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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case Nos. 2021 AP454 & 2021 AP455

PORTAGE COUNTY,

Plaintiff-Respondent,

v.

SEAN M. DUGAN,

Defendant-Appellant,

ON 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
PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
STATEMENT OF THE ISSUE	3
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	3
STATEMENT OF THE FACTS AND CASE.....	3
STANDARD OF REVIEW.....	4
ARGUMENT	4
I. REVERSE QUARTANA: THE STATE IS NOT REQUIRED TO TRANSPORT A DEFENDANT TO A DIFFERENT LOCATION	4
II. THE STATE HAD PROBABLE CAUSE TO ARREST MR. DUGAN.....	9
CONCLUSION.....	10
APPENDIX.....	14
Appendix Table of Contents.....	14
<i>County of Fond Du Lac v. Ramthun</i> , 2016 WI App 88, 372 Wis. 2d 459, 888 N.W.2d 247 (unpublished but citable)	A-1
<i>State v. Doyle</i> , 2011 WI App 143, 337 Wis. 2d 557, 806 N.W.2d 269 (unpublished but citable)	A-2
<i>State v. McKeel</i> , 2017 WI App 21, 3, 374 Wis. 2d 438, 896 N.W.2d 391 (unpublished but citable)	A-3

TABLE OF AUTHORITIES

<i>Arizona v. Johnson</i> , 555 U.S., at 333, 129 S.Ct. 781 (2009).....	7, 8
<i>Florida vs. Royer</i> , 460 U.S. 491, 499, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).....	8
<i>Illinois v. Caballes</i> , 543 U.S. at 407, 125 S.Ct. 834 (2005).....	8
<i>In re Refusal of Anagnos</i> , 2012 WI 64, ¶ 21, 341 Wis. 2d 576, 815 N.W.2d 675 (2012) ..	5
<i>Muehler v. Mena</i> , 544 U.S. 93, 101, 125 S.Ct. 1465, 1961 L.Ed.2d 299 (2005).....	8
<i>Rodriguez v. United States</i> , 135 S.Ct. 1609, 1614-15, 191 L.Ed.2d 492 (2015).....	8
<i>State v. Koch</i> , 175 Wis.2d 684, 701, 499 N.W.2d 150 (1993).....	9
<i>State v. Nordness</i> , 128, Wis.2d 15, 35, 381 N.W.2d 300 (1986).....	9
<i>State v. Paszek</i> , 50 Wis.2d 619, 624, 184 N.W.2d 836 (1971).....	9
<i>State v. Quartana</i> , 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App. 1997).....	5, 6, 7
<i>United States v. Sharpe</i> , 407 U.S. 675, 686, 105 S. Ct. 1568, 84 L.Ed.2d 605 (1985)	6, 8
Statutes	
Wis. Stat. § 346.63(1)(b).....	3
Wis. Stat. § 968.24.....	3, 6, 7

STATEMENT OF THE ISSUE

Whether the Circuit Court for Portage County erred on September 12, 2019 when it denied Mr. Dugan's motion to suppress evidence resulting from his performance of Standard Field Sobriety Tests.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Appellant, State of Wisconsin (State), requests neither oral argument nor publication.

STATEMENT OF THE FACTS AND CASE

Mr. Dugan was charged with driving a motor vehicle while under the influence of an intoxicant, as a first offense contrary to Wis. Stat. §346.63(1)(a), and driving a motor vehicle with a prohibited blood alcohol level greater than .015, also as a first offense contrary to Wis. Stat. §346.63(1)(b). Both offenses occurred in the same incident on February 24, 2019, in the city of Stevens Point, Portage County, Wisconsin.

On said date, Mr. Dugan was stopped by Deputy Mark Smallwood for Portage County Sheriff's Office after Deputy Smallwood observed Dugan's black SUV strike a snowbank on the south side of the intersection of Fremont Street and Main Street in Stevens Point. R19. Deputy Smallwood then observed the vehicle traveling eastbound on Main Street, which is one-way street with traffic only traveling in a westbound direction. *Id.* Deputy Smallwood conducted a traffic stop with his patrol vehicle camera activated and the parties visible in the camera throughout the interaction. *See* R17. Hon. Robert Shannon of the Portage County Circuit Court relied on the squad video for purposes as for the Motion to Suppress hearing, and the State relies on it and will reference it, herein. A-AP 106:4-7.

After stopping the black SUV, Deputy Smallwood made contact with the driver of the vehicle and identified him as the Defendant-Appellant, Mr. Sean Michael Dugan. R19. Deputy Smallwood observed Mr. Dugan's eyes were

glossy, and he looked dazed. *Id.* Deputy Smallwood immediately smelled an order of an intoxicating beverage emitting from Mr. Dugan. *Id.* When asked something to the effect of, “Do you realize where you are and what you are doing here?”, Mr. Dugan responded “What do you mean?” *See* R17, at 00:01:35. Mr. Dugan’s responses were slow, and he stated had no idea what road he was on. R19. Mr. Dugan also admitted to having had a “couple” of drinks, then clarified that he had three or four drinks and started drinking at 6 or 7 PM and stopped drinking at 10 or 11 PM. *Id.* It was approximately 4:40 AM at the time of the stop. *Id.* Mr. Dugan originally stated that he had been drinking at Partner’s Pub but had not spent the entire night there, then contradicted himself by saying he was coming from Partner’s Pub prior to being stopped by the Deputy. *Id.* Mr. Dugan was also unable to provide his phone number to the Deputy. *See* R17, at 00:02:37.

As a result of Mr. Dugan’s confusing and inconsistent statements, his admission to consuming alcohol and the deputies’ observations of Mr. Dugan’s demeanor and prior driving, Deputy Smallwood asked Mr. Dugan to step out of his vehicle to conduct Standardized Field Sobriety Tests. *See id.*, at 00:06:58. Mr. Dugan agreed to complete the field sobriety tests. *See* R17, at 00:11:11. There is no question that the weather on the night of February 24, 2019 was less than ideal. *See id.* It was about 30 degrees outside and snowing, similar conditions to too many Wisconsin winter nights. R19. Deputy Smallwood took care to account for the snow on the roads, and on the squad footage, Deputy Smallwood can be heard asking Mr. Dugan to move over to a clearer part of the roadway. *See id.*, at 00:13:16.

Deputy Smallwood observed clues on all tests of the Standardize Field Sobriety Tests. R19. First, on the Horizontal Gaze Nystagmus test the Deputy observed six of six clues: lack of smooth pursuit in both eyes (two clues), distinct and sustained nystagmus at maximum deviation in both eyes (two clues), onset of nystagmus prior to 45 degrees in both eyes (two clues), and vertical nystagmus. *Id.* On the Walk and Turn test, the deputy observed six clues: breaks instructional stance, starts too soon, misses heel-to-toe (all steps), steps out of line (step 12), number of

steps takes (18 steps), and stops after walking. *Id.* Next on the One Leg Stand test, the deputy observed four clues: swaying while balancing, puts foot down (5, 10, 20 seconds), uses arms to balance, and hopping. *Id.* The defendant did not submit to a Preliminary Breath Test. *Id.*

Mr. Dugan was transported to Aspirus Emergency Department, where he consented to an evidentiary chemical test of his blood. R19. Medical Technician Anderson was observed and took two vials of Mr. Dugan's blood. *Id.* The vials were sealed and sealed into a blood kit. *Id.* The blood kit was sent off to the Wisconsin State Laboratory of Hygiene. *Id.* The Blood Alcohol Concentration test resulted in 0.268 g/100mL ethanol. R33.

On June 18, 2019, the defense filed a Motion to Suppress based up unconstitutionally unreasonable detention and arrest. On September 12, 2019, the trial court conducted a hearing on the motion and the County called one witness--Deputy Smallwood—to testify. Oral argument was then held for this motion on February 28, 2020 in front of the Honorable Judge Shannon. In ruling on the motion, Judge Shannon reasonably assessed the totality of the circumstances of the night in question to deny the motion. A-AP at 106:14-15. In his ruling, Judge Shannon recognized the less-than-optimal conditions—the weather, the timing of the incident at 4:52AM, and the location being one of the most central intersections in the City of Stevens Point. A-AP at 104:23-25. Furthermore, Judge Shannon identified the defendant's confused state, his dazed and confused appearance, the smell of alcohol emitting from Mr. Dugan, his failure to comprehend where he was going or that he was traveling the wrong direction down a one-way street, and Mr. Dugan's inability to provide his phone number *all* as independent signs of impairment. *Id.*, at 105:7-15. Judge Shannon held that, "the deputy did not totally or entirely base his arrest decision on the field sobriety tests," and denied the motion. *Id.*, at 105:2-4.

Furthermore, Judge Shannon advised the parties that Mr. Dugan's performance of the field sobriety tests would be an, if not *the*, main issue for trial, and that the factfinder would be able to determine at trial if Mr. Dugan's performance of the field sobriety tests was appropriate evidence of his impairment under the circumstances of this

case. A-AP at 106:18-24. Finally, Judge Shannon recognized that Mr. Dugan's performance of the field sobriety tests "will be proper fodder for detailed cross examination" at trial. A-AP at 107:4-5.

Judge Shannon also addressed the reverse-*Quartana* issue and held said case does not require the officer to utilize an off-site location to administer the field sobriety tests, or that the accused has an option to request the field sobriety tests to be conducted somewhere other than the location of the traffic stop. A-AP at 107:6-12. Because no such standard exists in the law, the officer was not required to move the location of the field sobriety tests to another location, nor was his decision to conduct them at the site of the traffic stop unreasonable even under the circumstances as they existed. A-AP at 107:21-25.

On January 14, 2021, a trial was held for both charges against the defendant, and Judge Shannon found Mr. Dugan guilty of Operating While Intoxicated as a first offense and Operating with a Prohibited Alcohol Content as a first offense. A-AP at 101. The Court later stayed the sentence pending the result of this appeal. A-AP at 101.

STANDARD OF REVIEW

This appeal is the result of a question of fact and if the facts rise to the level of a constitutional violation. The Court of Appeals reviews questions of fact under the clearly erroneous standard. *In re Refusal of Anagnos*, 2012 WI 64, ¶ 21, 341 Wis. 2d 576, 815 N.W. 2d 675 (2012). "We review the application of those historical facts to the constitutional principles independent of the determinations rendered by the circuit court and court of appeals." *Id.*

ARGUMENT

The defendant's motion is colloquially referred to in the OWI community as a Reverse-*Quartana* motion.¹ *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997). Because officers may relocate an OWI suspect a short distance to perform field sobriety tests during poor

¹ In his oral ruling, Judge Shannon refers to the "Reverse-*Quartana*" issue. A-AP at 107:6

weather conditions (pursuant to *State v. Quartana* and other related cases), Mr. Dugan and other defendants are attempting to extend the ruling in *Quartana* to get courts to say that officers have a duty to change the location of the field sobriety tests in such circumstances of inclement weather. *Id.* However, there is no case which would support such a conclusion or the extension of the holding in *Quartana*, and fourth amendment principles should not be twisted to support the concept.

The defendant further argues that, due to the possibility of the weather conditions impacting his performance of the field sobriety tests, the officer did not have probable cause for an arrest. However, as Judge Shannon accurately explained in his ruling, the facts of this case do not support that conclusion because there were ample facts and other evidence of impairment that the officer relied upon, and that were not affected by the weather, as probable cause for the arrest.

I. REVERSE QUARTANA: THE STATE IS NOT REQUIRED TO TRANSPORT A DEFENDANT TO A DIFFERENT LOCATION.

“After having identified himself or herself as a law enforcement officer, that person may stop another person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.” Wis. Stat. §968.24 (2019-2020).

Pursuant to this Statute, which is Wisconsin's codification of *Terry v. Ohio*, an officer may temporarily stop a suspect to conduct an investigation. *See also, Terry v. Ohio*, 392 U.S. 1, 88 S.Ct.1868, 20 LEd 2d 889. A temporary stop is based on reasonable suspicion. Wis. Stat. § 968.24, “permits the police, if they have reasonable grounds for doing so, to move a suspect in the general vicinity of the stop.” *State v. Quartana*, 213 Wis. 2d 440,

446, 570 N.W.2d 618, 621 (Ct. App. 1997). However, no part of the statute requires the police to move an individual to a more convenient location for the stop. *Id.* If the suspect is detained in violation of the statute or *Terry* restrictions, the temporary stop may be transformed into an arrest. *Terry v. Ohio, supra*. If that arrest is without probable cause, then the arrest is unlawful. *Id.*

Whether one is “in the vicinity” of the stop, as required by Wis. Stat. § 968.24, is an issue which has been litigated extensively. In *Quartana*, the first case to address this issue, the defendant argued that transporting him a mile back to the accident scene from his home where he was located by officers was not “in the vicinity” of the temporary detention. *State v. Quartana, supra*, at 447. Further, the defendant argued that his refusal to take a test for intoxication was not improper as the result of his unlawful detention. *Id.*, at 443. The Court of Appeals noted that temporary detentions must be as short as possible. *Id.*, at 448.

Nonetheless, the Court of Appeals found that that Quartana’s detention was reasonable. *Quartana, supra*, at 448. The Court noted that the officer investigating the incident remained at the scene of the accident, and thus it was proper for a different police officer to return Quartana from his residence to the scene so the investigating officer could attempt to speak to him. *Id.*, at 444.

In recent years there have been a number of decisions which have defined the parameters of “in the vicinity.” In *Blatterman*, the defendant complained of chest pain and was transported to a hospital where field sobriety testing was conducted. *State v. Blatterman*, 362 Wis. 2d 138, 864 N.W.2d 26 (Wis., 2015). The *Blatterman* court ruled that because Blatterman was taken ten miles to the hospital, he was not “in the vicinity” and the temporary detention was transformed into an arrest. *Id.* In an unpublished opinion to be considered for its persuasive value, *County of Fond Du Lac v. Ramthun*, the defendant argued that transporting him three or four miles to a gas station for the purpose of field sobriety testing when there was “heavy rain” transformed the stop into an unlawful arrest. In an unpublished decision, the court disagreed. *County of Fond*

Du Lac v. Ramthun, 2016 WI App 88, 372 Wis. 2d 459, 888 N.W.2d 247 (unpublished).

A number of other unpublished decisions have addressed the vicinity issue. In *State v. Dane McKeel*, the court ruled that 8 or 9 miles was in the vicinity, when McKeel was transported to the nearest place from a rural location during poor weather conditions. *State v. McKeel*, 2017 WI App 21, ¶ 3, 374 Wis. 2d 438, 896 N.W.2d 391 (unpublished but citable). In *re Burton*, the court held that Burton was not in the vicinity and was instead arrested when he was transported in handcuffs eight miles. *In re Burton*, 2009 WI App 158, ¶ 6, 321 Wis. 2d 750, 776 N.W.2d 101 (unpublished but citable). Interestingly, the *Burton* court upheld the arrest and blood draw because it determined that Burton was lawfully arrested before he was transported. *Id.* In *State v. Doyle*, the Court held that Doyle was in the vicinity when transported 3 or 4 miles and it was a rural area, and the defendant was transported to the nearest municipality. *State v. Doyle*, 2011 WI App 143, 337 Wis. 2d 557, 806 N.W.2d 269 (unpublished but citable).

None of these decisions, however, imposes an obligation or duty upon law enforcement to move the suspect during a temporary detention. The simple truth is that there are no published decisions supporting the defendant's argument that law enforcement's failure to relocate the temporary stop in circumstances of inclement weather violates the suspects 4th Amendment rights. The aforementioned cases demonstrate that, in proper situations, law enforcement may move the suspect or conduct the stop in a different location, but none of them impose this as an obligation upon law enforcement.

Federal constitutional law even cautions that unreasonably prolonging temporary detentions is frowned upon because doing so might violate the Fourth Amendment absent probable cause to arrest, and we must "guard against police conduct which is overbearing and harassing." See *Florida v. Royer*, 460 U.S. 491, 499, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). In deciding whether the length of a stop is lawful, we must "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain..." *United States v.*

Sharpe, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L.Ed. 2d 605 (1985).

The defendant's *Quartana* argument is really attempting to turn important constitutional concepts on their head. The law allows a temporary stop by police to confirm or dispel suspicion. The law also affords the officer discretion to move the defendant if reasonable under the circumstances and *in the vicinity* of the temporary stop. However, the law does not do the opposite—it does not impose a duty or burden upon law enforcement to find ideal conditions for performing field sobriety testing when the stop is made in less-than-ideal weather conditions.

Because there was no duty or obligation upon Deputy Smallwood to move the location of the field sobriety tests from the vicinity in which the defendant was stopped to a nearby hospital or some other warmer and less snowy location. Because there is no law imposing such duty or obligation on Deputy Smallwood, he did not violate Mr. Dugan's Fourth Amendment rights by not doing so.

II. THE STATE HAD PROABLE CAUSE TO ARREST MR. DUGAN.

The defendant extends its argument in support of his motion to suppress by alleging that the cold, snowy conditions *could have had* an impact on his performance of the field sobriety tests such that Deputy Smallwood lacked probable cause to arrest him for OWI. Deputy Smallwood testified that weather conditions “could have some effect on the tests.” R52 at 21:19-21; 21:10-12. The Deputy did not testify that the weather did have some effect on Mr. Dugan's performance of the field sobriety tests. Moreover, Mr. Dugan did not testify at the motion hearing so there is no evidence in the record that his performance of the field sobriety tests was actually affected by the weather. Moreover, as appropriately addressed by County at the motion hearing, there was evidence from the field sobriety tests (such as the HGN test and the parts of the tests related to the person's ability to follow instruction) that was not affected by weather, not to mention the officer's observations—of Mr. Dugan's physical conditions, smell of alcohol, admission to drinking alcohol and him driving

into a snow bank and then the wrong way down a one-way street—to establish probable cause for the arrest.

Probable cause to arrest is the “quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152 (1993)(quoting *State v. Paszek*, 50 Wis.2d 619, 624, 184 N.W.2d 836 (1971)). The information available to the officer must lead a reasonable police officer to believe that guilt is more than just a possibility. *State v. Richardson*, 156 Wis.2d 128, 148, 456 N.W.2d 830 (1990). In determining whether probable cause exists, courts must evaluate the totality of the circumstances. *State v. Nordness*, 128, Wis.2d 15, 35, 381 N.W.2d 300 (1986).

In this case, the defendant struck a snowbank, travelled the wrong way on a one-way street, could not coherently answer simple questions, did not understand where he was located, could not say where he was coming from, admitted drinking and displayed common signs of impairment such as slurred speech, the smell of intoxicants and glassy eyes. These are all common indicators of impairment. The defendant then performed poorly during field sobriety testing, and the defendant argues that the field sobriety tests are suspect because the weather was cold and snow. However, Mr. Dugan completely ignores that his failures in the field sobriety tests that would not have been effected by the weather. The Deputy observed that on Walk and Turn Test, Mr. Dugan started too soon, broke instructional stance, and stopped while walking. It is unlikely that the cold or snowy conditions had an any effect on Mr. Dugan’s performance of these parts of the test. Based upon to totality of the information available to him, the Deputy properly arrested Mr. Dugan.

The officer’s squad video shows that Mr. Dugan was not affected by the cold conditions, despite the unsupported and hypothetical statements in the defendant’s brief about shivering and twitching thigh muscles. *See* R17; Def.’s Brief 10. Even if there was an impact on the defendant by the weather, that impact is insignificant given the totality of evidence of impaired driving which existed before and after the field sobriety testing.

CONCLUSION

This Court should summarily deny the Defendant-Appellant's appeal. Under *Quartana*, officers making a temporary seizure are not required to move a suspect before conducting Standardize Field Sobriety Tests. Rather, *Quartana* allows officers to move a suspect under certain circumstances without violating the Fourth Amendment. Deputy Smallwood was under no obligation to move the defendant. In fact, other cases interpreting the Fourth Amendment discourage it.

Furthermore, based on the totality of circumstances, Deputy Smallwood had ample evidence to establish probable cause to arrest the defendant.

Dated this 17th day of June, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4140 words.

Dated this 17th day of June, 2021.



Brian J. Pfeil
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (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.

Dated this 17th day of June, 2021.



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