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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP708-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CATTI J. MEISENHELDER,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

SUSAN E. ALESIA
Assistant State Public Defender
State Bar No. 1000752

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1774
alesias@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ISSUES PRESENTED

1. Where police detained the defendant for retail theft in a Walmart, was a search inside a "very small" opaque vial attached to a keychain inside the defendant's purse a valid search incident to arrest? Was there probable cause to conduct the search of the vial?

The circuit court held that because the purse that contained the vial was in the defendant's "immediate area" this was a valid search incident to arrest. (30; App. 13).

The court of appeals did not address probable cause to search, instead affirming the circuit court solely on the search incident to arrest analysis. *State v. Meisenhelder*, No. 20201AP708-CR, slip op. recommended for publication (Wis. Ct. App. June 15, 2022)(App. 3-12).

CRITERIA FOR REVIEW

This court should accept review and hold that the relationship to the crime of arrest and the size of the container searched are critical to an analysis of the search-incident-to-arrest exception to the warrant requirement.

In this case, after a theft involving less than $20 of merchandise from a Walmart, police opened a "very small vial" attached to a keychain found inside Ms. Meisenhelder's purse. (49:15). The circuit court and court of appeals approved the warrantless search as a lawful search incident to arrest. (30; App. 13).

In an unpublished court of appeals' opinion, *State v. Hinderman*, No. 2014AP1787-CR (Wis. Ct. App. Feb. 12, 2015), the court of appeals held that the search of a 3-inch pouch pursuant to an OWI arrest was illegal because the pouch was too small to contain any alcohol other than a one-shot bottle. The court's analysis rested on the fact that a search incident to arrest required a link to the crime of arrest and the size of the container. (App. 18-25).

The *Hinderman* analysis appears to conflict with the court of appeals' conclusion in Ms. Meisenhelder's case, where a search of the "very small vial" in a retail theft case was deemed appropriate. Further, in *State v. Coffee*, 2020 WI 53, ¶62-63, 391 Wis.2d 831, 943 N.W.2d 845, this court discussed the *Hinderman* ruling but ultimately declined to determine whether *Hinderman* was correctly decided. This court noted that further discussion of *Hinderman* was "beyond the scope of this case."

An analysis of the search incident to arrest reasoning set forth in *Hinderman* is directly within the scope of Ms. Meisenhelder's case. This court should accept review and decide that *Hinderman* was correct: the size of the container and its relationship to the crime of arrest must be applied to the search incident to arrest analysis.

This issue presents a significant question of state and federal constitutional law. Wis. Stat. § (Rule) 809.62(1r)(a).

If the court grants review, it should also resolve the issue of whether there was probable cause to

search the vial, as that issue was litigated in the circuit court and on appeal.

STATEMENT OF THE CASE

The state filed a complaint on July 15, 2019, charging Ms. Meisenhelder with three counts: misdemeanor retail theft in violation of 943.50(1m)(b) and (4)(a); possession of methamphetamine in violation of Wis. Stat. §§ 961.41(3g)(g); and possession of drug paraphernalia in violation of Wis. Stat. §§ 961.573(1). (2). An information with the same three counts was filed on August 13, 2019. (8).

Defense counsel filed a motion to suppress on January 27, 2020, and hearing on that motion was held on June 25, 2020. (19; 49). In a written decision entered on September 4, 2020, the circuit court denied the suppression motion. (30; App. 13).

The case proceeded to a plea and sentencing hearing on November 23, 2020. Ms. Meisenhelder entered a no-contest plea to possession of methamphetamine and the circuit court imposed an 18-month term of probation. (44; 40; App. 16).

The court of appeals affirmed the circuit court's denial of the suppression motion. *Meisenhelder*, slip op. ¶18. (App. 12).

STATEMENT OF FACTS

This case arose when eyeliner and mouthwash, worth a total of $18.18, were taken from a Walmart. (49:13, 20).

At about 4:30 on a July afternoon, Officer Jordan Woelfel received a dispatch to the local Walmart. He was told that Walmart loss prevention officers stopped a woman for retail theft and they were holding her in their office. (49:6-7).

This was a common situation. Officer Jordan Woelfel testified that he responded to retail theft calls at this Walmart about two to three times a week. (49:5).

The officer stated that sometimes when a person commits a retail theft, a theft or a burglary "it is related to their need for money and drug use" and that Walmart can sometimes have drug activity in the parking lot. (49:6).

With his body camera activated, Officer Woelfel arrived at Walmart and went to the loss prevention office. In the office, he saw Ms. Meisenhelder and "at least two loss prevention officers." (49:7). A loss prevention officer explained that Ms. Meisenhelder had items in her cart that were not stolen but she had concealed two other items, the eyeliner and the mouthwash, in her purse and those two items were stolen. (49:11, 21).

Officer Woelfel testified that when he walked into the loss prevention office, Ms. Meisenhelder was not free to leave. (49:13).

The body cam video shows that Officer Woelfel took Ms. Meisenhelder's purse, told her "I have to check inside your bag and make sure you don't have anything else" and gave the bag to a second officer on the scene, Officer Anderson. (49:14).

Officer Anderson looked through Ms. Meisenhelder's purse. He did not find any stolen merchandise. He did not find anything related to retail theft. He did not find a weapon. Officer Anderson did find a keychain. The officer pulled the keychain out of Ms. Meisenhelder's purse. Attached to her keychain was a "very small" opaque "purple vial-like container" with a screw top. (49:11, 14-15). No one asked Ms. Meisenhelder what was inside the vial nor did anyone ask permission to open the vial. (49:17).

Officer Anderson unscrewed the small cap and opened the vial. (49:17). Inside was a white crystalline rock substance that was inside some type of plastic. (49:11). Officer Woelfel believed the white substance was methamphetamine. (49:12). No other drug-related items were found in Ms. Meisenhelder's purse. (49:17).

When Ms. Meisenhelder saw the substance removed from the very small vial, she became emotional and said she "forgot that was in there." (49:12).

Officer Woelfel then arrested Ms. Meisenhelder. (49:12). He gave her Miranda warnings and she admitted the substance in the vial was methamphetamine. (49:18). After the arrest, Ms. Meisenhelder handed over a "very minute, small" amount of a crystalline substance from her pockets. (49:18). The officer then handcuffed Ms. Meisenhelder. (49:12).

Officer Woelfel testified that misdemeanor theft suspects are not always arrested and taken into custody; at times those individuals are released and the charges are referred. (49:19).

Ms. Meisenhelder argued that the items discovered during the search must be suppressed because the officer lacked probable cause to believe there was a connection between the small vial attached to the keychain in Ms. Meisenhelder's purse and any criminal activity. (19:3).

After a hearing, the circuit court entered an order denying the motion to suppress. The circuit court, relying on *State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, found that "the officer carried out a valid search incident to arrest…" (30:3; App. 15).

The court of appeals affirmed the circuit court's denial of the motion to suppress in a June 15, 2022, opinion. *Meisenhelder*, slip op. ¶18 (App. 12). The court of appeals relied solely on the search incident to arrest analysis. The court held that the search-incident-to-arrest exception allowed the police to search Ms. Meisenhelder and any objects within her reach. Concluding that her purse was within reaching distance in the loss prevention office, the court of appeals held that the vial was "not so small that it could not have contained additional stolen merchandise." *Meisenhelder*, slip op. ¶¶ 16-17 (App. 11-12).

Ms. Meisenhelder petitions from that decision.

ARGUMENT

I. This court should accept review, assess the nature of the crime and the size of the container consistent with the court of appeals' analysis in *Hinderman*, and hold: (1) this was not a lawful search incident to arrest because the "very small vial" could not reasonably contain a weapon or any evidence of theft and the vial was not in Ms. Meisenhelder's immediate control and (2) there was no probable cause to search the "very small vial" because there was not a fair probability that the vial contained contraband or evidence of a crime.

A. Introduction and Standard of Review.

After being accused of retail theft for taking an eyeliner and mouthwash, four officers confronted Ms. Meisenhelder in the loss prevention office at a Walmart. One officer searched Ms. Meisenhelder's purse but found no stolen items or weapons. Instead, the officer found Ms. Meisenhelder's keys with a "very small" opaque vial attached to the keychain. The officer unscrewed the top of this vial. (49:11, 15, 17). This warrantless search was not supported by probable cause and was not a proper search incident to arrest. Because the search violated Ms. Meisenhelder's right to be free from unreasonable searches provided by the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution, the evidence obtained during this illegal search must be suppressed.

Warrantless searches are presumed to be unconstitutional. This provides protection from

unreasonable searches and seizures and safeguards an individual's privacy against unreasonable governmental intrusions. *State v. Sanders*, 2008 WI 85, ¶27. A warrantless search is unreasonable and therefore unconstitutional unless it falls in one of the specifically delineated exceptions to the Fourth Amendment's warrant requirement. *State v. Williams*, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834. It is the state's burden to prove that a warrantless search falls within one of the exceptions to the warrant requirement. *State v. Sanders,* 2008 WI 85, ¶27.

The legality of a warrantless search is a question of constitutional fact. On review, this court will uphold the circuit court's findings of fact unless they are clearly erroneous and will apply constitutional law to those facts de novo. *Id.* at ¶25.

B. This was not a valid search incident to arrest because the "very small" vial could not reasonably contain a weapon or any evidence of theft and the vial was not in Ms. Meisenhelder's immediate control.

The search of the vial exceeded the scope of a lawful search incident to arrest.

One of the established exceptions to the warrant requirement is the search incident to a lawful arrest. In *Chimel v. California*, 395 U.S. 752, 763 (1969), the United States Supreme Court noted that it is reasonable for the arresting officer to remove any weapons and search for and seize evidence on the arrestee's person. *Chimel* held that this exception is limited to the arrestee's person and the area within his immediate control – construing that phrase to mean

the area from within which he might gain possession of a weapon or destructible evidence.

In *Arizona v. Gant*, 556 U.S. 332 (2009), the United States Supreme Court expanded upon *Chimel*. *Gant* involved a car search. The court explained the search incident to arrest exception derived from officer safety and evidence preservation "if there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id*. at 339.

Emphasizing the importance of privacy interests and the dangers of "police entitlement", the court held that the search of Gant's car was unreasonable. In regards to evidence preservation, the court noted "An evidentiary basis for the search was also lacking in this case…Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant's car." *Id*. at 344-346.[1]

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[1] Wisconsin has codified the search incident to arrest exception in Wis. Stat. § 968.11:

Scope of search incident to lawful arrest. When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:

(1) Protecting an officer from attack;

(2) Preventing the person from escaping;

(3) Discovering and seizing the fruits of the crime;

Applying *Chimel* and *Gant* to the facts in Ms. Meisenhelder's case, it is clear that the search inside the vial was not a valid search incident to arrest.

The "very small vial" clearly could not contain a weapon. The "very small vial" clearly could not contain evidence of retail theft.

Similar to the reasoning in *Gant*, the search incident to arrest exception cannot apply where Ms. Meisenhelder was arrested for retail theft and there was no possibility that evidence of retail theft could be found inside the vial.

And the surrounding circumstances also preclude the search incident to arrest exception. There were four officers in the loss prevention office with Ms. Meisenhelder. There was no evidence that Ms. Meisenhelder had access to her purse in this situation, and certainly no evidence that she could have grabbed her purse, pulled out her keychain, unscrewed the top of the vial and destroyed whatever was inside while the four officers stood by helpless.

In Wisconsin, the court of appeals in *State v. Hinderman*, No. 2014AP1787-CR (Wis. Ct. App. Feb. 12, 2015)[2] applied the same reasoning set forth in *Chimel* and *Gant* and analyzed the search in the

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(4) Discovery and seizing instruments, articles or things which may have been used in the commission of, or which may constitute evidence of the offense.

[2]An unpublished, authored opinion can be cited as persuasive authority. Wis. Stat. § 809.23(3)(b).

context of the crime of arrest. In *Hinderman*, the defendant was arrested for an OWI. After officers placed her in the squad car, they searched the defendant's car. They found a purse, looked inside and discovered a closed, zippered pouch about three inches long and one-half to three quarters of an inch wide. The deputy opened the pouch and found marijuana and paraphernalia. *Id* at ¶4 (App. 20).

The defendant moved to suppress the marijuana and paraphernalia, citing *Gant*. The circuit court and court of appeals agreed that the evidence should be suppressed, focusing on the second prong of *Gant*: whether officers could reasonably believe the search would uncover "evidence relevant to the crime of arrest." *Id*. at ¶8 (App. 21). The *Hinderman* court held that the small size of the zippered pouch made it unlikely to contain any evidence related to the OWI. The court noted that the pouch was too small to hold a can of beer, a flask or a half pint. At best, the pouch might hold one shot sized bottle size of alcohol "but that is simply too remote to be specific and articulable in the scheme." *Id*. at ¶10 (App. 23).

Applying this analysis to Ms. Meisenhelder's case, the same result of suppression must occur. The "crime of arrest" was retail theft. The "very small vial" attached to the keychain inside her purse was simply too small to contain any evidence of retail theft. If it could be argued that some tiny piece of merchandise could be squeezed inside the vial, the Hinderman analysis of the one-shot bottle of alcohol is persuasive. Just because something is theoretically possible does not mean the search was reasonable: it can be "simply too remote to be specific and articulable in the scheme." *Id*. at ¶10 (App. 21). The assertion that

evidence of items stolen from Walmart could be concealed inside a "very small vial" attached to a keychain inside a purse is too remote to be specific and articulable and therefore the search incident to arrest exception cannot apply.

Finally, similar facts existed in *U.S. v. Maddox*, 614 F.3d 1046 (9th Cir. 2010). In *Maddox*, the defendant was stopped for driving with a suspended license. He refused the officer's request to step out of his car. The officer grabbed the defendant's keys and tossed them on the seat. He then arrested the defendant and placed him in the squad car.

The officer returned to the defendant's car and picked up the keychain. Attached to the keychain was a metal vial with a screw top. The officer unscrewed the top of the vial and found methamphetamine inside the vial.

The court concluded "this was *not* a search of Maddox's person incident to arrest. Maddox's person was handcuffed in the back of a squad car, incapable of either destroying evidence or presenting any threat to the arresting officer. While the keychain was within Maddox's immediate control while he was arrested, subsequent events – namely Officer Bonney's handcuffing of Maddox and placing Maddox in the back of the patrol car – rendered the search unreasonable." *Id*. at 1048. The court noted that the defendant's demeanor did not provide legitimate concern for officer safety, *Id*. at 1048. There was no possibility of Maddox concealing or destroying the keychain and no evidence of weapons or threats thus the search was not a valid search incident to arrest. *Id*.

Likewise, in Ms. Meisenhelder's case the vial was not in her immediate control, her demeanor provided no concerns for officer safety, there was no possibility she would conceal or destroy the vial and there was no evidence of weapons or threats.

In denying the motion to suppress, the circuit court relied entirely on *State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. (28; App. 7).[3] The circuit court relied on *Sykes* with the apparent belief that once there is probable cause to arrest there is no limitation on the scope of the search. This is not the holding in *Sykes* and ignores *Chimel*.

A review of the facts in *Sykes* exposes the flaws in the circuit court's reliance. In *Sykes*, police were called when the renter of an apartment arrived home to find unwelcome guests who would not leave. Officers obtained the renter's permission to enter the apartment while a locksmith changed the locks. The defendant was in the apartment and told officers his identification was on the floor in his wallet. An officer opened the wallet and found a baggie of suspected crack cocaine. *Id*. at ¶¶ 4-9.

The ruling in *Sykes* was not focused on an analysis of the opening of the wallet. Instead, the court relied on the defendant's "apparent concession" to search his wallet and the fact that the defendant did not argue that the search exceeded the area that may be searched. *Id*. at ¶21.

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[3] *Sykes* was decided in 2008, three years prior to *Gant*.

At issue in *Sykes* was whether the search incident to arrest could only be valid if the officers subjectively intended to arrest the defendant for trespass before conducting the search and, after the search, officers actually arrested him for trespass. *Id*. at ¶ 34. That is not the issue presented in Ms. Meisenhelder's case. Instead, Ms. Meisenhelder argues that the opening of the vial was not a search incident to arrest because it did not satisfy *Chimel* and *Gant's* requirement that the search be limited to a search for a weapon or destructible evidence and that the search take place on the arrestee's person or the area within his immediate control.

The vial could not contain a weapon. The vial could not contain destructible evidence. The search was not in an area within Ms. Meisenhelder's immediate control as she was in a room with four officers and could not reasonably access the vial attached to the keychain inside of her purse. The evidence found in the vial, and all derivative evidence pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1963), must be suppressed.

C. In the midst of the retail theft investigation, there was not probable cause to open the "very small" and opaque vial attached to the key ring inside Ms. Meisenhelder's purse because there was not a fair probability that evidence of a crime would be discovered.

The quantum of evidence necessary to establish probable cause to search is a "fair probability" under the totality of the circumstances that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983). This is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Sveum*, 2010 WI 92, ¶24, 328 Wis. 2d 369, 787 N.W.2d 317.

Reasonableness is a part of the totality of the circumstances analysis and the touchstone of Fourth Amendment analysis: "Is it reasonable to believe in the circumstances that particular evidence or contraband may be located at a place sought to be searched?" *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988).

It was not reasonable to believe that evidence would be found inside the very small vial. Officers were investigating a retail theft, not a drug crime. This was not a drug investigation because there was no evidence of drug use before the search of the vial. No drugs were found inside the purse before the vial was opened. There was no odor of a controlled substance coming from the purse or from Ms. Meisenhelder. The two items Ms. Meisenhelder attempted to steal were personal care items: eyeliner and mouthwash. Their combined value was $18; not high-ticket items that an addict might steal to exchange for drugs or pawn for cash. (49:11, 17, 20). The opaque vial prevented plain view of a controlled substance. The officer could not touch what was inside the vial without first opening it.

Obviously there was no connection between the vial and any evidence of retail theft. The vial was simply too small to contain any stolen merchandise.

In *State v. Sutton*, 2012 WI App 7, ¶¶4-5, 338 Wis. 2d 338, 808 N.W.2d 411, pursuant to a traffic stop an officer observed the defendant's van make two

rocking motions. The officer decided that this movement suggested a person trying to retrieve or conceal a weapon. Officers removed the defendant from the van and conducted a pat-down search that did not reveal any weapons. The defendant was placed in the squad car and an officer searched the van. The officer found "two dark blue vials on a single keychain." The vials were opaque. The officer opened the vials and found pills.

This court suppressed the pills, holding that the officer lacked probable cause to open the vials. Finding that the officer had reasonable suspicion to look inside the van, and that the vials were in plain view, the court drew the line at *opening* the vials: "Officer Bartol did not have probable cause to believe that the cylinders were connected to 'criminal activity' until she opened them." *Id* at ¶9.

Specifically rejecting the officer's attempt to create probable cause by claiming in her experience valid prescriptions are carried in clear orange bottles and any other container was merely an attempt to thwart police suspicion, the court first noted that the vials in this case were opaque, thus eliminating any "plain view" justification. The court also rejected an argument that there is probable cause to search any container that might be used to foil police intrusion as "too slippery a criterion to permit the warrantless search of a container that could not, by its size or shape, hold a weapon." *Id*. at ¶10.

Like *Sutton*, the search inside the vial attached to Ms. Meisenhelder's keychain was not supported by probable cause. Like *Sutton*, the vial was opaque. Like *Sutton*, any argument that the vial itself might

contain drugs because it was a container that police wouldn't think contains drugs is "too slippery a criterion" to permit the warrantless search of a container that could not, by its size or shape, hold a weapon or even any stolen items. The officers could have requested a warrant to search the vial. They did not. The evidence must be suppressed.

CONCLUSION

For these reasons, Ms. Meisenhelder respectfully requests that this court grant the petition for review.

Dated this 14th day of July, 2022.

Respectfully submitted,

Electronically signed by Susan E. Alesia
SUSAN E. ALESIA
Assistant State Public Defender
State Bar No. 1000752

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1774
alesias@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,532 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 rules 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 or 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.

Dated this 14th day of July, 2022.

Signed:

Electronically signed by Susan E. Alesia
SUSAN E. ALESIA
Assistant State Public Defender