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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 AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, BRANCH II, THE HONORABLE ROBERT J. SHANNON PRESIDING, TRIAL COURT CASE NO. 19-CT-406

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE COUNTY MISCHARACTERIZES MR. DUGAN'S ARGUMENT.

In what can best be characterized as a "red-herring argument," the County's Response Brief [hereinafter "CRB"] in this matter repeatedly characterizes Mr. Dugan's position as an attempt "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." CRB at pp. 5, 7-8. *This is not an accurate representation of Mr. Dugan's position for the reasons set forth below.*

Mr. Dugan concedes that there is no published—or unpublished—authority which *compels* or otherwise *requires* a law enforcement officer to remove a person from the site of their initial detention to an alternate location when the weather is inclement. What *does* exist, however, is a "reasonableness" requirement under the Fourth Amendment to the United States Constitution. As Mr. Dugan noted in his initial brief:

> 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).

Appellant's Initial Brief, at p.5.

The concept of "reasonableness" is *not* fixed. It is obviously dependent on an assessment of the conditions at the time it is expected to be exercised. Thus, contrary to the County's assertion's otherwise, a "blanket duty" cannot be imposed upon law enforcement officers to always shelter a suspect from exposure to inclement conditions. The very determination of what is "inclement" connotes a "reasonable" evaluation of the existing circumstances. What is inclement in one situation may not be so in another. It is thus incumbent upon a law enforcement officer faced with determining whether the environmental conditions require removal to an alternate locale to act "reasonably" as the Fourth Amendment requires.

Notably, this very concept of reasonably assessing the weather conditions and the impact they may have on the subject individual is embodied in law enforcement officers' training manual which provides that the officer evaluate whether the conditions at roadside are conducive for the subject to be able to fairly perform the field tests, and "[i]f not, the research recommends [that] the subject be asked to perform the test[s] elsewhere, ..." *See* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *DWI Detection and Standardized Field Sobriety Testing (SFST) Manual*, Session VIII, pp. 8 & 73 (Rev. 02/2018)[hereinafter "NHTSA Manual"]. Even more importantly, the NHTSA Manual *explicitly states*: "Examples of conditions that may interfere with subject's performance on the . . . test[s include] wind/weather conditions." *Id.* at Session VIII, p.86. From the "reasonableness" perspective of the Fourth Amendment, it is not beyond credulity for Mr. Dugan to question whether, under the prevailing weather conditions at the time of his test, it was unreasonable to expect that he should have been relocated.

Precisely because there cannot be a brightline rule which defines the idea of "inclement," officers should be expected to act reasonably under the circumstances *then* existing. For example, having a person perform field sobriety tests in 32º F weather when there is no wind and the individual is wearing a hat, gloves, and winter coat is far more reasonable than having that same subject perform tests in 32º F weather when there are wind gusts of twenty-five miles per hour and the individual has neither a hat nor gloves and is only clad in a sweatshirt. In the latter situation, not only would the wind act as an impediment to the person's being able to perform the tests, but the wind chill would be a meager eighteen degrees. This example establishes the fact that no brightline rule regarding removal to an alternate location can be set at 32º F. The County's position that Mr. Dugan is positing that there is duty to remove a person to a sheltered location when the weather is inclement must, therefore, be considered for what it is: a straw-man argument.

What *is* known in the instant case, as Mr. Dugan set forth in his initial brief, are the following facts:

(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); and

(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

Appellant's Initial Brief, at p.4. The last of the foregoing items is of special import not only to the argument Mr. Dugan proffers regarding what is reasonable under the Fourth Amendment regarding removal to a sheltered location, but it also plays a significant role in the argument to follow.

Before turning to that argument, however, this Court should take special note of the fact that Deputy Smallwood admitted 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). In making this admission, the deputy has unwittingly made Mr. Dugan's point regarding the Fourth Amendment's reasonableness requirement for him, to wit: If the officer acknowledges that it is ***impossible for him to differentiate between field sobriety test clues which are due to the weather versus those which are due to being intoxicated***, should not the Fourth Amendment's reasonableness requirement, under those circumstances, require him to remove the person to a more sheltered location?

Perhaps Mr. Dugan's point in this regard is best made by an analogy to a circumstance which most individuals in Wisconsin would understand. If a person is suffering from deutan, protan, or achromatopsia color blindness (the three most common variety of color blindness), he will be incapable of distinguishing the color orange from green in the first two examples and from gray in the last.[1] If this color-blind individual is invited to go deer hunting in the Northwoods, would he be acting reasonably if he accepted the offer? Doubtless, most people would answer "no"

[1]https://enchroma.com/blogs/beyond-color/how-color-blind-see.

unless some accommodation could be made which would allow him to distinguish other hunters clad in orange from the fauna which moves through the forest. Yet, this is precisely the kind of unreasonable behavior in which Deputy Smallwood engaged. He admitted that he could not discriminate between clues due to the weather versus those due to alcohol impairment, just as the color blind person must admit that he cannot distinguish between orange and green or gray. If one would not feel safe moving through the woods in a blaze orange vest while a color blind person was out and about hunting, why would anyone feel confident in an officer's conclusions about impairment when he is incapable of discerning the cause of any clue? Perhaps unlike the hunting example, an accommodation *could have been made* in Mr. Dugan's case which would have removed the admitted impediment of gauging clues indistinguishable from the cold. If Deputy Smallwood would have acted reasonably under the Fourth Amendment, recognizing his inability to differentiate clues caused by the cold from those caused by alcohol impairment, he would have removed Mr. Dugan to a sheltered location. He did not. In the face of his admission, Mr. Dugan proffers that the Fourth Amendment's reasonableness requirement has not been satisfied. The County's protestations notwithstanding, Mr. Dugan's reliance on *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (1997), was solely for the purpose of establishing that the deputy had the authority to remove Mr. Dugan to another locale and not for the purpose, as the County claims, for establishing some new, brightline rule that removal is required under *Quartana*. Removal was, however, compelled by the Fourth Amendment's reasonableness standard.

II. PROBABLE CAUSE TO ARREST IN THIS CASE IS UNFOUNDED.

The County claims that even if the field sobriety tests are discounted, ample probable cause still existed to arrest Mr. Dugan for an operating while intoxicated offense. CRB at p.9. Whatever facts upon which the County relies in its brief matter little given that Deputy Smallwood not only admitted that he could not distinguish between clues due to the weather and those due to intoxication, but the deputy also admitted 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). If Mr. Dugan's performance on the field tests factored into the deputy's decision, it is apparent that the deputy is acknowledging factors which the County refuses to see because the deputy needed *more than* the indicia which existed apart from the field tests.

Mr. Dugan's point in this latter regard is evident from the facts upon which the County relied in its brief, but which the deputy did not think sufficient upon their

own merit to satisfy the probable cause standard. For example, the County attempts to make some hay from the fact that Mr. Dugan struck a snowbank as an indicator that he was impaired. CRB at p.9. Deputy Smallwood, more reasonably than the County, recognized that this was not a strong indicator of impairment as: it had snowed so heavily that vehicles were having difficulty travelling on the roads in the area (R52 at 11:10-12); there were "several inches of snow on the ground" (R52 at 18:6-11); and the Portage County Sheriff's Office had several calls for persons in need of assistance and for "cars in the ditch" (R52 at 25:2-6; 47:5-12). It would seem that the County has overstated its reliance on the fact that Mr. Dugan struck a snowbank as an indicator of impairment since several calls had come into the sheriff's department for "cars in the ditch."

Similarly, the County professes that probable cause to arrest Mr. Dugan must have existed apart from the field tests because he admitted to consuming intoxicants. CRB at p.9. It is not, however, illegal to consume intoxicants and operate a motor vehicle in Wisconsin. *See State v. Gonzalez*, 2014 WI App 71, 2013AP2585-CR, Wisc. App. LEXIS 379 (Wis. Ct. App. May 8, 2014)(unpublished). What is illegal is to consume a sufficient amount of intoxicants to be less able to exercise the "clear judgment" and "steady hand" necessary to safely operate a motor vehicle. *See* Wis. JI-Crim. 2668 (Rev. 2015).

Likewise, in a remarkable twist of logic which puts the County's position at odds with itself, the County argues that Mr. Dugan made "hypothetical statements" about a person who is exposed to the cold having difficulty performing field sobriety tests because they may be shivering or have twitching muscles. CRB at p.9. The County asks this Court to reject Mr. Dugan's argument in this regard because it is "unsupported." *Id*. Yet, the County *itself* makes an "unsupported and hypothetical" argument when it posits that Mr. Dugan's breaking the instructional stance during the walk-and-turn test, starting the test too soon, and stopping while walking are not likely due to the cold and snow. *Id.* If these two positions are not inherently tense when set side-by-side, Mr. Dugan wonders what could be?

First, it is not "hypothetical" for Mr. Dugan to surmise that in a wind chill a mere 13˚F to 16˚F[2] an individual may shiver. This is simply a *fact* of human physiology. It is part of the common stock of knowledge that people shiver in the cold, and it is well known that things which are of common knowledge need not be specifically proved. *See generally, Christiansen v. Schenkenberg*, 204 Wis. 323,

[2]R52 at 16:21 to 17:1.

329, 236 N.W. 109 (1931). For example, an astrophysicist need not be subpoenaed to appear in court to testify that the sun will rise in the east and set in the west if the time of day is a relevant issue in a particular trial. This is a reflection of the fact that certain knowledge is simply so fundamental "everyone" knows it. Mr. Dugan, therefore, was not engaging in any hypothetical regarding "shivering."

Second, it is purely hypothetical for the County to offer the suppositions it does regarding the walk-and-turn test. This is best demonstrated by addressing each of the County's examples on a one-to-one basis. The County set forth its belief that Mr. Dugan would not have started the walk-and-test too soon due to the cold, but this fails to recognize that a person standing out in the cold would reasonably "want to get things over" in order to get out of the sub-freezing conditions as soon as possible. Next, the County indicated that it does not believe Mr. Dugan would have stepped out of the instructional stance due to the weather, however, this fails to recognize that standing in one position, rather than moving around, makes one feel even more cold in inclement weather and therefore any movement Mr. Dugan made could have been to warm himself. The County finally postulated that the weather would not have caused Mr. Dugan to stop during the walk-and-turn test, however, he could easily have stopped because he was shivering. Certainly, the County cannot claim to have x-ray vision to see through Mr. Dugan's pants to determine that he was not shivering. Perhaps this is why the deputy was being more frank, understanding, and forthright than the County when he admitted he could not distinguish between clues due to the weather from those due to impairment.

Ultimately, all of the foregoing can be distilled into one, straightforward conclusion, namely: Mr. Dugan was never afforded a reasonable and fair opportunity to perform the field sobriety tests given the adverse weather conditions on the night of his arrest. The remaining facts—the driving, the admission to consuming intoxicants, and even the bloodshot eyes given the time of the morning at which the detention occurred—are insufficient to rise to the level of establishing probable cause to arrest.

CONCLUSION

Because Mr. Dugan was required to perform field sobriety tests in conditions which did not permit Deputy Smallwood to fairly assess his performance, contrary to both the Fourth Amendment's reasonableness requirement and the National Highway Traffic Safety Administration's standardized field sobriety test training

manual, he respectfully moves this Court to reverse the determination of the circuit court and remand his case with directions to grant his motion.

Dated this 7th day of July, 2021.

Respectfully submitted:
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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 2,631 words.

Dated this 7th day of July, 2021.

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