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

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & SINGH, LLC

Matthew M. Murray
State Bar No. 1070827

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
matt@melowskilaw.com

ARGUMENT

I. THE STATE OVERLOOKS OR IGNORES THE RELEVANT FACTS OF THIS CASE AS THEY RELATE TO COMMON LAW DECISIONS WHICH CHARACTERIZE WHAT IS CONSIDERED UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT.

There are innumerable flaws in the State's characterization of the facts of the instant case and several points at which the State fails to distinguish the circumstances of Mr. Watson's detention from cases in which courts of supervisory jurisdiction have held detentions unreasonable. While these will be examined in turn below, Mr. Watson is compelled to begin with the most egregious of these.

In an effort either to dupe this Court into believing something which is patently erroneous, the State repeatedly asserts that Mr. Watson was going to be transported to the Plymouth Police Department for field sobriety testing because "Deputy Peters wanted Watson to have the best opportunity to perform the tests." State's Response Brief at p.7, *see also* pp.3 & 8-9. [hereinafter "SRB"]. That may have been the *pretense* offered to Mr. Watson, however, the record reveals the *actual* reason he was being transported to the police department, to wit: because "[n]obody [would be] watching. It would strictly just be officers and the defendant." R69 at 12:5-6. The State's effort to paint a picture in which the officers were acting benevolently and solely in the best interests of Mr. Watson is utterly preposterous. Clearly, the testimony given under oath in this case reveals the officers' true motives, namely that if the tests were done at the police department "[n]obody [would be] watching." *Id*. This testimony is a far cry from the State's characterization of the facts. There is an immense rift which separates a pretense expressed to a suspect from the true motivations underlying the actions of law enforcement officers.

The State also attempts to excuse Mr. Watson's transportation to an institutional setting by proffering that he "agreed to be transported to the Department." SRB at p.3. This matters not. In *Florida v. Royer*, 460 U.S. 491 (1983), Royer's consent to being removed to an interrogation room ***did not effect*** the Court's conclusion that Royer's Fourth Amendment rights were violated. In *Royer*, 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*. Notwithstanding the fact that Royer *consented* to go with law enforcement officers,

the Supreme Court concluded that Royer's removal to a room out of public view for the purpose of conducting an investigatory detention constituted a violation of the Fourth Amendment. *Id*. at 505. Tellingly, nowhere within the four corners of its Response Brief does the State attempt to distinguish the facts of *Royer* from the facts present in this case. To this point, it is worth repeating what the Seventh Circuit Court of Appeals concluded in *United States v. Verrusio*, 742 F.2d 1077 (7th Cir. 1984), regarding the removal of a suspect from a public area to a ten-by-twelve foot room out of public view:

> [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). As with *Royer*, the State does not—likely because it cannot—make any effort to distinguish the facts of the instant matter from those in *Verrusio*.

Further justification for Mr. Watson's removal to an institutional setting outside of public view is offered by the State in the form of an argument that "there was 'not too big of a shoulder' to even perform the [field sobriety] tests on scene, ..." SRB at p.3. Even if Mr. Watson concedes that the shoulder in the area in which he was detained was not accommodating enough "size-wise" to administer field sobriety tests, the State concedes that there were other places, such as a local gas station, to which he could have been transported. SRB at pp. 2-3. Obviously, gas station parking lots are not as narrow as shoulders abutting the side of the road. There would have been plenty of room on the surface of a gas station parking lot—a location within public view—to perform field sobriety tests.

The State avers that the foregoing gas station parking lot could not have been used because the "temperature [was] between 29 and 33 degrees Fahrenheit" on the morning of Mr. Watson's detention. SRB at p.7. Conveniently, the State overlooks the commonly-known fact that not only have *tens of thousands* of individuals been subject to performing field sobriety tests in such conditions in Wisconsin over the decades, but suspects have actually been subjected to performing tests in far colder temperatures and worse conditions, *i.e.*, in the rain, when it is snowing, against high

winds, *etc*. The temperature range which the State claims to be prohibitive with respect to conducting field sobriety tests represents a disingenuous argument on the State's part. Deputy Peters himself admitted that it was not uncommon for him to conduct OWI investigations outside in winter conditions. R69 at 22:10 to 24:3.

If it was true that the proffered temperature range was not conducive to testing, either the National Highway Traffic Safety Administration's *Standardized Field Sobriety Test Training Manual* should proscribe conducting tests under these circumstances—which it does not—or alternatively, every defendant stopped when the temperature is below thirty-three degrees should be afforded the right to be removed to an alternate location shielded from the cold. If the latter was the case, not only would absurd results become commonplace as there may be no locations "within the vicinity" in which the accused is being detained (such as when the detention occurs in a rural area), but this would create an undue burden on law enforcement officers who would be required to take the time and make the effort to relocate all suspects detained in thirty-three degree and lower temperature weather.

Remarkably, the State characterizes Mr. Watson's encounter as one which is not indicative of custody despite his being handcuffed because, it asserts, "that the use of handcuffs does not necessarily transform an investigative stop into an arrest." SRB at p.6, citing *State v. Vorburger*, 2002 WI 105, ¶ 64, 255 Wis. 2d 537, 648 N.W.2d 829. This assertion does not only ignore the *entire context* of Mr. Watson's detention, but it ignores the fact that the handcuffing in the *Vorburger* case was premised upon concerns for officer safety. The restraint in *Vorburger* was justified based upon the fact that of the two individuals being detained by law enforcement officers, one of them had an electric weapon in his vehicle and the other was known by law enforcement to be a bouncer at a local bar. *Id*. ¶ 66. Based upon *these facts*, the *Vorburger* court concluded "that the officers did not act unreasonably in their efforts to protect themselves, ..." *Id*. Unlike *Vorburger*, there are no allegations in the record of this case which indicate that Mr. Watson was a threat to officer safety prior to his transport.

More importantly, however, is the fact that the State's attempt to minimize the nature of Mr. Watson's handcuffing as it relates to being an indicia of custody must fail because it does not account for the *entire context* of Mr. Watson's detention. Not only was Mr. Watson handcuffed, but *additionally*, Mr. Watson was searched (R69: 6:8-10); the arresting officer questioned him and then accused Mr. Watson of lying to him (R69 at 18:7-10); he was secured in the rear, locked portion of a squad car prior to being transported to a *police station* (R69 at 19:10-12) and

the record is devoid of any proof that Mr. Watson was informed that he would be free to leave if he passed the field sobriety tests. When *all of the circumstances* of this case are taken together, *i.e.*, the handcuffing without "officer-safety" justifications, the search, the accusations of lying, the locking in the rear of a squad, and the transportation to a police department, what more is needed to conclude that enough indicia of custody are present to make any individual believe that they are "under arrest"? The formal words "you are under arrest" are not some magical invocation which is the *sine qua non* of custody. Custody can, and often does, exist under innumerable circumstances in which those words are not invoked. Even the most cursory review of cases like *Royer*, *Verruzio*, and *Dunaway v. New York*, 442 U.S. 200 (1979), reveals s much. As the Court in *Dunaway* observed:

> **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**.

Dunaway, 442 U.S. at 212-13 (emphasis added). It should be noted that all of the facts present in this case were also present in *Dunaway* when the Court found that Dunaway's detention had transmogrified into a custody, *i.e.*, Dunaway was not questioned briefly where he was found; he was taken from a neighbor's home to a police car; he was transported to a police station; he was never informed that he was "free to go"; and he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.

Finally, the State makes one assertion which seemingly attempts to shift the burden from the constitutionally-imposed requirement that *it* bears the burden of proving that Mr. Watson's custody was reasonable under the Fourth Amendment onto Mr. Watson's shoulders to prove that it was not. The State proffers that "[r]ather than showing any police misconduct, the use of the Department for field tests gave Watson an advantage." SRB at p.8. Such burden shifting should be rejected by this Court without the slightest apology. *Mr. Watson is **not** obligated to demonstrate that there was "any police misconduct.*" Simply put, this is not a correct characterization of the applicable standard in the instant case. The burden is on the *State* to prove that there was compliance with the Fourth Amendment. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

CONCLUSION

Because Mr. Watson was transported to an institutional setting while handcuffed and secured in the locked rear seat of a squad car, after having been accused by law enforcement of having lied, and after having been searched, he respectfully moves this Court to reverse the determination of the circuit court that the circumstances of his detention did not violate his Fourth Amendment rights and remand his case with directions to grant his motion.

Dated this 26th day of July, 2021.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,055 words.

Dated this 26th day of July, 2021.

MELOWSKI & SINGH, LLC

Electronically signed by:
Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant