STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP668-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

KEVIN R. RADDEMANN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH IV, THE HONORABLE SANDRA J. GIERNOTH PRESIDING, TRIAL COURT CASE NO. 21-CM-699

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER A REASONABLE SUSPICION EXISTED TO DETAIN MR. RADDEMANN FOR VIOLATING A LOCAL ORDINANCE WHICH PROHIBITED PERSONS FROM ENTERING A CEMETERY "THROUGH THE GATES" AFTER HOURS WHEN THE GATE HAD BEEN REMOVED PRIOR TO MR. RADDEMANN'S DETENTION?

> Trial Court Answered: YES. The circuit court concluded that the detaining officer, Adam Albea, had a reasonable suspicion to stop Mr. Raddemann's vehicle because he: (1) observed it exit the cemetery, (2) after dark, and (3) it did not appear to be a vehicle which was consistent with any known authorized vehicle permitted to be in the cemetery. R31 at 37:17 to 41:8; D-App. at 103-07. Based upon these observations, the court held that "the officer had reason to believe that this vehicle was violating that Hartford ordinance." R31 at 41:5-7; D-App. at 107.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Raddemann will NOT REQUEST publication of this Court's decision as the common law authorities which set forth the standard for detaining an individual based upon anonymously tipped information are well-settled.

STATEMENT OF THE CASE

On June 30, 2021, Mr. Raddemann was charged in Washington County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a); Operating a Motor with a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b)—Second Offense; and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a). R4.

After retaining counsel, Mr. Raddemann filed a motion to suppress evidence based upon the arresting officer's lacking a reasonable suspicion to detain him. R19. An evidentiary hearing was held on Mr. Raddemann's motion on November 19,

2021. R31. The State offered the testimony of a single witness, the arresting officer, Adam Albea. R31 at pp. 4-34.

At the conclusion of the hearing, the court denied Mr. Raddemann's motion, finding that a reasonable suspicion existed to detain him. R31 at 41:5-7; D-App. at 107.

On March 23, 2022, Mr. Raddemann changed his plea to one of no contest upon which the court found him guilty and sentenced him accordingly. R40; R45; D-App. at 101-02.

It is from the adverse judgment of the circuit court that Mr. Raddemann now appeals to this Court by Notice of Appeal filed on April 20, 2022. R48.

STATEMENT OF FACTS

While on routine patrol on June 25, 2021, Officer Adam Albea of the City of Hartford Police Department observed a vehicle entering Highway 60 from the Pleasant Hill Cemetery. R31 at 6:14 to 7:18. By entering the highway from the cemetery, Officer Albea believed the vehicle to be in violation of Hartford Municipal Ordinance No. 27.13(1). R31 at 7:13-15; 13:23 to 14:4. Section 27.13(1) of the Hartford Municipal Ordinances provides:

> Entering; Closing Hours. No person shall enter or leave the cemetery except through the gates. No person other than the cemetery employees or other police officers shall be within the cemetery except during daylight hours.

Hartford Mun. Ord. No. 27.13(1); R31 at 13:23 to 14:4. During the course of his examination, Officer Albea testified that "[t]o the best of [his] recollection, the [cemetery] gates had previously been removed due to an issue with people striking them." R31 at 22:16-18. Officer Albea was unaware, however, as to how long prior to his contact with Mr. Raddemann the gate had been removed. R31 at 22:24 to 25:1.

Officer Albea "believe[d]" that "[t]he gates . . . depicted in the ordinance [were] these, in fact, stone pylons." R31 at 22:18-20. The "stone pylons" to which Officer Albea referred were two pillars on either side of the cemetery. R31 at 22:6-13; R25; D-App. at 108. Set back several dozen feet from these pillars is signage which advises, *inter alia*, that the cemetery is closed during hours of darkness. R25; D-App. at 108.

After observing an ostensible violation of the ordinance, Officer Albea detained the vehicle, later identified to have been operated by Mr. Raddemann. 8:8

to 9:6. Subsequent to his detention, Mr. Raddemann was ultimately arrested for operating a motor vehicle while intoxicated. R1; R2.

STANDARD OF REVIEW

The question presented to this Court relates to whether Mr. Raddemann's Fourth Amendment rights were violated when the arresting officer stopped his motor vehicle based upon an alleged ordinance violation for which the physical conditions at the time of the enactment of the ordinance had substantially changed, thereby rendering the ordinance vague. Because this case presents a question of law based upon an undisputed set of facts, it merits *de novo* review by this Court. *State v. Drogsvold*, 104 Wis. 2d 247, 311 N.W.2d 243 (Ct. App. 1981).

ARGUMENT

I. THE LAW IN WISCONSIN AS IT RELATES TO REASONABLE SUSPICION TO DETAIN AN INDIVIDUAL UNDER THE FOURTH AMENDMENT.

A. The Fourth Amendment in General.

The starting point for any analysis of the constitutionality of a seizure must begin with the foundations established by the Fourth Amendment itself. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious or arbitrary police action is not tolerated under the umbrella of the Fourth Amendment. "The basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d 516 (1983); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18,

315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

Both federal and state courts have consistently held that "[c]onstitutional provisions for the security of persons and property should be **liberally construed.**" *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886). "A close and literal construction deprives [these protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.**" *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973)(emphasis added).

The foregoing authority does not stand alone as time and again the Supreme Court has consistently repeated that the Fourth Amendment "guaranties are to be **liberally construed to prevent impairment of the protection extended.**" *Grau v. United States*, 287 U.S. 124, 127 (1932)(emphasis added). The High Court has admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931).

B. The Reasonable Suspicion Standard.

Before examining the issue which lies at the heart of Mr. Raddemann's appeal—*i.e.*, whether the ordinance at issue provided a basis for Officer Albea to reasonably believe it had been violated—a preliminary matter must first be disposed of, namely: what is the Fourth Amendment's "reasonable suspicion" standard?

Within the ambit of the Fourth Amendment, there are recognized three levels of encounter: (1) the "simple encounter" for which the individual is afforded no constitutional protection because his or her movement is not restricted; (2) the investigatory detention, or *Terry* stop, for which the officer must have a "reasonable suspicion" to detain the person, *see Terry v. Ohio*, 392 U.S. 1 (1968); and (3) the custodial arrest which requires probable cause. *State v. Welsh,* 108 Wis. 2d 319, 321 N.W.2d 245 (1982); *Henry v. United States,* 361 U.S. 98 (1959).

For purposes of determining whether Officer Albea's actions in detaining Mr. Raddemann's vehicle were constitutionally justified, the inquiry involves an objective test of reasonableness. *Terry,* 392 U.S. at 20-21.

> The test is an objective test. Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion

> grounded in specific, articulable facts and reasonable inferences from those facts, that **the individual has committed a crime**. An inchoate and unparticularized suspicion or 'hunch'. . . will not suffice.

State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(internal quotations omitted; emphasis added); *United States v. Pavelski,* 789 F.2d 485, 489 (7th Cir. 1986).

Whether an investigatory detention is constitutionally reasonable turns upon:

> 'a particularized and objective basis' **for suspecting the person stopped [is engaged in] criminal activity**. *Ornelas v. United States*, 517 U.S. 690, 696, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996)(citation omitted). When determining if the standard of reasonable suspicion [is] met, those facts known to the officer must be considered together as a totality of the circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

State v. Powers, 2004 WI App. 143, ¶ 7, 275 Wis. 2d 456, 685 N.W.2d 869 (emphasis added). Absent proof of any wrongdoing, a detention is constitutionally unreasonable.

The notion that an investigatory detention is constitutionally justifiable is built upon there being a "particularized basis" for suspecting that the person who is detained is engaged in some illegal activity. *Ornelas*, 517 U.S. at 696. A particularized basis is one which requires that there be some nexus, or link, between the suspect and **an alleged violation**. Absent a nexus between the suspect and the potential violation, a detention is constitutionally unreasonable under the Fourth Amendment.

The United States Supreme Court emphasized the need for a particularized suspicion of wrongdoing in *United States v. Cortez*, 499 U.S. 411 (1981). Therein the Court clarified that the totality of the circumstances

> must raise a suspicion that the *particular individual being stopped is engaged in wrongdoing*. Chief Justice Warren, speaking for the Court in *Terry v. Ohio, supra*, said '[that] this demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*.'

Cortez, 499 U.S. at 418 (emphasis in original in part, added in part), citing *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661-63 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

Based upon the foregoing authority, this Court faces one question: Did the observations made by Officer Albea—premised upon his belief that the cemetery

"gate" should now be construed to be the stone pylons at the entryway despite the actual gate's earlier removal—justify a detention of Mr. Raddemann's vehicle under the Fourth Amendment?

It is Mr. Raddemann's position that the nexus required between his driving behavior and some "wrongdoing" as required under *Cortez*, *Brignoni-Ponce*, *Prouse*, *Ornelas*, *Powers*, *Richardson* and their progeny, does not exist in the instant case because, subsequent to the removal of the cemetery gates, Hartford Municipal Ordinance No. 27.13(1) is no longer objectively enforceable in a manner which provides proper notice to drivers of when its elements are violated.

C. The Constitutional Concepts of "Notice" and "Vagueness."

Before the foregoing question can properly be analyzed, a brief foray into the law relating to the constitutional concepts of "notice" and "vagueness" must first be undertaken.

The concept of constitutional "vagueness" is an outgrowth of the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2007). It is a concept that is driven by notions of fair play. *See, e.g., Connally v. General Construction Company*, 269 U.S. 385, 391 (1926). Because depravations of life or liberty may result from the application of a statute which fails to satisfy the concept of due process as protected by the Fifth Amendment, the Supreme Court has held that the Fourteenth Amendment is implicated in vagueness challenges as well. *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). The *Giaccio* Court reflected upon the due process implications of a vague statute, and commented that "[b]oth liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Id.*

Expounding upon these "notions of fair play" in the context of constitutional vagueness, the United States Supreme Court has observed:

> It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. *See Stromberg v. California*, 283 U.S. 359, 368; *Lovell v. Griffin*, 303 U.S. 444. **No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.** The applicable rule is stated in *Connally v. General Construction Co.*, 269 U.S. 385,

> 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'

Lanzetta v. New Jersey, 306 U.S. 451, 444 (1939)(emphasis added).

Due process thus compels, at its most fundamental level, that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). Laws must afford a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so he or she may act accordingly. *Id.* A vague law is one which impermissibly delegates basic policy matters to law enforcement, judges, and juries for resolution on an *ad hoc* or subjective basis, which itself carries the attendant dangers of arbitrary and discriminatory application. *Id.* at 108-09.

With the foregoing understanding of the importance which due process notions of notice and fair play have in compelling a municipality to draft ordinances which leave no room for guesswork regarding the prohibited conduct, it is necessary to divine a test by which the vagueness of a law can be measured. As a starting point, Wisconsin courts have held that for an enactment to be void for vagueness, it must be so ambiguous that one who is intent upon obedience cannot tell when proscribed conduct is approached. *State v. Smith*, 215 Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997). In a vagueness challenge, the primary issues involved are whether the provisions of the law are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise a judge and jury of standards for the determination of guilt. *State v. Zwicker*, 41 Wis. 2d 497, 507, 164 N.W.2d 512 (2002).

The U.S. Supreme Court has recognized two independent circumstances under which a law can be impermissibly vague. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000), citing *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999). It is Mr. Raddemann's position that Hartford

Municipal Ordinance No. 27.13(1) fails to adequately provide a person of ordinary intelligence an opportunity to understand what conduct it prohibits on two independent grounds as discussed in Section II., *infra*.

The foregoing standard enunciated by the Supreme Court has been similarly adopted in Wisconsin. In *Oak Creek v. King*, 148 Wis. 2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court observed:

> The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that people of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional. *State v. McCoy*, 143 Wis. 2d 274, 285-86, 421 N.W.2d 107 (1988); *Bachowski v. Salamone*, 139 Wis. 2d 397, 406, 407 N.W.2d 533 (1987).

King, 148 Wis. 2d at 546.

II. APPLICATION OF THE LAW TO THE FACTS.

In the present case, the pertinent Hartford Ordinance prohibits persons from "enter[ing] or leav[ing] the cemetery **except through the gates**." Hartford Mun. Ord. No. 27.13(1) (emphasis added); R31 at 13:23 to 14:4. In order for a person of "ordinary intelligence [to have] a reasonable opportunity to understand what conduct [the ordinance] prohibits," an unambiguous understanding of what constitutes the "gates" of the cemetery must exist. *See Hill*, 530 U.S. at 732. In the instant matter, however, no such reasonable understanding can exist because, as Officer Albea admitted on cross-examination, the gates had been removed from the entryway. R31 at 22:16-18.

While it may be true that signage was posted "near" the entrance to the cemetery which advised motorists that the "cemetery is closed after daylight hours,"[1] the sign does not expressly advise where that cemetery entrance is actually located, *i.e.*, is at the area in which the sign is posted? Is it twenty feet in front of

[1]R31 at 16:5-6.

the sign? Is it ten feet beyond the sign? Is it where the cemetery road first forks? Is it where the first gravestone appears? Is it at the exact point at which the apron of the cemetery road meets Highway 60?

When a physical gate previously stood at the point of entrance to the cemetery, it was clear to any motorist, citizen, cemetery employee, law enforcement officer, *etc.*, precisely where one could be deemed to have made entry onto the cemetery grounds, *i.e.*, just beyond the physical gate itself. In the absence of the physical gate, however, where a violation of the ordinance first occurs is no longer clearly defined because the signage which advises that the cemetery is closed during hours of darkness is set *well behind* the stone pylons which Officer Albea thought were the "gate." *See* R25; D-App. at 108.

Because persons of ordinary intelligent could differ with respect to sharing Officer Albea's belief that the ordinance prohibited entrance to the cemetery at the location of the stone pylons—*e.g.*, it is not unreasonable to believe that prohibited entrance does not take place until one reaches the signage which advises that the cemetery is closed during hours of darkness (signage which is *well behind* the stone pylons)—the ordinance "encourages arbitrary and discriminatory enforcement," and therefore is not enforceable. *See Hill*, 530 U.S. at 732. In the instant case, Officer Albea stated that since the removal of the actual gates from the cemetery entrance, he "believe[d]" the gates referred to in the municipal ordinance were the stone pylons near the cemetery entryway. R31 at 22:18-20. An officer's "belief" is not something which can apprize an ordinary citizen of when the ordinance has been violated insofar as a private citizen is incapable of knowing what Officer Albea "believes." *See Zwicker*, 41 Wis. 2d 497 at 507; *King*, 148 Wis. 2d at 546.

Because the ordinance at issue in the instant matter could not be objectively enforced in a manner which avoids mere guesswork, Mr. Raddemann's Fourth Amendment right to be free from unreasonable searches and seizures was violated when Officer Albea detained him for being in the Pleasant Hills Cemetery after hours of darkness, allegedly in violation of Hartford Municipal Ordinance No. 27.13(1).

CONCLUSION

Because Officer Albea acted under his personal belief as to what constituted the "gates" of the Pleasant Hills Cemetery, as opposed to an objective standard by which any member of the motoring public could determine whether he was acting in violation of Hartford Municipal Ordinance No. 27.13(1), Mr. Raddemann proffers that Officer Albea lacked a reasonable suspicion to detain him in violation of the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution, and respectfully requests that this Court reverse the decision of the lower court and remand this matter for further proceedings not inconsistent with the Court's judgment.

Dated this 11th day of July, 2022.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
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Kevin R. Raddemann

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 3565 words.

CERTIFICATION OF APPENDIX

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. 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 first names and last initials 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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, including 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.

Dated this 11th day of July, 2022.

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