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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISION AND STATUE CITED

ARGUMENT

On nothing more than a hunch, Rocha arrested Mr. Tek for OWI immediately after Mr. Tek exercised his right to remain silent, calmly stepped out of the car, and explained that, unless he was under arrest and unable to freely leave, he would leave his parked car on this residential street. The state claims that his arrest was reasonable. This court should reject this claim. Tek was unreasonably arrested and any evidence derived from his unconstitutional arrest must be suppressed.

Mr. Tek's arrest was unreasonable.

It cannot be disputed that the Fourth Amendment requires reasonableness "in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977). Thus, a full custodial arrest, such as the one Tek was subjected to, requires the court to conduct a reasonableness inquiry. *Payton v. New York*, 445 U.S. 573, 585 (1980) (finding that "the warrantless arrest of a person is a species of seizure required by the [4th] Amendment to be reasonable."). Here, Tek's arrest was unreasonable because it was not supported by probable cause of a crime and was a disproportionate response to a potential parking ticket.

A. Rocha did not have probable cause to arrest Tek for an OWI.

The test to determine probable cause is a reasonableness test requiring an examination of the totality of the circumstances on a case-by-case basis. *State v. Miller*, 2003 WI App 188, ¶7, 266 Wis. 2d 1062, 668 N.W.2d 563 (asking whether a reasonable police officer would believe that the defendant was operating a motor vehicle while under the influence of an intoxicant). (citation omitted). In other words, facts and circumstances may reasonably establish probable cause in one case and not in another. The state argues Rocha had probable cause of an OWI not only based on claims unsupported by the record, but also based on prior cases much different than this one. (Resp. Br. 16-18). Contrary to what the state now claims, the circuit court's reasonable conclusion that Rocha did not establish probable cause to arrest Tek for an OWI within 45 seconds is well supported by the record.

The state cites to four cases to support the assertion that probable cause for OWI existed within 45 seconds. (Resp. Br. 17). However, even if these facts were accurate to this case, they "are simply factors applicable in each of those cases…[and] are not meant to be a definitive list of what must be present in all cases in order for probable cause to exist." *Miller*, 266 Wis. 2d 1062, ¶11. In *Reese*, the defendant was the only person standing by the door of the car with the same license plate reported to the officer by dispatch, the officer also observed Reese's unsteadiness and strong odor of alcohol, and the officer knew Reese's

prior OWIs placed him at a lower lawful threshold for BAC. *State v. Reese*, 2014 WI App 27, ¶13, 353 Wis. 2d 266, 844 N.W.2d 396. Here, Rocha did not observe unsteadiness or any odor of intoxicants, nor did he know Tek from any previous OWI arrests or that this parked car was the same as the one dispatch reported.

In *Lange*, the court found that Lange's driving was not "merely erratic and unlawful; it was the sort of wildly dangerous driving that suggests the absence of a sober decision maker behind the wheel." *State v. Lange*, 2009 WI App 49, ¶24, 317 Wis. 2d 383, 766 N.W.2d 551. In addition to crossing the centerline multiple times and driving on the wrong side of a four-lane road, Lange also "increased his speed to over 80 [mph] in a 30 [mph] zone" when pursued by the officers and "drove his vehicle off the road and through a utility pole." *Id.*, ¶24. Nothing like this type of "wildly dangerous" driving was ever observed by Rocha at any point, and especially not within 45 seconds of meeting Tek parked on the side of a residential street.

In the other two cases, the courts did not make any probable cause findings. In *Sibel*, a 1991 case that involved a serious car accident where several people were killed or injured, the supreme court found that "unexplained erratic driving which causes a serious accident," "strong odor of intoxicants from the passengers [and defendant]," and "belligerence and lack of contact with reality [in the hospital]" all supported *reasonable suspicion* of criminal activity sufficient to support a blood test. *State v. Sibel*,

163 Wis. 2d, 164, 182, 471 N.W.2d 226 (1991) (also finding that "none of these indicia alone would rise to a reasonable suspicion that the defendant's driving was impaired by alcohol."). In *Martell*, a 1960 insurance case also involving a serious accident, the court determined that "Klingman's erratic driving just before the collision" constituted corroborating physical evidence of intoxication. *Martell v. Klingman*, 11 Wis. 2d 296, 308, 105 N.W.2d 446 (1960). Not only do neither of these cases support the existence of probable cause to arrest Tek of OWI in 45 seconds, but the type of "belligerence" and "erratic driving" in those cases never occurred here.

The assertion that Tek was belligerent or that Rocha saw damage to the car are unsupported by the record. (Resp. Br. 7, 14, 17-18). Tek was calm, moved slowly and steadily, and placed his hands behind his back—all reasonable and cooperative behavior. (44:29-30). The state repeatedly claims throughout their brief that Rocha saw damage to the car when he initially stopped Tek. (Resp. Br. 7, 12, 17-18). However, as established by Rocha's own police report and his testimony at the suppression hearing, Rocha did not see any flat tires or paint marks until after Tek was locked in the squad car. (44:24-26).

In 45 seconds, Rocha had a dispatch report about a car[1] driving with flat tires, with no mention of a

[1] The record does not support the state's repeated claim that an eyewitness reported a "white Cadillac" driving without tires. (Resp. Br. 6, 12, 17). Instead, Rocha's testimony and the

crime, no mention of alcohol, no mention of anyone hurt, nor any accident. When Rocha approached Tek, Rocha had no confirmation that this was the reported driver. Rocha did not observe any damage on the car. (44:24-26). Rocha did not observe any alcohol or drugs, nor any driving, let alone "dangerous" driving. All of these significant factors and normal indicia of intoxicated driving were missing from the record and contribute to the totality-of-the-circumstances analysis.

To a reasonable officer, the totality of the circumstances does not establish that Tek was probably driving while intoxicated. Instead, Rocha arrested Tek because he said he would leave unless he was not free to and was under arrest. Rocha's response to these calm statements (that were well within Tek's rights) was to handcuff him, drag him away from the car, search him, put him in the back of a locked squad car, and make him sit there until he was booked in jail.

The state makes a fleeting assertion that Tek somehow consented to his own arrest, however it cites to no precedent that one can waive their constitutional right to a reasonable arrest based on probable cause or a warrant simply because they were cooperative and placed their hands behind their back. (Resp. Br. 15). Tek's arrest, unsupported by probable cause, was so disproportionate to any legitimate reason Rocha may have had to conduct a brief investigative traffic stop.

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police reports only indicate that dispatch reported "a vehicle" with no specific make or color. (44:10); (23: 3, 5, 8).

Thus, Tek's *de facto* arrest was unreasonable and unconstitutional.

B. Arresting Mr. Tek for a parking violation was unreasonable.

Tek's immediate arrest for what could amount to a parking ticket was unreasonable and unconstitutional. The state cites only two cases from the 1980s to assert a rule giving officers constitutional carte blanche to arrest whenever probable cause exists for a violation of a city parking ordinance punishable only by a fine. No such rule exists. Instead, courts should conduct a reasonableness balancing test weighing a citizen's Fourth Amendment right to be free from unreasonable governmental intrusion against the state's legitimate interest in enforcing a civil forfeiture violation through means of an arrest. *State v. Iverson*, 2015 WI 101, ¶60, 365 Wis. 2d 302, 871 N.W.2d 661.

The state cites to *Nelson* where the supreme court held only that an arrest for a city ordinance punishable by a fine is not *per se* unconstitutional given that the United States Supreme Court had not considered this specific question. *City of Milwaukee v. Nelson*, 149 Wis. 2d 434 (1989). The Milwaukee officers arrested Nelson for violating a city ordinance, loitering, after gathering detailed and specific observations of Nelson engaging in the type of suspicious conduct the ordinance was designed to target. *Id.*, at 440-41. During a total of 20-25 minutes of observation, they saw Nelson stand outside of a

tavern, in a "high crime area," with "No Loitering" signs nearby, shake hands with several pedestrians passing by, and briefly lean into passenger car windows. *Id*. After approaching Nelson for the second time, Nelson fled into the tavern where the officers arrested him. *Id.* Importantly, the supreme court found there to be significant public interest in the strict enforcement of city ordinances like loitering that encourage "proactive" policing as a means of curbing rising "street crime." *Id*., at 462-63.

Later, in *Iverson*, the supreme court held that reasonable suspicion of littering on a highway justified only a "brief and limited traffic stop" under these circumstances. *State v. Iverson*, 2015 WI 101, ¶60, 365 Wis. 2d 302, 871 N.W.2d 661. After following Iverson for some time, a State Trooper observed him drift within his lane, twice come to a complete stop at an empty, flashing-yellow-light intersection, and throw a cigarette butt out of the window that scattered ashes across the road. *Id.* ¶7-8. The Trooper stopped Iverson for littering in violation of Wis. Stat. § 287.81, a statute punishable by a fine. The supreme court conducted a reasonableness balancing test weighing the legitimate public concern to maintain safe and clean highways against Iverson's right to "personal security." *Id.* ¶50-55. Ultimately, the brief nature of a traffic stop weighed in favor of reasonableness. *Id*. ¶52.

As the *Nelson* court noted, the United States Supreme Court has yet to outline any specific constitutional limits to arrests for violations of

ordinances punishable only by a fine. Indeed, it has only held that arrests for *criminal misdemeanors* punishable by a fine may be reasonable, given probable cause. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). Thus, this court need only conduct a straightforward balancing test to determine that Tek's arrest was unreasonable.

Here, Tek's arrest was unreasonable because his right to personal security was *not* outweighed by any legitimate state interest to arrest him for a parking ticket. First, the public's serious concern with the conduct prohibited by the loitering ordinance in *Nelson* was significantly greater than any (if at all) concern the public has with parking on the wrong side of a residential street. *Nelson*, 149 Wis. 2d 434, at 462. Second, unlike the officers in *Nelson* or *Iverson*, Rocha spent all of 45 seconds observing nothing but benign and cooperative behavior from Tek before arresting him. *Nelson*, 149 Wis. 2d 434, at 440; *Iverson*, 365 Wis. 2d 302, ¶7-8. Third, unlike in *Iverson*, Tek's arrest, which consisted of handcuffing him, pulling him away from his car, and locking him in a squad car to wait to be booked in jail, was not at all a "brief and limited traffic stop." *Iverson*, 365 Wis. 2d 302, ¶51.

All in all, the state had no legitimate interest in arresting Tek for what amounts to a parking ticket within 45 seconds. Even if this court finds that Rocha initially conducted a lawful investigative stop on the basis of a parking violation, immediately handcuffing Tek after he asked to be free to leave, searching him, locking him in the squad car, and eventually booking

him in jail quickly transformed a traffic stop into an unreasonable *de facto* arrest unsupported by probable cause. *State v. Anker*, 2014 WI App 107, ¶15, 357 Wis. 2d 565, 855 N.W.2d 483 (holding that Anker was under arrest when "Anker was ordered to stop, told he was under arrest forcibly handcuffed, and taken to Horne's vehicle to be given over to investigating authorities."). Any evidence derived from Tek's unreasonable and unconstitutional arrest must be suppressed.

CONCLUSION

For all the reasons set forth in the brief-in-chief and the reply brief, Tek respectfully requests that this Court vacate the judgement of conviction and remand with directions to grant the motion to suppress.

Dated this 14th day of March, 2022.

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 2111 words.

Dated this 14th day of March, 2022.

Signed:
Electronically signed by
Megan Elizabeth Lyneis
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