STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2021AP1302

STATE OF WISCONSIN,

Plaintiff-Appellant,

-vs-

RODNEY J. OFTE,

Defendant-Respondent.

APPEAL FROM AN ORDER SUPPRESSING EVIDENCE ENTERED IN THE CIRCUIT COURT FOR VERNON COUNTY, BRANCH I, THE HONORABLE DARCY J. ROOD PRESIDING, TRIAL COURT CASE NO. 19-CM-149

BRIEF OF DEFENDANT-RESPONDENT

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STATEMENT OF THE ISSUE

I. WHETHER MR. OFTE'S RIGHT TO BE FREE FROM SELF-INCRIMINATION UNDER ARTICLE I, § 8 OF THE WISCONSIN CONSTITUTION WAS VIOLATED WHEN THE DEPUTY INTERROGATED HIM AFTER HE WAS SECURED IN THE REAR OF THE DEPUTY'S SQUAD?

Trial Court Answered: YES. The circuit court found that Deputy Paulson intended to circumvent the *Miranda* rule when he secured Mr. Ofte in the rear of his squad and interrogated him without first having read him his *Miranda* rights in violation of Article I, § 8 of the Wisconsin Constitution. R65 at 39:1-7.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question which, when examined under the appropriate standard of review, may be disposed of easily and in a manner consistent with well-established rules of appellate review. The issue presented is of a nature that can be addressed by the application of legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue before this Court is premised upon the unique facts of the case and is of such a nature that publishing this Court's decision would likely have little impact upon future cases.

STATEMENT OF THE CASE

Mr. Ofte was charged criminally in Vernon County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b). R2. Mr. Ofte retained private counsel to represent him, and he entered a plea of not guilty to both charges. R5.

By pretrial motions electronically filed on December 2, 2019, Mr. Ofte challenged (1) whether his consent to blood testing was unconstitutionally coerced and (2) whether his constitutional rights under the Fourth Amendment were violated. R25 & R26. As a result of a decision of the Wisconsin Court of Appeals, Mr. Ofte ultimately withdrew his "coerced consent" motion.[1] R55 at 5:12-15.

Regarding Mr. Ofte's challenge under the Fourth Amendment, an evidentiary hearing was held on November 10, 2020. R55. At the hearing, the State offered the testimony of a single witness, namely the arresting officer in this matter, Deputy Ryan Paulson of the Vernon County Sheriff's Office. R55 at pp. 6-51.

During the course of the deputy's testimony, an additional legal issue came to light which was not evident prior to the hearing and which related to whether Mr. Ofte had been unconstitutionally interrogated in violation of the Fifth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution. R57. Based upon this new evidence, Mr. Ofte filed a supplemental brief which described and developed his contention. R57.

Ultimately, the circuit court set the matter over for oral argument on April 15, 2021. R65. At the conclusion of oral argument, the court granted Mr. Ofte's unconstitutional interrogation motion but withheld imposing any remedy for the violation at that time. R65 at 39:1-12. On April 19, 2021, the court ordered the parties to file briefs which addressed the appropriate remedy to be imposed based upon the court granting Mr. Ofte's motion. R66.

After briefing was complete, by order entered on June 16, 2021, the circuit court suppressed "all evidence gathered after the defendant was placed in Officer Paulson's car, including statements made by the defendant, evidence obtained from the field sobriety tests, and the results from the blood test, ..." R69 at p.2. The circuit court premised its decision upon *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. R69 at p.1.

[1]More specifically, this decision was *State v. Levanduski*, 2020 WI App 53, 393 Wis. 2d 674, 948 N.W.2d 411.

STATEMENT OF FACTS

On April 11, 2019, Deputy Ryan Paulson of the Vernon County Sheriff's Office was dispatched to investigate the report of an individual who was observed by a passer-by to be parked in his vehicle with his head down and who appeared to be non-responsive. R55 at 7:3 to 8:5.

After arriving at the location to which he was dispatched, Deputy Paulson observed that EMS personnel were already on the scene and were treating the individual, who was later identified as the Respondent, Rodney Ofte, in the back of their ambulance. R55 at 8:16-24. Deputy Paulson made contact with Mr. Ofte while he was being treated in the ambulance, and upon doing so, observed that Mr. Ofte had slurred speech, bloodshot and glassy eyes, and had an odor of intoxicants emanating from his person. R55 at 9:7-12.

Deputy Paulson then questioned Mr. Ofte regarding whether he had consumed any intoxicants that day, to which Mr. Ofte replied that he had and provided Deputy Paulson with "the places where he was drinking . . . ." R55 at 9:18-21. Based upon these responses, Deputy Paulson informed Mr. Ofte he was going to administer a battery of field sobriety tests to him and ordered him to step out of the ambulance. R55 at 10:8-12.

Thereafter, Deputy Paulson told Mr. Ofte "that we had to walk up towards [his] squad car, ..." R55 at 10:24-25. Upon reaching his squad, Deputy Paulson stated that he "eventually placed him in the back seat of [his] squad car and started to question him more about where he was drinking at and how many drinks he had." R55 at 11:1-7. After interrogating Mr. Ofte regarding his drinking, Deputy Paulson transported Mr. Ofte in the rear of his squad "to a flat spot on Highway 56 to run him through field sobriety [tests]." R55 at 14:7-8. At the conclusion of the field sobriety testing, Deputy Paulson formally placed Mr. Ofte under arrest. R55 at 23:7-8.

At the evidentiary hearing on cross-examination, Deputy Paulson admitted that he had Mr. Ofte in the secured, rear portion of his squad car for approximately five minutes while he interrogated him and, at that time, he "believe[d Mr. Ofte] was too impaired to drive." R55 at 30:12-16 and 38:15-19, respectively. Deputy Paulson conceded that was not going to allow Mr. Ofte to leave based upon his

belief that he was too impaired to drive and that he was "going to arrest that person." R55 at 38:22 to 39:22.

Deputy Paulson further admitted that not only did he question Mr. Ofte while he was secured in his squad, but also that he "challenged him at various points as he told his story of his whereabouts, . . ." and "pointed out inconsistencies [in his story] to him." R55 at 40:5-17; 40:25 to 46:3. While this questioning was taking place, Deputy Paulson stood at the rear, open passenger-side door of his squad which would have blocked Mr. Ofte's ability to egress if he attempted to do so. Tr. at 41:7-13.

During this interrogation, Deputy Paulson also testified that he was in full uniform, armed, and that another deputy was on the scene with him. R55 at 41:17-23. The deputies had arrived in separate, marked squad cars with their emergency lights activated. R55 at 42:3-9.

After Mr. Ofte's interrogation, Deputy Paulson conceded that he shut his squad door with Mr. Ofte inside and that it was not possible for Mr. Ofte to get out of the vehicle because the rear door could only be opened from the outside. R55 at 44:8-19. At no point during this portion of his encounter with Mr. Ofte did Deputy Paulson inform "him that he wasn't under arrest." R55 at 45:6-7.

Based upon the additional challenge Mr. Ofte raised regarding the constitutionality of his interrogation, the circuit court held an additional non-evidentiary hearing on April 15, 2021, to address Mr. Ofte's motion. At the conclusion of oral argument, the lower court made the following findings of fact relevant to the issue on appeal:

(1) Deputy Paulson "was impeding" Mr. Ofte's ability to egress from the rear of the deputy's locked squad when he stood in front of the rear door. R65 at 25:9-12.

(2) The "back of the squad" was a "locked" area. R65 at 25:9-11.

(3) Deputy Paulson's subjective intent was to avoid *Mirandizing* Mr. Ofte and "that anything going forward [from Mr. Ofte's departing the ambulance] was a charade, ..." R65 at 39:1-7.

(4) Deputy Paulson's actions constituted an "obviously . . . intentional avoidance of *Miranda* results." R65 at 32:6-7.

Based upon the foregoing findings of fact, the circuit court concluded that, as a matter of law, Deputy Paulson "didn't arrest [Mr. Ofte], similar to *Knapp*, where the officer was trying to avoid *Mirandizing* the individual so that he could get more information." R65 at 35:5-8.

STANDARD OF REVIEW ON APPEAL

The instant case involves a mixed question of constitutional law and fact. Accordingly, "[a] question of constitutional fact is 'one whose determination is decisive of constitutional rights.'" *State v. Hajicek*, 2001 WI 3, ¶ 14, 240 Wis. 2d 349, 620 N.W.2d 781, quoting *State v. Martwick*, 2000 WI 5, ¶ 17, 231 Wis. 2d 801, 604 N.W.2d 552. The issue of whether Mr. Ofte's constitutional right against self-incrimination was violated requires the application of a constitutional standard to a set of uncontroverted facts. *Hajicek*, 2001 WI 3, ¶ 14.

Questions of constitutional fact present a mixed question of fact and law that is reviewed using a two-step process. *Id.* ¶ 15., citing *Martwick* 2005 WI 5, ¶ 16; *State v. Phillips*, 218 Wis. 2d 180, 189, 577 N.W.2d 794 (1998). This Court first reviews the circuit court's findings of historical fact employing a deferential standard of review and will uphold the circuit court's findings unless they are clearly erroneous. *Hajicek*, 2001 WI 3, ¶ 15; *State v. Weed*, 2003 WI 85, ¶ 13, 263 Wis. 2d 434, 666 N.W.2d 485.

After giving great deference to the lower court's findings on matters of fact, this Court then reviews the circuit court's application of constitutional law to those facts *de novo*. *Hajicek*, 2001 WI 3, ¶ 15; *Weed*, 2003 WI 85, ¶ 13.

ARGUMENT

I. DEPUTY PAULSON UNCONSTITUTIONALLY INTERROGATED MR. OFTE.

A. Introduction to the Protections Afforded by Article I, § 8 of the Wisconsin Constitution.

It is well settled that the Wisconsin Constitution affords greater protection of the right to be free from self-incrimination for the citizens of this State than does the minimum standard established by the Fifth Amendment to the United States Constitution. *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. Instructive on the issue of whether law enforcement officers may circumvent the requirement of providing *Miranda* warnings to a suspect is *Knapp*, 2005 WI 127. In *Knapp*, the Wisconsin Supreme Court examined (1) whether a suspect's right to be free from self-incrimination under Article I, § 8 of the Wisconsin Constitution was co-extensive with the same right as expressed under the Fifth Amendment to the United States Constitution, and (2) whether the law enforcement practice of interrogating a suspect before *Miranda* warnings need to be given should be condoned without sanction.

In reaching its conclusion on the first question, the *Knapp* court examined at length the long and well-established rights of the states to interpret their constitutions independent of the protections afforded by the Federal Constitution. Based upon that history, the *Knapp* court stated that Wisconsin was not required to march in "lock step" with the federally established protections found in the U.S. Constitution, but rather would "not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *Id.* at ¶ 59, quoting *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

On the second point, the *Knapp* court used strong language to impress upon law enforcement that it would not tolerate deliberate circumvention of the protections afforded by Article I, § 8 of the Wisconsin Constitution. The court unambiguously stated:

> We have recently shown **little tolerance** for those who violate the rule of law. In *State v. Reed*, 2005 WI 53, P36, 280 Wis. 2d 68, 695 N.W.2d 315, we depicted the Fifth Amendment as providing a shield that protects against compelled self-incrimination. By its very nature, the *Miranda* warnings secure the

> integrity of that shield--and to be sure, **that shield is made of substance, not tinsel**. *See Hoyer*, 180 Wis. at 413. Any shield that can be so easily pierced or cast aside by the very people we entrust to enforce the law fails to serve its own purpose, and is in effect no shield at all. Just as we will not tolerate criminal suspects to lie to the police under the guise of avoiding compelled self-incrimination, **we will not tolerate the police deliberately ignoring *Miranda's* rule as a means of obtaining inculpatory physical evidence. As we have frequently recognized in the past, what is sauce for the goose is also sauce for the gander.**

Knapp, 2005 WI 127, ¶ 72 (citations omitted in part; emphasis added).

Language such as "little tolerance," "that shield is . . . not tinsel," "not tolerate ignoring *Miranda*," and "what is sauce for the goose is also sauce for the gander," clearly, ardently, and categorically describe the *Knapp* court's intention: namely, that the rights safeguarded by Article I, § 8 are sacrosanct and should not easily be circumvented.

There are well-established standards to protect an accused's constitutional privilege against compulsory self-incrimination during police interrogation. *See generally, Miranda v. Arizona* 384 U.S. 436 (1966). Unless law enforcement officers give certain specified warnings before questioning a person, and follow certain specified procedures during the course of an interrogation, any statement made by the person being interrogated cannot, over his objection, be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary. *See Michigan v. Tucker,* 417 U.S. 433, 443 (1974).

B. The "Interrogation" Element Under Miranda.

"Interrogation" means direct questioning by the police, as well as any words or actions on the part of the police that the police should know "are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001); *United States v. Westbrook*, 125 F.3d 996, 1005 (7th Cir. 1997).

C. The "Custody" Element Under the Fifth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution.

In order to determine whether an individual is "in custody" for the purpose of determining whether the Fifth Amendment's right to be free from self-incrimination attaches, an objective "totality of the circumstances" test is employed. *State v. Dobbs*, 2020 WI 64, ¶ 54, 392 Wis. 2d 505, 945 N.W.2d 609, citing *State v.*

Bartelt, 2018 WI 16, ¶¶ 31-32, 379 Wis. 2d 588, 906 N.W.2d 684. When applying the totality of the circumstances test, the *Dobbs* court observed that:

> There are several factors we consider, including: "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." *State v. Martin*, 2012 WI 96, ¶ 35, 343 Wis. 2d 278, 816 N.W.2d 270 (quoting *Morgan*, 254 Wis. 2d 602, ¶ 12). When evaluating the "degree of restraint," we consider "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, **whether the suspect is moved to another location, whether questioning took place in a police vehicle**, **and the number of officers involved.**" *Morgan*, 254 Wis. 2d 602, ¶ 12.

Dobbs, 2020 WI 64, ¶ 54 (emphasis added).

In *Dobbs*, the court found that the defendant was in custody for *Miranda* purposes because, *inter alia*, he was secured in the backseat of the officer's squad, he was not told that he would be free to leave, and multiple officers were present during his interrogation. *Id*. ¶ 64.

D. Incorporating the Lower Court's Findings of Fact to the Conclusions of Law.

1. Interrogation.

There can be no reasonable argument that the questions Deputy Paulson asked of Mr. Ofte were *not* direct or likely to elicit incriminating information. What could be more incriminating in an investigation of an impaired-operating related traffic offense than asking a suspect "about where he was drinking at and how many drinks he had?" R55 at 11:1-7.

All that is required to prove that an "interrogation" took place is either direct questioning or evidence "that the police should know [the questions] are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301; *Briggs*, 273 F.3d at 740; *Westbrook*, 125 F.3d at 1005. Clearly, questions about consuming intoxicants are "direct questions." Thus, Mr. Ofte satisfied this prong of the *Miranda* test, and therefore, the "interrogation" element of the *Miranda* rule cannot form the basis of a reason to reverse the decision of the lower court.

2. Custody.

With respect to the custody element of the *Miranda* rule, Mr. Ofte could not have reasonably concluded under the totality of the circumstances that he was objectively free to leave. First, more than one uniformed, armed officer was present

during his interrogation—in this case, it was two officers. R55 at 41:17-23. These officers arrived in separate marked squad cars with their emergency lights activated, which lights remained activated during Mr. Ofte's questioning. R55 at 42:3-9.

Second, Mr. Ofte was neither asked nor requested to accompany Deputy Paulson to his squad car. Rather, the deputy told Mr. Ofte that he "**had to**" go to his squad car. R55 at 10:24-25.

Third, upon arriving at the deputy's squad, Mr. Ofte was secured in the rear seat. This portion of the squad is locked and a person may only alight from the rear of the squad if another individual releases the person from the outside. R55 at 44:8-19; R65 at 25:9-11.

Fourth, even when the rear squad door was open during a portion of the interrogation, the lower court reasonably found that Deputy Paulson "was impeding" Mr. Ofte's ability to egress from the rear of the locked squad when he blocked the door with his body, as was evident on the deputy's own video footage. R65 at 25:9-12.

Finally, Deputy Paulson never informed Mr. Ofte that he was not in custody or under arrest. R55 at 45:6-7.

3. Application of *Knapp*.

Before examining whether the lower court's finding of fact regarding Deputy Paulson's intention to circumvent *Miranda* is reasonable, it is first necessary to establish what the court was attempting to curtail in *Knapp*. More specifically, the *Knapp* court was concerned with whether evidence should be suppressed when it is derivative of an *intentional* violation of the *Miranda* rule under the "fruit of the poisonous tree" doctrine. *Knapp*, 2005 WI 127, ¶ 2.

In *Knapp*, a police detective was dispatched to the defendant's apartment with an intention to arrest him based upon an apprehension request made by the defendant's probation officer. *Id.* ¶ 7. At the time the detective went to the Knapp apartment, Mr. Knapp was a suspect in the investigation of a homicide which had occurred in the early morning hours the day before. *Id.* ¶¶ 3-5. Knowing the foregoing, when the detective entered Knapp's bedroom to allow him to put on some shoes, he questioned Knapp about the clothes he had been wearing the prior evening. *Id.* ¶ 8. When Knapp pointed to a pile of clothing on the floor, the detective seized the same. *Id.*

After he was taken to the police station and further interrogated, a sweatshirt with a blood stain was found among the clothes the detective seized. *Id*. ¶ 9. Given the technology of the day, the blood stain evidence could not be directly linked to the victim of the homicide. *Id*. After a period of twelve years elapsed, DNA technology had sufficiently advanced that it could be determined that the blood on Knapp's sweatshirt belonged to that of the victim. *Id*. ¶¶ 11-12. Based upon the new analysis of the blood stain, Knapp was charged with the homicide. *Id*. ¶ 13.

Knapp's counsel moved to suppress the sweatshirt evidence. *Id*. During counsel's cross-examination of the detective who seized the sweatshirt, the detective admitted, *inter alia*, that he did not *Mirandize* Knapp because he wanted to "keep the lines of communication open" and did not want Knapp to exercise his *Miranda* rights. *Id*. ¶ 14.

On appeal, the State conceded that the sweatshirt was seized as part of an *intentional* violation of *Miranda*. *Id*. ¶ 20. In examining whether this deliberate violation of *Miranda* was sanctionable to the point of excluding more than just ill-gotten statements, but rather extended to the suppression of evidence under the exclusionary rule, the *Knapp* court took pains to note that the primary purpose underlying the exclusionary rule "is to deter future unlawful police conduct. . . ." *Id*. ¶ 22, citing *United States v. Calandra*, 414 U.S. 338, 347 (1974). The *Knapp* court then observed that if the illegality is further exploited by the police, derivative evidence is also subject to suppression under the "fruit of the poisonous tree" doctrine. *Id*. ¶ 24, citing *Wong Sun v. United States*, 371 U.S. 471, 485-88, (1963); *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970).

Having described the foregoing principles, the *Knapp* court elected to examine whether Article I, § 8 of the Wisconsin Constitution afforded broader protections against self-incrimination to the citizens of Wisconsin than did the precedent of the United States Supreme Court when interpreting the right as it exists under the Fifth Amendment and whether the exclusionary rule and fruit of the poisonous tree doctrine ought to apply to *Miranda* violations. *Knapp*, 2005 WI 127, ¶¶ 56-59.

In concluding that the Wisconsin Constitution did, in fact, afford greater protection under Article I, § 8 than did the Fifth Amendment, the *Knapp* court held:

> Therefore, turning to the exclusionary rule, "This state has accepted the doctrine that courts must consider the means used in obtaining evidence and not receive it if obtained by violation of constitutional rights of an accused." *Warner v. Gregory*, 203 Wis. 65, 66, 233 N.W. 631 (1930). Because the goals of the exclusionary rule

> and fruit of the poisonous tree doctrines are to curb "illegal governmental activity," and because *Dickerson* announced that *Miranda* is a constitutional rule (which we embrace as concluding *Miranda* is constitutional), we conclude that it is appropriate that the exclusionary rule bars physical fruits obtained from a **deliberate** *Miranda* violation under Article I, Section 8.

Knapp, 2005 WI 127, ¶ 73 (emphasis added).

Based upon the foregoing holding, the *Knapp* court found that the detective's *intentional* conduct was "particularly repugnant"[2] and concluded:

> It is not too much to expect law enforcement to respect the law and refrain from **intentionally** violating it. When law enforcement is encouraged to **intentionally** take unwarranted investigatory shortcuts to obtain convictions, the judicial process is systemically corrupted. To guard against this danger, fair play requires the players to play by the rules, especially those players who enforce the rules.
>
> Here, it is undisputed that physical evidence was obtained as the direct result of an **intentional** *Miranda* violation. Therefore, applying our holding above, the physical evidence is inadmissible.
>
> In summary, we conclude that physical evidence obtained as a direct result of an **intentional** violation of *Miranda* is inadmissible under Article I, Section 8 of the Wisconsin Constitution. We will not allow those we entrust to enforce the law to **intentionally** subvert a suspect's constitutional rights. As it is undisputed that the physical evidence here was obtained as a direct result of an **intentional** violation of *Miranda*, it is inadmissible.

Id. ¶¶ 81-83 (emphasis added). Clearly, the foregoing holding establishes that a law enforcement officer's intentions, prior to questioning a suspect, are dispositive of whether Article I, § 8 has been violated.

The instant case is precisely on point with *Knapp*. In *Knapp*, the detective who went to the defendant's apartment went there with the intention to take him into custody. *Id.* ¶ 7. In this case, the circuit court made a reasoned and well-supported finding of fact that Deputy Paulson, *prior to his interrogation of Mr. Ofte*, had an intention to arrest him. R65 at 32:6-7; 39:1-7; R55 at 38:22 to 39:22.

The detective in *Knapp* did, in fact, interrogate Knapp by asking him about the clothing he wore the night before. *Knapp*, 2005 WI 127, ¶ 8. Deputy Paulson, like the detective in *Knapp*, extensively interrogated and challenged Mr. Ofte. R55 at 11:1-7; 40:5-17; 40:25 to 46:3.

[2] *Knapp*, 2005 WI 127, ¶ 75.

Finally, the detective in *Knapp* deliberately and intentionally elected not to *Mirandize* Knapp in order to "keep the lines of communication open." *Knapp*, 2005 WI 127, ¶ 14. In the instant case, the lower court made a reasoned and well-supported finding of fact that Deputy Paulson's questioning of Mr. Ofte was a "charade" and that he had an intention to avoid the application of *Miranda*. R65 at 39:1-7 and 32:6-7, respectively.

Based upon the foregoing, there is *no* appreciable difference between *Knapp* and the instant case. Since the facts upon which the lower court's conclusions of law are based are *not* clearly erroneous, but rather are plainly supported by the record, there exist no grounds upon which this Court can reverse the decision of the circuit court.

III. ADDRESSING SPECIFIC ERRORS IN THE STATE'S ARGUMENT.

The State's brief is rife with both misstatements of fact and mischaracterizations of law, and further, wholly ignores not only its burden under the standard of review applicable in the instant matter, but additionally, fails to recognize the driving and principal concern underlying *Knapp*.

A. Mischaracterization of Fact.

The State impliedly characterizes Mr. Ofte accompanying Deputy Paulson from the ambulance to the deputy's squad and being secured in the rear seat as voluntary. State's Brief at p.9. The State goes so far as to claim that Mr. Ofte was "never ordered or demanded to get in the back of the police vehicle, he was asked to get into the vehicle." *Id*. The record does *not*, however, bear out the State's claim. One need only examine the State's reliance upon pages ten and eleven of the evidentiary hearing transcript to ascertain that the State has mischaracterized that portion of the record it claims in support of its argument. *Id.*

More specifically, Deputy Paulson testified that he "*informed*" Mr. Ofte that his squad was parked at a different location and that they "*had to*" walk to the squad. Notably, "informing" a person that the "have to go" somewhere is a far cry from *asking* someone to accompany you to another location. "Informing" a suspect of something, when translated from "cop-speak," means that a law officer has communicated—either through tone, words, or actions—that the suspect really does not have a choice. Similarly, a law enforcement officer's command to a person that they "*had to*" walk over to the officer's squad betrays no true choice for the individual. After all, a law enforcement officer just informed them that they "had

to" do something. What person, acting reasonably, would objectively feel as though they had a choice?

Further undermining the house of saltines upon which the State erected its "never ordered or demanded" argument is that fact that at page eleven of that portion of the record on which the State relies, Deputy Paulson testified that he "eventually **placed** [Mr. Ofte] in the back of [his] squad car and started to question him more about where he was drinking at and how many drinks he had." R55 at 11:1-4 (emphasis added); State's Brief at p.9. Again, semantics are important here. Deputy Paulson is not averring that he *asked* Mr. Ofte to take a seat in his squad; he is not stating that he made a "request" that Mr. Ofte sit in his squad; he is not proffering that there was, as the State claims, any hint of voluntariness on Mr. Ofte's part. What Deputy Paulson's testimony reveals is that Mr. Ofte was *obeying* the *commands* of a law enforcement officer. What is most amazing is that the foregoing testimony was what the State was relying upon to support its claim. State's Brief at p.9, citing "R55:10-11." Clearly, Deputy Paulson's testimony does not come anywhere close to what the State claims it does, *i.e.*, "[Mr. Ofte] was **asked** to get into the vehicle." State's Brief at p.9 (emphasis added). Frankly, the State *grossly mischaracterizes* the actual record. Thus, the State's implied "voluntariness" or "consent" argument must be rejected.

B. Misapplication of Law.

When the State turned its attention to describing the common law as it relates to the questions which may permissibly be asked of a person detained during a traffic stop, its analysis became extremely muddled. The State presses its argument by referring to common law decisions such as *Terry v. Ohio*, 392 U.S. 1 (1968), which permit "question[ing] a suspect, without arrest, for **investigative purposes**." State's Brief at p.6 (emphasis added). There is an unfavorable outcome for the State's position, however, by proffering the foregoing argument.

The common law decisions on which the State relies relate to the permissible extent of questioning for "investigative" purposes. That is precisely what a *Terry* stop is designed to do, namely: to *investigate* whether a violation of the law is afoot. This is inapposite to what transpired in this case, *i.e.*, Deputy Paulson testified that he had already made up his mind to arrest Mr. Ofte and the State has provided *no citations to the record to the contrary*. There was never going to be an "investigation" in the instant case, and therefore, the State's citation to authority regarding the permissible extent of questioning under the Fourth Amendment for

investigative purposes *is not relevant* to this case because Deputy Paulson was no longer "investigating" when he admitted that his decision to arrest Mr. Ofte had already been made. The State's brief fails to offer this Court any pinpoint citations which make the lower court's *finding of fact* that Deputy Paulson had formed the *intention* to violate *Miranda* clearly erroneous. R65 at 32:6-7. In fact, as noted below, the State's entire brief fails to provide this Court with any citations to the record which meet its burden to demonstrate that the lower court's findings of fact were **"clearly erroneous."**

C. Meeting the Burden.

The conclusions of law in the instant matter must be based upon constitutional facts which, upon appellate review, will only be set aside if their finding was "clearly erroneous." "Clearly erroneous" has been defined by the Wisconsin Supreme Court of appeals to mean that:

> In general, **we are bound not to upset the trial court's findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence**. This is basically a "clearly erroneous" standard of review. *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984). Questions of law require independent appellate review, *State v. Lee*, 122 Wis. 2d 266, 274, 362 N.W.2d 149 (1985), while questions of constitutional fact are also subject to independent review and require an independent application of the constitutional principles involved to the facts as found by the trial court. *Id.; Woods*, 117 Wis. 2d at 715; *State v. Mazur*, 90 Wis. 2d 293, 309, 280 N.W.2d 194 (1979). The reviewing court has the duty to apply constitutional principles to the facts as found in order to ensure that the scope of constitutional protections does not vary from case to case. *Woods*, 117 Wis. 2d at 715.

State v. Turner, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987)(emphasis added). The "clearly erroneous" standard is one which owes ***deference*** to the lower court's findings. *State v. Jenkins*, 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24.

In this case, the State has the burden to demonstrate that the relevant factual findings made in the lower court—*i.e.*, Mr. Ofte was "confined" and, more importantly, Deputy Paulson intended to avoid the application of *Miranda*—were clearly erroneous and were "contrary to the great weight and clear preponderance" of the evidence. Mr. Ofte could find no factual dispute in the State's argument which rose to the level of the established standard. There is no point in the State's brief in which it prays "Fact X" to this Court and then offers "Fact Y" from the record to contradict "Fact X" in an effort to show that the lower court's findings were "contrary to the great weight and clear preponderance" of the evidence. At

least if the State had done that, even in the face of great "deference" to the lower court's findings, this Court would have had competing inferences to weigh. The State's brief, however, fails to identify any factual missteps or deficiencies in the circuit court's findings. The argument it proffers is, therefore, limited to the undisputed record before this Court.

D. The Primary Principle Underlying Knapp.

The final problem with the State's position is its mis-focused attention on the "custody" issue. The State expends a tremendous amount of effort trying to convince this Court that Mr. Ofte was never "in custody" for *Miranda* purposes. Focusing on the issue of custody so intently either deliberately ignores or wholly overlooks the facts of *Knapp*, 2005 WI 127.

Even the most cursory reading of *Knapp* reveals that the court's opinion centered on its concern that the detective in that case acted to circumvent the *Miranda* rule **intentionally**. *See* Section II.D.3., *supra*. Yet, despite the intentional violation of *Miranda* being the *sine qua non* of the Wisconsin Supreme Court's decision to suppress the unconstitutionally-obtained evidence, there is literally nothing within the four corners of the State's brief which establishes that Deputy Paulson's actions were *not* intentional. The closest approach the State makes to establishing that the deputy was not acting intentionally is a bald, unsupported, conclusory statement in the "Introduction" section of the State brief in which it avers, "Deputy Paulson did not intentionally attempt to circumvent Ofte's *Miranda* protections by asking him preliminary questions . . . ." State's Brief at pp. 2-3. The lower court, however, recognized that the State's position regarding the deputy's intent was a mere "charade." R65 at 39:1-7.

More to the point, the State's patently absurd assertion that Mr. Ofte would not have reasonably felt "confined" by being secured in the rear of a squad car ignores that, by comparison, the facts underlying the *Knapp* decision are even more favorable to his position. Recall in *Knapp* that the detective who went to Knapp's apartment with the intention to arrest him identified Knapp's clothing and questioned him about it ***while Knapp was in his own bedroom***. *Knapp*, 2005 WI 127, ¶¶ 7-8. Even though the evidence was seized in an area in which Knapp likely was very comfortable—*i.e.*, his own bedroom—the *Knapp* court still ordered it suppressed because it focused its attention on the more important fact that the detective *intended* to circumvent *Miranda* in "order to keep the lines of

communication open," which the *Knapp* court found to be "particularly repugnant." *Id.* ¶ 14 & ¶ 75, respectively.

In this case, Mr. Ofte was not interrogated in his bedroom (like Knapp had been), but rather, he was questioned in a far more unfamiliar and hostile environment, namely the secured rear seat of a marked squad car. Mr. Ofte's position is simple: if the location of the questioning in *Knapp* did not save the ill-gotten evidence from suppression, then surely, the more hostile interrogation environment in this case will not save the State's case. Why is this true? It is true because the most important part of the *Knapp* decision focused on the officer's *intention* to question a suspect despite the fact that he *knew* he was going to arrest that same person. Like the officer in *Knapp*, Deputy Paulson testified, admitted, conceded, that he was going to arrest Mr. Ofte *before* he started interrogating him in the rear of his squad. There is literally no factual distinction between the facts of this case and *Knapp* which is of any moment or import. This Court should, therefore, not reverse the decision of the court below.

CONCLUSION

Because the lower court found that Deputy Paulson had the intention to deliberately circumvent the constitutional protections afforded Mr. Ofte against self-incrimination, this Court cannot upset that finding unless it is clearly erroneous. Since the record in the instant case demonstrates that the lower court had more than an adequate evidentiary basis upon which to make this finding, it cannot now be upset on appeal.

Further, based upon the evidence adduced at the evidentiary hearing below, the circuit court reasonably concluded that Mr. Ofte was confined when he was interrogated and, therefore, as a matter of law, the decision in *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, applies to the circumstances of the instant case. As a result thereof, it is not unreasonable for the lower court to have ordered suppression of the evidence obtained after Mr. Ofte's unconstitutional interrogation.

Dated this 21st day of February, 2022.

Respectfully submitted:

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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,188 words.

I also certify that no appendix has been filed with this brief, either as a separate document or as part of this brief.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on February 21, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 21st day of February, 2022.

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