STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case Nos. 2021AP454 & 2021AP455

PORTAGE COUNTY,

Plaintiff-Respondent,

-vs-

SEAN M. DUGAN,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT ENTERED IN
THE DISTRICT IV COURT OF APPEALS
DATED AUGUST 5, 2021

PETITION FOR REVIEW AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

MELOWSKI & SINGH, LLC

Dennis M. Melowski
State Bar No. 1021187

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

TABLE OF CONTENTS

STATEMENT OF THE ISSUE 3

STATEMENT OF THE CASE 3-4

STATEMENT OF FACTS 4-5

STANDARD OF REVIEW ON APPEAL 6

STATEMENT OF CRITERIA IN SUPPORT OF PETITION 6-7

ARGUMENT 8-12

I. FRAMING THE ISSUE PRESENTED 8

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 9

A. Constitutional and Statutory Authority to Remove a Suspect to an Alternate Location 9

B. Application of the Law to the Facts 9-12

CONCLUSION 12

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. P-App. at 112-18.

Court of Appeals Answered: NO. The court of appeals held that there was no constitutional obligation under the Fourth Amendment for the officer in this case to remove Mr. Dugan to a location sheltered from the inclement weather conditions for field sobriety testing. P-App. at 106-08.

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; P-App. at 112-18.

It is from the adverse decision of the circuit court that Mr. Dugan appealed to the court of appeals. By decision dated and filed on August 5, 2021, the court of appeals rejected Mr. Dugan's contention and held that the Fourth Amendment's reasonableness requirement was not violated when the arresting officer failed to relocate Mr. Dugan to a more sheltered location shielded from the inclement weather conditions for the purpose of field sobriety testing. It is from this adverse decision that Mr. Dugan now petitions this Court for review.

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

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

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.

For purposes of this Petition, 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 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).

[2]R52 at 53:13-15.

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.

STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW UNDER WIS. STATS. § 809.62(1r)(a), (1r)(c)2., (1r)(c)3., & (1r)(d).

1. Section 809.62(1r)(a): This Case Presents a Real and Significant Question of Constitutional Law.

Review should be granted in the instant case because it implicates concepts of constitutional "reasonableness" under the Fourth Amendment. As more fully set forth below, Mr. Dugan proffers that there is a genuine need to clarify what a law enforcement officer's obligations are under the Fourth Amendment to remove a person to a sheltered location out of inclement weather conditions when administering field sobriety tests. This need exists principally given that Wisconsin is a state which does not suffer from temperate conditions year round, law enforcement officers regularly come into contact with suspected drunk drivers under less than favorable weather conditions.

This case presents a substantial question of constitutional law because without some kind of guiding framework established to assist law enforcement officers in determining what is constitutionally reasonable under the Fourth Amendment when it comes to removing a person from exposure to unfavorable weather conditions, not only will suspect citizens of this State be subject to performing field sobriety tests in wholly disadvantageous circumstances, but additionally, there will not be uniform enforcement of the Fourth Amendment's reasonableness standard in Wisconsin as every law enforcement officer will adopt his or her own individual standards which are likely to vary wildly across different conditions.

2. Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is a Novel One Which Will Have Statewide Impact.

There exist no decisions of this Court or the court of appeals which address the issue presented herein, namely: What limitations, if any, does the Fourth Amendment's reasonableness requirement place upon law enforcement officers who are administering field sobriety tests in unfavorable weather conditions. The

issue presented is therefore, by definition, "novel" and satisfies the criterion set forth in § 809.62(1r)(c)2.. Similarly, there are no common law decisions on remotely tangential issues which provide guidance regarding how to approach the question presented, or establish a standard for determining the answer, or describe elements which should be considered when assessing "reasonableness," *etc.*

Doubtlessly, a decision of this Court will have statewide impact as nearly 29,000 individuals per year are arrested in Wisconsin for operating while intoxicated violations according to Department of Transportation statistics.[3] These cases arise in all seventy-two Wisconsin counties, and certainly, given Wisconsin's northern latitude, result in suspect individuals being asked to perform field sobriety tests in inclement weather. Clearly, § 809.62(1r)(c)2. is satisfied with respect to the issue presented having statewide impact.

3. *Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is Likely to Recur Unless This Court Intervenes.*

The question presented by Mr. Dugan is likely to recur based upon the statistics set forth above. With 29,000 operating while intoxicated arrests occurring annually, there undoubtedly will be those cases in which the accused is asked to submit to field sobriety testing when the weather is far less than accommodating. Given that the issue, as framed by Mr. Dugan, implicates constitutional notions of reasonableness, it is not one which defense counsel will likely "toss aside" in favor of raising other issues in a particular defendant's case. Rather, the gravity and pervasiveness of the issue compels its being raised in the defense of the relevant client lest counsel subject their representation to "ineffectiveness" scrutiny under *Strickland v. Washington*, 466 U.S. 668 (1984). Given the unpleasantness of *Strickland* inquiries, counsel will certainly err on the side of raising these issues unless this Court first intervenes in Mr. Dugan's case to answer the question presented definitively.

Until such time as this Court intervenes to establish a clear standard by which the reasonableness of environmental conditions can be assessed when conducting field sobriety tests, law enforcement officers throughout Wisconsin will interpose their own local interpretations of "reasonableness" which is not conducive to harmonizing the law as discussed below. Moreover, disparate treatment of similarly situated defendants will occur throughout the State which raises equal protection and fundamental fairness concerns. This Court should intervene to provide direction to officers throughout this State under § 809.62(1r)(c)2..

---

[3]*See* https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx. The statistics for alcohol-related offenses cited herein are from 2015, the most recent year for which the DOT has the same compiled.

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 in this Petition, 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.

Despite the recognition that "reasonableness" is the overarching standard by which law enforcement conduct is ultimately judged, the court of appeals nevertheless stated that "Dugan points to no authority holding that the mere potential that weather conditions might affect the results of a field sobriety test renders the officer's decision to conduct that test in a given location a violation of the Fourth Amendment." P-App. at 107. There are two major deficits in the Court's reasoning: (1) Mr. Dugan could not point to authority regarding the question presented because none exists as this is a question of first impression; and (2) the court of appeals mischaracterized the facts by stating "that the weather conditions *might affect* the results of a field sobriety test" because the record reflects that the conditions *were* severe enough that it was constitutionally unreasonable to expect that field sobriety tests could fairly be judged. Each of these issues will be addressed in turn 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. Application of the Law to the Facts.

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.

Based upon the fact that there is no common law authority directly on point with the issue presented by Mr. Dugan, it is patently preposterous for the court of appeals to reject Mr. Dugan's claim because he has "pointed to no authority" which directs the removal of a person to an alternate location when necessitated by the weather conditions. Quite simply, Mr. Dugan could point to no such authority because *there is none*. This is part of the reason this Court should act to accept Mr. Dugan's Petition, *i.e.*, to provide guiding authority on a question which is likely to recur hundreds of times.

It is 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* properly attired for the weather and when a significant amount of snow is accumulating at the same time. 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.

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.

In the end, Deputy Smallwood's conclusions regarding probable cause in the instant case are suspect. 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 unreasonable under the Fourth Amendment.

What the court of appeals failed to recognize is that 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. For example, a "blanket duty" cannot be imposed upon law enforcement officers to always shelter a suspect from exposure to inclement conditions because 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, which is precisely why this Court must act to provide direction to law enforcement officers regarding when the administration of field sobriety tests will be considered "reasonable" under the circumstances then existing. It is 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 and that is where this Court can provide direction.

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 32° 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 32° 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 itself acts 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 32° F. What can be added to the foregoing calculus, however, is direction from this Court regarding what factors a law enforcement officer should take into account regarding the weather; what factors should be considered regarding a suspect's clothing; what factors regarding alternate locations must be incorporated into the "reasonableness" inquiry, if any; *etc.*

CONCLUSION

Mr. Dugan respectfully requests that this Court reverse the Court of Appeals and 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 3rd day of September, 2021.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant-Petitioner

CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,638 words.

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809(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. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

I certify that I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that: This electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 8th day of September, 2021.

MELOWSKI & SINGH, LLC
Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant-Petitioner