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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case Nos. 2021AP454 & 2021AP455

PORTAGE COUNTY,

Plaintiff-Respondent,

-vs-

SEAN M. DUGAN,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, BRANCH II, THE HONORABLE ROBERT J. SHANNON PRESIDING, TRIAL COURT CASE NO. 19-TR-406 & 19-TR-597

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE INCLEMENT CONDITIONS SURROUNDING MR. DUGAN'S INITIAL DETENTION WERE UNREASONABLE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 11 OF THE WISCONSIN CONSTITUTION SUCH THAT HE SHOULD HAVE BEEN TRANSPORTED TO AN ALTERNATE LOCATION FOR FIELD SOBRIETY TESTING?

> Circuit Court Answered: NO. The circuit court found that the inclement weather conditions on the night of Mr. Dugan's detention permitted law enforcement officers to conduct field sobriety testing at roadside under the totality of the circumstances known to the officer at the time. D-App. at 102-08.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of whether a particular set of facts rises to the level of establishing a constitutional violation. 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. Dugan.

STATEMENT OF THE CASE

Mr. Dugan was charged in Portage County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—First Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle With a Prohibited Alcohol Concentration—First Offense, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on February 24, 2019. R1.

Mr. Dugan retained private counsel and thereafter filed a pretrial motion alleging that his right to be free from an unreasonable seizure under the Fourth Amendment to the United States Constitution was violated when the arresting officer in this case failed to transport him to a location to perform field sobriety tests which was shielded from the inclement weather conditions at the time he was detained. R13.

A hearing on Mr. Dugan's motion was held on September 12, 2019, before the Circuit Court for Portage County, the Honorable Robert J. Shannon presiding. R52. The State called a single witness, the arresting officer, Mark Smallwood, to testify. R52 at 8:24 to 56:12. Oral argument was held on the motion after the hearing. R52 at 57:12 to 65:19. Ultimately, the circuit court denied Mr. Dugan's motion, concluding that his transportation to an alternate location sheltered from the inclement weather conditions was not necessary given the totality of the circumstances. R52 at 65:20 to 71:2; D-App. at 102-08.

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

STATEMENT OF FACTS

On February 24, 2019, the above-named Defendant, Sean Dugan, was stopped and detained in Portage County by Deputy Mark Smallwood of the Portage County Sheriff's Office for allegedly operating his motor vehicle in the wrong direction on a one-way street. R52 at 11:21 to 12:10.

After making contact with Mr. Dugan, Deputy Smallwood ostensibly observed that he had an odor of intoxicants about his person, had glossy eyes, and had difficulty "keep[ing] his train of thought." R52 at 14:17-22. Based upon these observations and Mr. Dugan's admitting to consuming intoxicants,[1] Deputy Smallwood asked Mr. Dugan to submit to a battery of field sobriety tests. R52:18-23 to 19:1. Mr. Dugan agreed to submit to the requested tests. R52 at 19:2-3.

Deputy Smallwood testified that it was "a pretty snowy night" during the period of field sobriety testing. R52 at 18:4-5. Moreover, Mr. Dugan was clad only in an unbuttoned flannel shirt with a T-shirt underneath the same at the time the field tests were executed. R52 at 29:4-13.

At no time during the course of their roadside encounter, neither before nor during the field sobriety tests, did Deputy Smallwood offer Mr. Dugan an opportunity to be transported to a warmer location[2] even though he was aware that he had the authority to relocate Mr. Dugan to an alternate location for field sobriety testing. R52 at 24:11-14; 49:3-5. Deputy Smallwood acknowledged that there were "plentiful [other locations] in the area where Mr. Dugan was stopped" to which he could have been transported for field sobriety testing. R52 at 52:17-19. In fact, the deputy agreed that the possible alternate locations were "endless." R52 at 41:2-4. Among these options was the ambulance bay at the hospital to which Mr. Dugan would ultimately have to be transported for a blood test. R52 at 40:4-23.

[1]R52 at 16:21 to 17:1.
[2]R52 at 53:13-15.

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

(1) it was such a snowy night at the time of Mr. Dugan's detention that vehicles were having difficulty travelling on the roads in the area (R52 at 11:10-12);

(2) there were "several inches of snow on the ground" (R52 at 18:6-11);

(3) the Portage County Sheriff's Office had several calls that night for persons in need of assistance and for "cars in the ditch" (R52 at 25:2-6; 47:5-12);

(4) the area in which Mr. Dugan was required to perform the field sobriety tests was snow covered (R52 at 19:7-8);

(5) Deputy Smallwood admitted that the weather at the time field sobriety tests were administered to Mr. Dugan "could have some effect on the tests" (R52 at 21:19-21; 21:10-12);

(6) Deputy Smallwood even admitted that he slipped in the snow despite the fact that he was wearing boots (R52 at 36:19 to 37:16);

(7) Deputy Smallwood also conceded that the conditions under which Mr. Dugan had to perform the field sobriety tests were "hardly ideal conditions" (R52 at 42:4-8);

(8) Deputy Smallwood also testified that it was fair to state that it was "impossible for [him] to tell which [clues on the tests are] due to the snow and which [are] due to [Mr. Dugan] being intoxicated" (R52 at 44:24 to 45:2); and

(9) Deputy Smallwood testified that Mr. Dugan's performance on the field sobriety tests played a role in his decision to arrest Mr. Dugan (R52 at 39:5-9).

Mr. Dugan will incorporate the foregoing facts adduced at the evidentiary hearing in this matter throughout the remainder of his Brief.

STANDARD OF REVIEW ON APPEAL

This appeal presents a question of whether an undisputed set of facts rises to the level of establishing a constitutional violation. 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. FRAMING THE ISSUES PRESENTED.

Before beginning the analysis of the issue Mr. Dugan presents for this Court's review, it is first incumbent upon him to clarify precisely what it is he is alleging.

As a starting point for focusing the issue presented by this appeal, there is one important constitutional notion which must be recalled throughout the entirety of Mr. Dugan's argument, namely that "reasonableness" is the *sine qua non* of Fourth Amendment jurisprudence. Fourth Amendment "reasonableness" is among the most fundamental and well settled of all constitutional concepts. *See, e.g.*, *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d (1983); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). To pass constitutional muster under the Fourth Amendment, a search or seizure must, among all other things, be reasonable. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Questions arising under the Fourth Amendment "turn[] on considerations of reasonableness . . . ." *State v. Richter*, 2000 WI 58, ¶ 30, 235 Wis. 2d 524, 612 N.W.2d 29; *see also*, *State v. Smith*, 131 Wis. 2d 120, 230, 388 N.W.2d 601 (1986). It is to this standard to which all government conduct must ultimately conform.

Thus framed, Mr. Dugan raises two questions which are different sides of the *same* coin. First, he proffers that it was

constitutionally *un*reasonable under the rubric of the Fourth Amendment not to remove him to a location sheltered from the inclement weather conditions for the purpose of fairly administering field sobriety tests to him. Second, he posits that any conclusion that probable cause existed to arrest him for an operating while intoxicated violation is *un*reasonable under the auspices of the Fourth Amendment because of the significant disadvantage at which he was placed due to the inclement weather.

Even though these questions are inextricably intertwined, Mr. Dugan will examine each of them independently below.

II. IT WAS CONSTITUTIONALLY UNREASONABLE FOR DEPUTY SMALLWOOD NOT TO REMOVE MR. DUGAN TO A SHELTERED LOCATION FOR THE PURPOSE OF ADMINISTERING FIELD SOBRIETY TESTS.

A. Constitutional and Statutory Authority to Remove a Suspect to an Alternate Location.

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. Otherwise known as an "investigatory detention," 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 plain language of § 968.24 thus allows for the removal of a suspect from one location to another, so long as it is in the same "vicinity." Wis. Stat. § 968.24 (2019-20).

If there was any question regarding whether a suspect may be removed from one vicinity to another during an investigatory detention, it was settled by the Wisconsin Supreme Court in *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (1997). 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. *Id*. at

448; *accord*, *Florida v. Royer*, 460 U.S. 491, 496 (1983). Mr. Dugan posits that the failure to remove him to a warmer location out of the inclement elements was unreasonable under the Fourth Amendment to the U.S. Constitution and Article I, § 11 of the Wisconsin Constitution because the existing weather conditions could only have adversely affected his ability to perform field sobriety tests making any conclusions drawn therefrom unreasonable.

B. Application of the Law to the Facts.

In the present case, despite the fact that the weather conditions were inclement, Deputy Smallwood—knowing full-well that Mr. Dugan was clad in only an unbuttoned flannel shirt and T-shirt—made no effort or offer to remove Mr. Dugan to a location which was shielded from the cold, which locations were "plentiful and endless" according to the deputy.

Moreover, Deputy Smallwood acknowledged that he *knew* he had the authority to remove Mr. Dugan to another location within the vicinity. Nevertheless, he unreasonably chose not to do so.

How is it that the deputy's decision not to exercise his authority under *Terry* and § 968.24 was unreasonable? It was unreasonable because of everything the deputy admitted during both his direct and cross examinations. He conceded that it was a "snowy" night with several inches of snow on the roads. The weather was so poor the night of Mr. Dugan's detention that, according to the deputy, the Sheriff's Office was inundated with multiple calls for assistance due to traffic sliding off of the roadways. Moreover, the deputy himself—not ironically—slipped in the snow while he walked outside of his squad *even though* he was wearing boots. The deputy admitted that the weather could have an effect on Mr. Dugan's performance on the field sobriety tests which he *conceded* would not be distinguishable from signs of impairment.

It is patently unreasonable for Deputy Smallwood to administer field sobriety tests to Mr. Dugan under conditions in which the weather creates an obstacle or disadvantage to Mr. Dugan's

ability to perform the tests. At some point, the deputy has to be smart enough to recognize that environmental conditions are going to affect a suspect's ability to perform field sobriety tests, *especially* when the defendant is not only *not* properly attired for the weather and when a significant amount of snow is accumulating at the same time as well. After all, § 968.24 and *Quartana* permit an officer to relocate a suspect to another location without violating the person's rights so long as the relocation is "reasonable" under the auspices of the Fourth Amendment. Based upon the facts of this case, Mr. Dugan's being required to perform field sobriety tests under the conditions then existing on February 24, 2019, 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 because the cold temperature and snow can easily skew the conclusions an officer draws from a suspect's performance on the field sobriety tests, thereby rendering any probable cause determination based unreliable. *See*, Section III., *infra*.

III. DEPUTY SMALLWOOD'S FINDING OF PROBABLE CAUSE TO ARREST MR. DUGAN IS UNDERMINED BY THE WEATHER CONDITIONS.

A. Statement of the Additional Issue.

Should this Court conclude that Deputy Smallwood was under no obligation to remove Mr. Dugan to a more sheltered location for purposes of administering field sobriety tests, it should nevertheless reverse the decision of the lower court on the ground that Deputy Smallwood's conclusion that probable cause to arrest Mr. Dugan existed in this case was utterly undermined by the unreliability of the observations he made under the conditions which existed at the time he performed the field sobriety tests, contrary to the reasonableness requirement of the Fourth Amendment.

B. Statement of the Law.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The Fourth Amendment's purpose is to prevent ***arbitrary*** and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983)(emphasis added). Capricious or arbitrary police action is not tolerated under the umbrella of the Fourth Amendment. "The basic purpose of this prohibition is to safeguard the privacy and security of individuals against ***arbitrary*** invasions by government officials." *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d (1983)(emphasis added); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

Within the ambit of the Fourth Amendment, there are recognized three levels of encounter, namely (1) the "simple encounter" for which the individual is afforded no constitutional protection because his or her movement is not restricted; (2) the investigatory detention, or *Terry* stop, for which the officer must have a reasonable suspicion to detain the person, *see Terry v. Ohio*, 392 U.S. 1 (1968); and (3) the custodial arrest which requires probable cause. *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982); *Henry v. United States*, 361 U.S. 98 (1959).

In the latter type of encounter, "[p]robable cause, although not easily reducible to a stringent, mechanical definition, generally refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986)(citations omitted). "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 was operating a motor vehicle while under the influence of an intoxicant." *Id*. (emphasis added).

C. Application of the Law to the Facts of the Case.

Mr. Dugan believes that any conclusions drawn by the deputy in the instant case based upon his performance on the field sobriety tests are entirely arbitrary, contrary to *Reichl* and *Boggess* because the inferences Deputy Smallwood drew regarding Mr. Dugan's ability to balance, ambulate, or otherwise maintain an instructional stance, *etc*, were undermined by the interference caused by the snow and cold.

Key to an examination of this issue are two important facts the deputy admitted during his testimony. The first of these is that Mr. Dugan's performance on the field sobriety tests factored into his decision to arrest Mr. Dugan. The second admission of particular relevance is the deputy's concession that he could not distinguish between clues observed during the field sobriety tests which were caused by the weather versus those which were cause by some degree of intoxication.

The deputy's admission that clues caused by inclement weather versus those caused by impairment are indistinguishable can be understood by reference to a simple thought experiment. If an individual is standing outside exposed to the snow and cold, the individual can certainly begin to shiver. When a person in such a situation is standing on one leg with a twitching thigh muscle, the individual will literally be fighting against their body's own involuntary muscle contractions to maintain their balance. This is a battle which cannot always be won given that each twitch comes not only unannounced, but each twitch is not of the exact same strength contraction to contraction. It is impossible to anticipate whether the next involuntary contraction will be weaker than, the same as, or stronger than the last, or as importantly, whether it will next come in 200 milliseconds, 7/10ths of a second, or two seconds from the last. Thus, if a person sways or even falls during the one-leg stand, a law enforcement officer cannot separate a clue due to the cold from one due to impairment by alcohol. The same "thought experiment" can

be undertaken with a walk-and-turn test as well to demonstrate just how much the cold can affect field sobriety test performance.

In the end, Deputy Smallwood's conclusions regarding probable cause in the instant case are suspect. Because precedent requires this Court to *objectively* look at the "totality of the circumstances" when ascertaining whether there was probable cause to arrest Mr. Dugan, it must consider the weather. In so doing, this Court should recognize that which the officer did not, namely: the reliability of the field sobriety tests is thoroughly suspect given the cold and snowy conditions in which they were administered and given the clothing in which Mr. Dugan was clad. After all, if a "sober" law enforcement officer clad in boots can slip in the snow just walking in a "normal" fashion, *i.e.*, not being asked to balance during a one-leg stand or walk in an atypical manner heel-to-toe, how can a citizen suspect exposed to the same elements be expected to maintain their balance? Any conclusions regarding Mr. Dugan's alleged impairment are patently unreasonable under the Fourth Amendment.

CONCLUSION

Mr. Dugan 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 the deputy's failure to relocate him to a location sheltered from the inclement weather was unreasonable under the Fourth Amendment to the United States Constitution; Article I, § 11 of the Wisconsin Constitution; and contrary to notions of reasonableness implied in *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (1997).

Dated this 19th 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 3,064 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 19, 2021. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 19th day of May, 2021.

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_____

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APPENDIX

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