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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2021AP001112-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER ANTONJE TEK,

Defendant-Appellant.

Appeal from a Judgment and Order Entered
in the Rock County Circuit Court,
the Honorable Karl R. Hanson, Presiding

BRIEF OF
DEFENDANT-APPELLANT

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**CONSTITUTIONAL PROVISIONS
AND STATUTES CITED**

United States Constitution

Fourth Amendment 13, 14, 21, 24

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346.54(1) 21

ISSUE PRESENTED

Without a warrant, law enforcement approached Mr. Tek in a parked car and arrested him for OWI within 45 seconds of making contact on a report of a car driving on flat tires. Was Mr. Tek arrested without probable cause such that all evidence derived from it must be suppressed?

The circuit court answered “no.”

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

The evidence presented at the suppression hearing, including the footage from Officer Rocha’s body camera, the police reports, and Rocha’s testimony, established the following.

In the early morning of June 10, 2018, Officer Benito Rocha of the Janesville Police Department received a call from dispatch that a car was driving on flat tires on Richardson Street and Benton Avenue. (44:10-11; App. 14-15). As Rocha drove southbound on Richardson Street, he observed a white Cadillac parked on the wrong side of the road and facing northbound with its headlights on. (44:11;

App. 14). Rocha approached the car and noted that the car was off and a single person was in the driver's seat. (44:12; App. 16). The person in the car was later identified as Mr. Christopher Tek. (44:12; App. 16).

As he stood in front of Mr. Tek's door, Rocha asked Mr. Tek how he was doing and if everything was okay. (44:29;22:0:36; App. 33). Initially, Mr. Tek did not respond. (44:29; App. 33). However, once Rocha asked if Mr. Tek could hear him, Mr. Tek stepped out of the car and told Rocha that he was about to get picked up unless Rocha arrested him. (44:29;22:0:46-50; App. 33). Now out of the car, Mr. Tek stood mere inches from Rocha. (22:0:49). While talking, Mr. Tek turned to face the car for a few seconds with his hands behind his back. (22:0:50).

After a question from Rocha, Mr. Tek briefly turned to face Rocha and stated, "I'm about to get picked up right now. You can let me go. I'm about to get picked up right now." (22:0:53). Immediately, Rocha ordered Mr. Tek to turn back around to face the car. (22:0:55). Mr. Tek obliged and continued stating, "I'm about to get picked up right now." (22:0:56).

As Mr. Tek turned to face the car, Rocha asked Mr. Tek whether he had been drinking. (22:0:56). Mr. Tek responded again with, "I'm going to get picked up right now." (22:0:57). Rocha repeated his question and Mr. Tek continued to say, "I'm about to get picked up right now." (22:0:58).

Within 45 seconds of approaching Mr. Tek, Rocha had him in handcuffs. (44:30-32;22:1:14; App. 34-36). Rocha ordered Mr. Tek to drop the keys in his hands, and began to put Mr. Tek in handcuffs. (22:1:01-1:06). Mr. Tek pleaded with Rocha, “just please let me go. I’m about to get picked up right now.” (22:1:06-1:08). Rocha did not let Mr. Tek leave, moved him so he was standing up against the car, and ordered him to “relax.” (22:1:07-1:10). Mr. Tek continued to plead with Rocha to release him. (22:1:08-1:10). Rocha refused, ordered him to “relax” and completed putting Mr. Tek in handcuffs. (44:32;22:1:12-1:24; App. 36).

Upon handcuffing Mr. Tek, Rocha searched him “incident to arrest,” took Mr. Tek’s phone from his pockets, and placed it on top of the car. (44:32;22:1:15-1:18; App. 36). After ordering Mr. Tek to “relax”, Rocha continued to ask Mr. Tek questions about what he had done that night. (22:1:33-1:53). Mr. Tek never stated that he had been intoxicated, he never indicated that there was any damage to the car, that any accident occurred, or that he or anyone else had been injured. He only asked Rocha if he was free to leave.

Within 90 seconds of approaching Mr. Tek, Rocha led a handcuffed Mr. Tek away from the car. (22:1:55-2:00). After a few questions, Rocha moved Mr. Tek to the squad car. (22:2:16). Upon approaching the squad car, Mr. Tek tried to get out of Rocha’s grip. (22:2:12). Rocha ordered Mr. Tek to “knock it off” and continued to pull Mr. Tek along the street. (22:2:11-2:18). Rocha then ordered Mr. Tek to “have a seat” in

the back of the squad car. (22:2:19-2:25). Once Mr. Tek was in the squad car, Rocha closed the door. (22:2:33).

Within 2 minutes of approaching Mr. Tek, Rocha left Mr. Tek in the back seat of the squad car. (22:2:33). Rocha returned to the Cadillac where Rocha and other officers began searching through the car and investigating the scene. (22:2:40-3:48, 4:52-6:40). According to Rocha's report, the damage to the car included a flat front tire, a missing front tire, and paint transfer on the front tire-side of the car. (44:25; App. 29). Mr. Tek sat in the squad car for another 8 minutes or more while officers searched his car, questioned him, ordered him to calm down, and investigated the scene. (22:2:40-9:49). Mr. Tek was never asked to perform field sobriety tests. After those 8 minutes, Rocha stopped his body camera and, eventually, took Mr. Tek to the county jail. (23:9)

Just over three hours after the original stop, Mr. Tek was taken to get his blood drawn pursuant to a search warrant. (23:14). The Crime Lab's test showed a blood alcohol content of .162. (23:14).

The state charged Mr. Tek with count one, operating with a prohibited alcohol concentration, and count two, operating while intoxicated – second offense. (4). Mr. Tek moved the court to suppress all evidence derived from his illegal arrest, including the results of his blood alcohol content test. (19).

On September 22, 2020, the circuit court held a hearing on Mr. Tek's suppression motion. (44; App. 5-64). At the hearing, Officer Rocha testified about the events of June 10, 2018. (44:9-37; App. 11-41). In addition to the testimony, the video footage from Rocha's body camera and police report were entered into evidence. (44:49; App. 53).

Rocha admitted that he did not remember many things that happened the morning of Mr. Tek's arrest. (44:19-34; App. 23-38). Given the fact that Rocha wrote his report much closer in time to the event than the suppression hearing, Rocha deferred to his report and the bodycam footage as accurate representations of the events of that morning. (44:19-34; App. 23-38).

Based on his report, Rocha admitted that he did not smell any odor of intoxicants until after he begun handcuffing Mr. Tek. (44:32-33;23:8; App. 36-37). On the body camera footage, Rocha never stated that he smelled intoxicants until the last few seconds of the almost 10-minute-long video. (22:9:50). Both in the report and on the footage, Rocha never noted any damage on the Cadillac until after he moved Mr. Tek to the squad car and returned to the car. (44:25;23:8;22:2:40; App. 29).

Mr. Tek argued two points at the hearing. First, Rocha arrested Mr. Tek when he handcuffed Mr. Tek within the first 45 seconds of their interaction and moved Mr. Tek to the squad car. (44:39-54; App. 43-58). Second, the state did not meet its burden—Rocha

did not have probable cause to arrest Mr. Tek at that point, if at all. (44:39-54; App. 43-58).

At the hearing, the circuit court issued an oral ruling denying the suppression motion. First, the court agreed with the defense and found Mr. Tek to be under arrest at the time Rocha handcuffed him. (44:55-56; App. 59-60). The court stated that based on the testimony at the hearing “the arrest of Mr. Tek came at the time that he was placed in handcuffs” which was about “45 to 60 seconds into the interaction between Officer Rocha and Mr. Tek.” (44:56; App 60). However, the court concluded that Rocha had probable cause to arrest Mr. Tek for a civil offense, parking on the wrong side of the road. (44:56-59; App 60-63).

On September 29, 2020, the circuit court *sua sponte* superseded its oral ruling by issuing a new, written decision and order denying the suppression motion. (24). In this new order, the circuit court found Mr. Tek to be under arrest only after law enforcement drove him away from the scene to the county jail. (24:3). In its analysis, the court found that up until then, Mr. Tek was in an investigative detention. (24:3). The court stated that Mr. Tek “presented Rocha with an unreasonable choice” to either arrest Mr. Tek or let him go. (24:3). And, when posed with these options, Rocha had “little choice but to put him in handcuffs.” (24:3). Despite the handcuffs, the court determined that this case was “one of the unique situations when handcuffs were needed” to “start [the police’s] investigation.” (24:3). But, once the police “moved Tek away from Richardson Street to the Rock County

Jail....it would be plain to any reasonable person that they were not free to go about their business.” (24:3). The court then concluded that by the time they moved him to the jail, law enforcement had gathered enough evidence to establish probable cause to arrest Mr. Tek for an OWI. (24:4).

The circuit court’s denial of Mr. Tek’s motion to suppress evidence derived from Mr. Tek’s unlawful arrest is the subject of this appeal.

After the court denied suppression, Mr. Tek entered a plea of no contest to count two, operating while intoxicated—second offense. (43:12; App 3-4). The court sentenced Mr. Tek to 10 days of local jail time. (43:16; App 3-4).

ARGUMENT

The circuit court erred by denying Mr. Tek’s motion to suppress the fruits of his unlawful arrest.

Within 45 seconds of Mr. Tek’s first contact with the police, he was under arrest. In those 45 seconds, the police had neither reasonable suspicion nor probable cause that Mr. Tek committed a crime. When Rocha approached Mr. Tek, he was not investigating a crime. All Rocha had was a report about a car driving with flat tires and a parked car in a residential neighborhood. (44:10-11; App. 14-15). But, seconds after approaching Mr. Tek, Rocha arrested him without any other information. Rocha admitted he did

not smell any odor of intoxicants until *after* he held Mr. Tek's arms behind his back, refused to let him leave, and handcuffed him. (44:32-33; App. 36-37). Rocha also admitted he did not observe any damage to the car until *after* he arrested Mr. Tek and sat him in the back of the squad car. (44:25; App. 29).

At the suppression hearing, the state did not prove that Mr. Tek's warrantless arrest was supported by probable cause. Thus, Mr. Tek's warrantless arrest was unlawful. Any evidence derived from his unlawful arrest should be suppressed.

A. Standard of review.

When reviewing a motion to suppress, this court employs a two-step analysis. It reviews a circuit court's finding of fact under the clearly erroneous standard, but reviews the circuit court's application of constitutional principles to those facts *de novo*. *State v. Anker*, 2014 WI App 2017, ¶10, 357 Wis. 2d 565, 855 N.W.2d 483 (citations omitted).

B. Mr. Tek's warrantless arrest was unlawful because it was not supported by probable cause.

An arrest is a seizure that implicates serious privacy and liberty interests protected by the Fourth Amendment. *State v. Dumstrey*, 2016 WI 3, ¶16, 366 Wis. 2d 64, 873 N.W.2d 502. Any warrantless arrest is *per se* unreasonable. *State v. Young*, 2006 WI 98, ¶54, 294 Wis. 2d 1, 717 N.W.2d 729. Thus, Fourth Amendment protections against unreasonable

seizures requires the police obtain probable cause that a crime has been committed before conducting a warrantless arrest. *Id.*, ¶22.

One limited exception to this general rule is a *Terry* stop where police need only reasonable suspicion to temporarily detain and question a person. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). However, no matter the type of seizure, “reasonableness is the ‘ultimate standard’ embodied by the Fourth Amendment.” *State v. Vorburger*, 2002 WI 105, ¶38, 255 Wis. 2d 537, 648 N.W. 829.

The state bears the burden to prove a warrantless arrest was constitutionally justified and supported by adequate probable cause. *State v. Taylor*, 60 Wis. 2d 506, 518-19, 210 N.W.2d 873 (1973). Like here, when the state fails to prove that the police obtained probable cause to conduct a warrantless arrest, the evidence derived from that unlawful arrest must be suppressed. *Id.* (stating, “The legality of the arrest itself is absolutely dependent upon evidence of probable cause and, in the absence of the state’s assuming the burden of showing that probable cause was established at the time of the arrest, the arrest is illegal and must be set aside.”).

1. Officer Rocha arrested Mr. Tek when he placed Mr. Tek in handcuffs.

Differentiating between an arrest and a *Terry* stop requires a careful look at the circumstances surrounding the seizure. Any seizure is a significant infringement on privacy and liberty interests. *Id.* But, an arrest is more serious. It is “inevitably accompanied by future interference with the individual’s freedom of movement.” *Anker*, 357 Wis. 2d 565, ¶¶ 14-17. It is “a more permanent detention that typically leads to ‘a trip to the state house and prosecution for crime.’” *Young*, 294 Wis. 2d 1, ¶22. (citing *Florida v. Royer*, 460 U.S. 491, 496 (1983)).

Courts determine whether an arrest occurred “by questioning whether a ‘reasonable person in the defendant’s position would have considered himself or herself to be ‘in custody,’ given the degree of restraint under the circumstances.” *State v. Wortman*, 2017 WI App 61, ¶7, 378 Wis. 2d 105, 902 N.W.2d 561. (quoting *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991)). The circumstances courts consider include whether a person asked permission to leave, whether the police informed a person that he is suspected of a crime, whether the person’s movement was limited, whether the officers engaged in coercive conduct suggesting that cooperation is required, and whether the person was in a private or public location. *Fox v. Hayes*, 600 F.3d 819, 833 (7th Cir. 2010). Although the use of handcuffs does not *per se* constitute an arrest, handcuffs and other restrictive measures are only

reasonable “when particular facts justify the measure for officer safety or similar concerns.” *Pickens*, 323 Wis. 2d., ¶32.

By contrast, a *Terry* stop is temporary and less intrusive. *State v. Gruen*, 218 Wis. 2d 581, 590, 582 N.W. 2d 728 (Ct. App. 1998). Indeed, it must last “no longer than necessary to effectuate the purpose of the stop.” *Royer*, 460 U.S. at 499-500. This less invasive seizure “constitutes only a minor infringement on personal liberty.” *Anker*, 357 Wis. 2d 565, ¶14. So, police need only reasonable suspicion to conduct a temporary detention. *Wortman*, 378 Wis. 2d 105, ¶6. “Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *Young*, 294 Wis. 2d 1, ¶21.

Furthermore, the investigative methods taken during a *Terry* stop must be “the *least intrusive* means reasonably available to verify or dispel the officer’s suspicion” and be limited to the scope of the stop. *Id.* (emphasis added). If the stop exceeds these bounds, the stop may transform into a *de facto* arrest unsupported by probable cause. *United States v. Ruiz*, 785 F.3d 1134, 1143 (7th Cir. 2015).

Similarly, an officer cannot use the pretense of an investigative *Terry* stop to conduct an arrest without probable cause. “[T]he police [may not] seek to verify their suspicions by means that approach the conditions of arrest.” *Royer*, 460 U.S. at 499. Thus, courts must carefully examine the circumstances of a

detention to determine whether an arrest has occurred. *State v. Pickens*, 2012 WI App 5, ¶27, 323 Wis. 2d 226, 779 N.W.2d 1.

Here, when Rocha handcuffed Mr. Tek, he transformed a citizen encounter into a full-blown arrest. Within 45 seconds, Rocha had handcuffed Mr. Tek, but Rocha had not identified reasonable suspicion of a crime, any officer safety concerns, or other similar concerns that required the use of handcuffs to investigate a report about a car with flat tires—Mr. Tek was unarmed, he was not aggressive, and he followed Rocha’s numerous orders.

Rocha’s use of handcuffs was not justified by Mr. Tek’s continued plea to leave. Mr. Tek was under no obligation to answer Rocha’s questions, let alone be subjected to cuffing as a result of answering the officer’s questions. Rocha was not investigating a crime—it is not a crime to drive on less than ideally inflated tires—and Rocha had no reasonable suspicion of a crime to detain Mr. Tek at this point. During this 45 second citizen encounter, Mr. Tek had every right to ask Rocha if he was under arrest or if he was free to leave. When Rocha handcuffed Mr. Tek, he confirmed that Mr. Tek was under arrest.

Moreover, Mr. Tek had not attempted to escape or evade police custody. Instead, Mr. Tek followed each of the unjustified commands. (44:29-30;22:1:07-1:10;App. 33-34). Mr. Tek simply stepped out of the car and asked Rocha to let him go. (44:29-30; App. 33-34). No reasonable person in Mr. Tek’s

circumstances would believe that, after 45 seconds of interaction and being handcuffed and placed in the back of locked squad car, meant they were not free to leave.

Additionally, handcuffing Mr. Tek within the first 45 seconds was not the least intrusive means of investigating a report about a car with flat tires. Instead of attempting to investigate the report by looking around at the car, Rocha arrested Mr. Tek. In the 45 seconds before the arrest, Rocha did not observe any evidence of a crime—no indications of intoxication, evidence of an accident, or any other potential crime to justify the arrest. Nor did Rocha identify any reason why Mr. Tek needed to be in handcuffs to “start [the police’s] investigation.” (24:3). Despite all this, Rocha handcuffed Mr. Tek, ordered him to relax, turn around and drop his keys, moved him away from the car, and sat him in the back of the locked squad car. (22:1:01-2:18). None of these “methods of investigation” were the least restrictive reasonably available to Rocha at this point. By far exceeding the bounds of a reasonableness, Rocha transformed a citizen encounter into more than even a *Terry* stop, Mr. Tek was *de facto* under arrest.

Furthermore, handcuffing Mr. Tek was followed by an escalating series of limitations to Mr. Tek’s freedoms that would confirm any reasonable person’s belief that he was under arrest. As Rocha handcuffed Mr. Tek, Mr. Tek repeatedly asked Rocha if he could leave, but was denied. (44:29-30; App 33-34). Rocha also continued to order Mr. Tek to submit to being

handcuffed, including pushing Mr. Tek up against the car. (22:1:07-1:10). Once handcuffed, Rocha searched Mr. Tek's pockets and pulled out his phone. (44:32; App 36). Rocha held Mr. Tek's handcuffed arm as he ordered Mr. Tek to move away from the car. (22:1:55-2:00). Rocha continued to hold Mr. Tek's handcuffed arm while moving him away from the scene. (22:2:16). Rocha forced Mr. Tek into the backseat of the squad car. (22:2:19-2:25). Rocha closed the squad car door. (22:2:33). Mr. Tek sat in the squad car for at least eight minutes before Rocha drove him to the jail. (22:2:40-9:49). At jail, Mr. Tek was searched again, issued a warrant for a blood draw, and booked. (23:9). This uninterrupted series of restraints and limitations to Mr. Tek's freedom was initiated by the use of handcuffs thus, transforming a stop into a permanent detention.

Based on the totality of the circumstances, Rocha arrested Mr. Tek when he put Mr. Tek in handcuffs. Rocha failed to reasonably investigate the simple report or observe any arrestable offense. Instead, Rocha handcuffed Mr. Tek after denying his request to leave and permanently detained him without any indication that Mr. Tek was a threat to officer safety. The handcuffs were an unreasonable, overly intrusive use of a restraint that transformed any investigatory stop into a *de facto* arrest of Mr. Tek. Given the circumstances of those 45 seconds, any reasonable person would believe he was under arrest.

2. Mr. Tek's warrantless arrest was not supported by probable cause.

Once an arrest is established, courts must determine whether that arrest was supported by probable cause. Probable cause to arrest is "the quantum of evidence which would lead a *reasonable* officer to believe that the defendant probably committed a crime." *State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W. 676 (1981) (emphasis added) (citation omitted). To determine whether probable cause was present, courts conduct a totality of the circumstances test to be decided on a case-by-case basis. *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994). This means that the court considers the facts that were available to the police at the time of the arrest, and measures them against an objective standard. *Cheers*, 102 Wis. 2d at 388 (citations omitted).

As an important safeguard against governmental intrusion, probable cause is required to make a lawful arrest. *Anker*, 357 Wis. 2d 565, ¶12 (citation omitted). When an arrest is not accompanied by a warrant, the state bears the burden of demonstrating the presence of probable cause. *Cheers*, 102 Wis. 2d at 388.

Here, Rocha had insufficient evidence at the time of Mr. Tek's arrest to establish reasonable articulable suspicion of a crime, let alone enough to believe that Mr. Tek probably committed a crime. Rocha had the neighbors report regarding the car

driving on flat tires and he saw a car parked on the left side of a residential street. But, neither the report nor the parking job was sufficient probable cause to arrest Mr. Tek for a crime or even a civil parking offense. *State v. Butler*, 2009 WI App 52, ¶15, 317 Wis. 2d 515, 768 N.W.2d 46. According to Wis. Stat. § 346.54(1), cars are permitted to park on either side of the roadway when authorized. Like here, this was a residential street where people legally park their cars on both sides. (44:19-20; App. 23-24). Even so, Rocha had no information about where Mr. Tek lived—he never attempted to obtain that information. Arresting Mr. Tek without investigating, at the bare minimum, if he was a resident, was unreasonable. And, the cornerstone of the Fourth Amendment is reasonableness. Officers are not allowed to arrest individuals on the mere suspicion of an ordinance violation. At the *very least* the constitution requires an arrest be based on probable cause. Thus, Mr. Tek's arrest based on a report of flat tires and mere suspicion of a parking violation is insufficient under the constitution.

Probable cause to arrest requires both evidence of a crime and evidence that a crime is linked to a specific person. *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Before Rocha handcuffed Mr. Tek, Rocha knew almost nothing about the situation in front of him. Rocha did not know Mr. Tek's name or age, nor did he ask Mr. Tek for any identification. Rocha never saw Mr. Tek driving or even flat tires on the car. He did not know whether this was the car the caller reported—nor did he have any

confirmation about any of the details reported to dispatch. Rocha also did not see any open containers, drugs, or paraphernalia. Mr. Tek never demonstrated any unsteadiness in his movements, any slurred speech, or incoherence. And, Rocha had not conducted any field sobriety tests or a preliminary breath test. According to Rocha's own admission at the suppression hearing, Rocha did not smell any signs of intoxicants until *after* Rocha began handcuffing Mr. Tek. Nor did Rocha observe any signs of damage to the car until *after* Mr. Tek was put in the back of the squad car. At the point Rocha began handcuffing Mr. Tek, Rocha had no evidence of a crime, let alone that Mr. Tek had engaged in a crime.

The lack of probable cause of a crime is further evidenced by both of the circuit court's orders denying Mr. Tek's motion to suppress. Despite the court's erroneous denial of Mr. Tek's motion, neither ruling found there to be enough evidence to establish probable cause for arrest until long after Mr. Tek had been handcuffed. Despite the fact that the parties never argued it nor was there any testimony given about whether Mr. Tek was in fact violating a parking ordinance, the court's first ruling determined that at the point of Mr. Tek's arrest—when he was handcuffed—there was probable cause to arrest Mr. Tek for a parking violation. (44:56-57; App. 60-61). But the court did not find there to be probable cause to arrest for an OWI. In the second ruling, the court changed its mind about the point of arrest but not about what evidence established probable cause for arrest. It determined that Mr. Tek was not arrested

until after Rocha drove Mr. Tek away from the scene. (24:3). The court explained away the handcuffs by finding that Mr. Tek put Rocha “in an impossible” position and Rocha had no choice but to handcuff Mr. Tek. (24:3). Although this was an erroneous legal finding that did not apply the correct legal standard, the court correctly noted that the handcuffs were the “start” of Rocha’s investigation. (24:3). The evidence to establish probable cause—the smell of intoxicants, the observable damage to the car, the confirmation of the neighbor’s report—did not come until after Mr. Tek was handcuffed. (24:3).

Regardless of the circuit court’s findings, this case is reviewed *de novo*. And, the facts as presented at the suppression hearing make it clear that Rocha did not have reasonable suspicion of a crime, let alone probable cause to arrest Mr. Tek for an OWI within the first 45 seconds of the encounter. Indeed, even if Rocha smelled intoxicants while handcuffing Mr. Tek, an officer cannot arrest someone for an OWI based on smell of intoxicants alone—that may establish reasonable suspicion for a brief investigatory stop, but not probable cause to arrest for an OWI. *State v. Lange*, 2009 WI 49, ¶37-38, 317 Wis. 2d 383, 766 N.W.2d 551. (stating that evidence of intoxicant usage, such as odor, often strengthens the existence of probable cause in drunk driving cases but that probable cause must amount to more than mere possibility).

In sum, Mr. Tek was arrested without probable cause when Rocha handcuffed him. At the point of arrest, Rocha knew next to nothing about the situation in front of him, including Mr. Tek's identity. The state failed to meet their burden to show that Rocha had probable cause to arrest Mr. Tek and the court's rationalization of the arrest is legally unsound and unsupported by the actual evidence presented. Mr. Tek's arrest was unreasonable and unlawful. Thus, the evidence derived from his arrest must be suppressed.

C. The evidence derived from Mr. Tek's unlawful arrest should be suppressed.

The state does not dispute the remedy Mr. Tek requested in his motion to suppress—to suppress all direct and derivative evidence obtained pursuant to an unlawful arrest. The presumptive remedy for a Fourth Amendment violation is exclusion of the evidence procured therefrom. *State v. Dearborn*, 2010 WI 84, ¶15, 327 Wis. 2d 252, 786 N.W.2d 97. “The exclusionary rule applies to both the tangible and intangible evidence and also excluded derivative evidence under certain circumstances, via the fruit of the poisonous tree doctrine, if such evidence is obtained ‘by exploitation of that illegality.’” *State v. Knapp*, 2005 WI 127, ¶24, 285 Wis. 2d 86, 700 N.W.2d 899 (quoting *Wong Sun v. United States*, 371 U.S. 471, 485-88 (1963)).

CONCLUSION

For all the reasons set forth, the circuit court improperly denied Mr. Tek's motion to suppress the fruits of his illegal arrest. Mr. Tek respectfully asks this Court to vacate the judgment of conviction, and to remand with directions to grant the motion to suppress.

Dated this 4th day of November, 2021.

Respectfully submitted,

Electronically signed by

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 4,561 words.

CERTIFICATION AS TO APPENDIX

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 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 4th day of November, 2021.

Signed:

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