a secured door. As the Plymouth officers told Deputy Peters,

if he brought Mr. Watson to their department "nobody" would see him and it would just be him and the officers. R69 at 12:5-6. If this is not "out of public view"—the main concern of the common law decisions noted above—then Mr. Watson is hard pressed to wonder what would be.

Fifth, even though the police department was within the "vicinity" of his initial detention, there were numerous **other establishments which were "in public view"** and to which he could have been taken. R69 at 22:18 to 24:7. These included other roads in the area (given that the weather was not horribly inclement and the roads were, as admitted by Deputy Peters, clear, the Kwik Trip to which he was originally to be transported, or even the driveway of the home from which the original disturbance complaint was initiated. *Id*.

Finally, once he was taken to a secured room within the police department out of public view, there were **multiple uniformed, armed officers** present while he performed the field sobriety tests. Any room can seem "confining" when just one armed deputy is present with an individual, but to have multiple officers present renders the same nearly claustrophobic.

As a checklist, every box which could be checked that makes Mr. Watson's investigatory detention seem more like an arrest than a *Terry* stop has been checked. For purposes of emphasis, it must be noted that the major distinguishing factor for the *Quartana* and *Royer* Courts in determining whether the transportation to a new location transforms an otherwise constitutional detention into an unconstitutional one is whether the new setting is an institutional one out of public view. In this case, Mr. Watson was removed from a very public location to a secured police department to which only law enforcement officers have access. Like the *Royer* Court's characterization, there are few other locales which could be characterized as "an almost classic definition of imprisonment." Based upon this fact alone, one could reasonably argue that Mr. Watson's detention cannot be viewed as anything but a violation of his Fourth Amendment right to be free from unreasonable seizure, as well as his coextensive rights under Article I, § 11 of the Wisconsin Constitution.

CONCLUSION

Mr. Watson respectfully requests that this Court reverse the order of the circuit court denying his motion to suppress based upon a violation of his right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution because his transportation to a secured facility out of public view is no different that that which was found unreasonable by the United States Supreme Court in *Florida v. Royer*.

Dated this 5th day of May, 2021.

Respectfully submitted:

MELOWSKI & SINGH, LLC

By:_____

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 3,936 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. 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. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on May 5, 2021. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 5th day of May, 2021.

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APPENDIX

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