STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2021AP001302

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RODNEY J. OFTE,

Defendant-Respondent.

APPEAL FROM AN ORDER SUPPRESSING EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR VERNON COUNTY, THE HONORABLE DARCY J. ROOD, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT

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ISSUES PRESENTED

On April 11, 2019, a citizen witness came upon a vehicle that was parked on the wrong side of the road, and observed a male in the vehicle with his head down who was not responsive. As a result, she contacted law enforcement. When law enforcement arrived on scene, the driver, Rodney Ofte was in the back of an ambulance being evaluated. After speaking with Ofte, officers observed that he appeared intoxicated. The officers observed that Ofte had an odor of alcohol about him, seemed confused, had bloodshot, glassy eyes, and had a difficult time keeping his balance. Law enforcement took Ofte from the ambulance and placed him into the back of a squad car to ask him additional questions. At that time Ofte admitted to consuming alcohol earlier that evening. Law enforcement conducted standardized field sobriety tests on Ofte, and as a result of the observations, admission by Ofte of consuming alcohol, the results of the field sobriety tests and a preliminary breath test, Ofte was arrested for operating under the influence of an intoxicant second offense.

1. Did the circuit court erroneously grant Defendant-Respondent Rodney Ofte's motion to suppress evidence, including statements made by Ofte, results of the field sobriety tests and the blood draw that was done?

The circuit court ruled that when officers took Ofte from the back of an ambulance to the back of a squad car for additional questioning he was in custody, and thus required to have *Miranda* warnings read prior to additional police questioning. Further, the Court held that there was a 5th amendment violation of Ofte's rights as Deputy Paulson intentionally attempted to circumvent giving Ofte his *Miranda* warnings.

This Court should reverse and hold that Ofte was not in custody, and therefore *Miranda* warnings were not required prior to Deputy Paulson asking Ofte additional questions and thus Deputy Paulson did not intentionally circumvent the protections afforded to Ofte by *Miranda*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

INTRODUCTION

Ofte along with his defense counsel brought a motion to suppress evidence in December of 2019 and it contained numerous arguments. A motion hearing on those issues was held on November 10, 2020. As a result of that hearing, supplemental briefing was done, and a subsequent motion hearing was held on April 15, 2021. Following the motion hearing held in April, the circuit court granted the motion to suppress evidence on the basis that there had been an intentional violation of Ofte's *Miranda* rights. The circuit court held that all statements made by the defendant following the *Miranda* violation as well as any results from the standardized field sobriety tests, and the results of the blood draw were inadmissible.

This Court should reverse. Ofte was not in custody at the time that deputies were asking him preliminary questions regarding the possible drinking and driving allegations. Further, because Ofte was not in custody, there was no *Miranda* violation that warranted suppression of the aforementioned evidence. Deputy Paulson did not intentionally attempt to circumvent Ofte's *Miranda*

protections by asking him preliminary questions so this Court should reverse the decision of the circuit court.

STATEMENT OF THE CASE

On April 11, 2019, Deputy Paulson with the Vernon County Sheriff's Department, responded to a call around 8:45 p.m. (R. 55: 7). The Vernon County Sheriff's Department received a call from Kim Felton, a passer-by, reporting that she saw a truck parked on the wrong side of the road facing westbound on highway 56 between Liberty and Viola, and the caller informed dispatch that there was a male inside the truck with his head down and he was not responsive. (R. 55: 7-8).

When officers arrived on scene, the driver of the vehicle was located and identified as Rodney Ofte. (R. 55: 8). Ofte was in the back of an ambulance. (R. 55: 8). Upon making contact with Ofte, Deputy Paulson noticed that Ofte's speech was slurred, there was an odor of intoxicants coming from his breath, and he observed that Ofte had red, bloodshot and glassy eyes. (R. 55: 9).

Deputy Paulson asked Ofte where he had been that day and if he had been drinking, and Ofte indicated that he was drinking that day. (R. 55: 9). After a brief conversation, Deputy Paulson informed Ofte that he wanted to conduct standardized field sobriety tests, to which Ofte agreed. (R. 55: 10). While exiting the ambulance, Deputy Paulson observed Ofte to be unsteady on his feet and lose his balance. (R. 55: 10).

Deputy Paulson informed Ofte that his squad was parked more up towards the hill and that they had to walk up towards the squad car and again Deputy Paulson observed Ofte was unsteady on his feet walking towards the squad car. (R. 55: 10-11). Ofte was then placed in the back seat of the squad car and Deputy Paulson began to ask additional

questions about where Ofte was drinking and how many drinks he had that day. (R. 55: 11). At that time, Deputy Paulson could still smell an odor of intoxicants coming from Ofte. (R. 55: 11). Deputy Paulson then told Ofte that he wanted to run him through the field sobriety tests to make sure that he was okay to drive home and Ofte responded that he "probably wasn't." (R. 55: 13). At this point, Deputy Paulson advised Ofte that he was taking him to a flat and level surface of the road, so he closed the door to the squad car and drove Ofte a short distance, still at the scene, to a flat part on the highway to run him through the standardized field sobriety tests. (R. 55: 46-47).

Deputy Paulson conducted the HGN test, walk and turn, one leg stand, and the alphabet test. (R. 55: 22). Once the field sobriety tests were concluded, Deputy Jake Johnson, another Deputy with the Vernon County Sheriff's department who was also on scene, asked Ofte if he would submit to a preliminary breath test, to which Ofte agreed. (R. 55: 22-23). After several attempts with the preliminary breath test, the reading showed a result of .223. Based on the totality of the circumstances, Ofte was placed under arrest for operating while intoxicated second offense. (R. 55: 23).

Following the motion hearing, the circuit court, the Honorable Darcy Jo Rood, presiding, granted the suppression motion after it ruled that Ofte was in custody at the time that deputies were asking him preliminary questions regarding the possible drinking and driving allegations. (R. 69: 1-2). Additionally, the circuit court found that because Ofte was in custody, deputies should have read Ofte his *Miranda* warnings prior to asking any additional questions and because they did not, and because Deputy Paulson testified that he knew he was going to arrest Ofte, Deputy Paulson was intentionally trying to circumvent giving Ofte his *Miranda* warnings. Thus, any and all evidence that came after the

Miranda violation, should be suppressed as it was merely a "charade". (R. 69: 1-2); (R. 65: 39). The State now appeals.

Additional facts will be developed in the pertinent sections of the Argument to follow.

STANDARD OF REVIEW

This Court typically reviews an order denying a motion to suppress under a two-step analysis. *State v. Robinson*, 2009 WI App 97, ¶ 9, 320 Wis. 2d 689, 770 N.W.2d 721. This Court will uphold the circuit court's findings of historical fact unless those findings are clearly erroneous. *Id.* Under the "clearly erroneous" standard, appellate courts will uphold a circuit court's finding of fact unless the findings go "against the great weight and clear preponderance of the evidence." *State v. Arias,* 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W. 2d 748 (quoting *State v. Sykes,* 2005 WI 48, ¶ 21 n.7, 279 Wis. 2d 742, 695 N.W. 2d 277). The application of constitutional principles to the facts found, on the other hand, presents a question of law that this Court reviews de novo. *Robinson*, 320 Wis. 2d 689, ¶ 9.

ARGUMENT

The circuit court erred in granting Ofte's motion to suppress evidence.

A. Based on the totality of the circumstances Ofte was not in custody for the purposes of *Miranda*.

In *State v. Gruen*, a City of Milwaukee police officer, came upon a car stuck in a snow bank. *State v. Gruen*, 218 Wis. 2d 581, 586, 582 N.W.2d 728, 729 (ct. App. 1998). At a motion hearing, Officer Barbian testified that the weather was cold, windy and snowing, with a layer of fresh snow on the ground. Id. Officer Barbian made contact with the suspect, Gruen, and asked if he was the owner of the vehicle.

Id. Gruen denied driving and Officer Barbian told Gruen that he needed to contact Wauwatosa Police Department because it was their jurisdiction. Id. at 586-87. Officer Barbian testified that, because it was so cold out, he "asked [Gruen] if he wanted to have a seat in my [police] van, and he indicated yeah, he would." Id. at 587. Before placing Gruen in the van, he was patted down. Id. Officer Barbian recalled that Gruen was not handcuffed when he was placed in the van and that Gruen was not under arrest at the time. Id. Instead, he was simply temporarily detained so that Wauwatosa could investigate the scene. Id. The Officer went on to testify that Gruen was only in the van for roughly 10-15 minutes before Wauwatosa police arrived. Id.

Gruen moved to suppress the statements made while he was in the van, arguing that they were custodial statements and he should have been advised of his *Miranda* rights prior to making them. Id. The Trial court denied the motion finding that the questioning was not a custodial interrogation, but instead a temporary detention and thus, *Miranda* rights were not required. Id. On appeal, the Wisconsin Court of Appeals upheld the decision of the lower court, finding that Gruen was not in custody for the purposes of *Miranda* given the degree of restraint under the circumstances. Id. at 598.

In its reasoning, the Court first noted that the U.S. Supreme Court determined that the Fourth Amendment is not violated when law enforcement officers, in appropriate circumstances, detain and temporarily question a suspect, without arrest, for investigative purposes. Id. at 589-90. The Court reiterated that for an investigatory stop and temporary detention under *Terry v. Ohio,* 392 U.S. 1 (1968) and § 968.24, Stats., to be valid, an officer must reasonably suspect "in light of his or her experience" that some criminal activity has taken place or is taking place before stopping an individual. Id. *See*

State v. King, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct.App.1993).

A determination of whether a temporary detention is reasonable is based on the totality of the circumstances. *Gruen,* at 590. If an officer has a suspicion, grounded in specific, articulable facts and reasonable inferences drawn from those facts, the officer may conduct a temporary detention of the individual in order to investigate further. *See id.* Here, the Trial Court found that Gruen had not been arrested, but instead, was being validly temporarily detained, and the Court of Appeals agreed reasoning that Officer Barbian, originally stopped to investigate an apparent accident, and therefore had a reasonable suspicion that a crime may have been committed after speaking to Gruen, based on Gruen's responses and his appearance of intoxication. Id. at 591.

The Court of Appeals further reasoned that Officer Barbian believed the matter was the responsibility of the Wauwatosa police, and he was justified in detaining Gruen temporarily until the Wauwatosa police could arrive and further investigate. Id. The placement of Gruen in Officer Barbian's police van was voluntary and reasonable, given the circumstances and the weather conditions. Id. The Court also reasoned that the second officer to arrive on scene had a duty to investigate whether or not Gruen had committed a crime. Further, the officer could not have reasonably performed his duty without asking a few general, investigatory questions. Id. at 592.

For Fifth Amendment purposes, to determine whether a person was in custody, the test is, "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.*] *Swanson,* 164 Wis.2d [437,] 446–47, 475 N.W.2d [148,] 152 [(1991)]. The

totality of the circumstances must be considered when determining whether a suspect was "in custody" for the purpose of triggering *Miranda* protections. *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). *Id.* at 321, 500 N.W.2d at 376.

Further, when evaluating the totality of the circumstances, it includes such relevant factors as the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. *See State v. Leprich,* 160 Wis.2d 472, 477, 465 N.W.2d 844, 846 (Ct.App.1991); *Swanson,* 164 Wis.2d at 446–47, 475 N.W.2d at 152. In exploring the degree of restraint, courts have also considered as relevant factors: (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a *Terry* frisk was performed; 4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning took place in a police vehicle; and (7) the number of police officers involved. *See Pounds,* 176 Wis.2d at 322, 500 N.W.2d at 377.

The Court found that (1) a reasonable person is less likely to believe he or she is in custody when he or she is asked, and not ordered, to do something by an officer, such as getting into their vehicle; (2) although the back of the police van in this case could not be opened from the inside, it didn't appear as though Gruen was aware of that, but if he had been, it was more likely that he would have been in custody. Id. at 597. However, the Court reasoned that at the time Gruen was questioned by the officer, the door to the van was open and the officer at the time, questioned him on one of the steps of the van, but Gruen was not locked inside of the van. Id. Therefore, it was more reasonable for Gruen to conclude he was not in custody at the time. Id. (3) That while it was debated whether Gruen was in cuffs or not at the time of

questioning, if Gruen would have been cuffed, that fact would strongly support the conclusion that he was in custody for *Miranda* purposes; (4) Gruen was not detained for an unreasonable amount of time and the officer only asked general common sense investigatory questions; (5) Gruen was not moved to another location, or transported to a police station, but instead was questioned at the scene of the crime; (6) Gruen was frisked for officer safety, he was not ordered to the ground, or had guns drawn at him; and (7) only two officers were involved in questioning Gruen; Id. After considering these factors, in the context of the totality of the circumstances, the Court of Appeals concluded that Gruen was not in custody for the purposes of *Miranda.* Id. at 596.

In the case at issue, it is the State's contention that based on the totality of the circumstances Ofte was not in custody for the purposes of Miranda.

Similarly to *Gruen*, (1) Ofte was never ordered or demanded by law enforcement to get into the back of the police vehicle, he was asked to get into the vehicle. (R. 55: 10-11). (2) The door of the police vehicle was not closed when Deputy Paulson was speaking with Ofte, so he was not locked into the back of the patrol car. (R. 55: 10-11). Eventually, after a brief period of time, the door was closed and Ofte was moved a short distance to a flat spot on the highway where the standardized field sobriety tests could be performed, and Ofte was notified that the reason Deputy Paulson closed the door and moved him was so that Ofte could perform the standardized field sobriety tests on flat, level ground. (R. 55: 46-47).

At the motion hearing, Deputy Paulson testified that on the evening of the incident in question, he felt that Ofte was too impaired to drive, but that he would have to go through the standardized field sobriety tests before making a decision. (R. 55: 39). Deputy Paulson then testified that he knew he was

going to arrest Ofte before the standardized field sobriety tests were performed. (R. 55: 39). It was noted by the defendant that Ofte was "in custody" because Deputy Paulson indicated that he knew he was going to arrest Ofte. However, in *Gruen*, the Wisconsin Court of Appeals found that because Gruen was not aware that the back door was locked from the inside, it was less likely that he would have felt in custody and if he had known that the door was locked from the inside, then it would have been an inference that lent itself to Gruen believing he was in custody. *Gruen,* at 597. The Court of Appeals placed emphasis on what was known to Gruen and how that affected the objectivity of the question of custody. The testimony given by Deputy Paulson falls in line with that reasoning. Here, Ofte was not aware of Deputy Paulson's subjective thoughts. Deputy Paulson never made any statements to Ofte regarding an arrest at that time. Furthermore, When Ofte was sitting in the back of Deputy Paulson's squad, Deputy Paulson again, was asking Ofte preliminary questions such as where he had been that day, if he had been drinking etc., which is standard practice for law enforcement officers investigating a potential operating while intoxicated offense.

Additionally, Deputy Paulson went through the proper procedure prior to Ofte's arrest. He had Ofte run through the standardized field sobriety test, he administered a preliminary breath test. Thus, given totality of the other factors in this case and the actions of Deputy Paulson rather than his own personal thoughts, a reasonable person would not have considered themselves to be in custody given the degree of restraint, or lack thereof.

Further, (3) Ofte was not in hand cuffs at this time. (4) Ofte was not in the back of the patrol car for an unreasonable amount of time, it was minutes at most. Additionally, Deputy Paulson asked investigatory questions relating to the

potential crime of operating while intoxicated, such as, "how much have you had to drink," "where were you coming, from." (R. 55: 10-11). As it related to his investigation, Deputy Paulson asked clarifying questions of Ofte when there were inconsistencies with what he was saying. (R. 55: 40). (5) Ofte was not moved from the scene of the accident to the police station, the questioning was done there at the scene. (R. 55: 10-11). (6) Ofte was not frisked, he was not ordered to the ground, and he did not have guns drawn on him. (7) Finally, like in *Gruen*, there were only two officers present at the time, and only one of them was asking any questions of Ofte at the time.

While it is true that even during a *Terry* stop, a defendant *may* be considered "in custody" for Fifth amendment purposes, and entitled to *Miranda* warnings prior to questioning, the State would argue that a reasonable person in Ofte's position would not have considered himself or herself to be in custody, given the degree of restraint under the circumstances. Under the totality of the circumstances, Ofte was not in custody, and therefore *Miranda* warnings prior to law enforcement asking investigatory questions, was not required.

CONCLUSION

For the reasons discussed, this Court should reverse the circuit court's order granting Ofte's motion to suppress and remand the case for further proceedings.

Dated this 2nd day of February 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,656 words.

Dated this 2nd day of February 2022.

Electronically signed by:

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