STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2022AP1839

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

NICHOLAS A. STILWELL,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, BRANCH II, THE HONORABLE MARTIN J. DE VRIES PRESIDING, CIRCUIT COURT CASE NO. 20-TR-5613

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Wisconsin Constitution

Wisconsin Statutes

United States Supreme Court Cases

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

STATEMENT OF THE ISSUE

WHETHER MR. STILWELL'S TRANSPORTATION FROM HIS HOME TO THE SCENE OF THE INCIDENT IN WHICH HE WAS ALLEGEDLY INVOLVED WAS CONSTITUTIONALLY UNREASONABLE UNDER THE CIRCUMSTANCES IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

> Circuit Court Answered: NO. The circuit court declined to address the foregoing issue directly, instead finding that because the vehicle involved in the accident at issue in this matter was registered to Mr. Stilwell and that he possessed the keys to the same when the officers interviewed him in his apartment, "there is probably enough there to arrest him . . . ." R29 at 35:19 to 36:5; D-App. at 102-03.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of whether a particular set of facts rises to the level of establishing a constitutional violation. 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

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue herein rarely complicates any case involving impaired driving. It is of such an uncommon occurrence that publishing this Court's decision would likely have little impact upon future cases, especially given that the common law, in its present incarnation, provides clear direction with respect to the issue raised by Mr. Stilwell.

STATEMENT OF THE CASE

Mr. Stilwell was charged in Dodge County with, *inter alia*, Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a), arising out of an incident which occurred on November 1, 2020. R29 at 7:10-24.

Mr. Stilwell timely requested a hearing on the reasonableness of his alleged refusal to submit to an implied consent test and a hearing on the propriety of Mr. Stilwell's refusal was thereafter held on October 7, 2022. R29. Prior to the refusal hearing, Mr. Stilwell filed a pretrial motion in a companion case which charged him with Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), which motion alleged that his Fourth Amendment right to be free from unreasonable seizures was violated when the arresting officer transported him from his residence—after being searched, placed in handcuffs, and secured in the rear seat of a locked squad car—to the scene at which the accident occurred. R7 at 71:22 to 72:24.

When defense counsel attempted to preserve the issue raised in the companion case at the refusal hearing by laying a factual foundation for his position, the circuit court referred to its earlier decision in the other matter, indicating that it "disagreed with [defense counsel's position, but] in the end it probably doesn't make a whole lot of difference." R29 at 25:23 to 30:25. Mr. Stilwell was then permitted to preserve the issue for appeal by laying the requisite foundation.

Ultimately, the circuit court found Mr. Stilwell's refusal to submit to an implied consent test unlawful, finding that because the vehicle involved in the accident at issue in this matter was registered to Mr. Stilwell and that he possessed the keys to the same when the officers interviewed him in his apartment, "there is probably enough there to arrest him . . . ." R29 at 35:19 to 36:5; D-App. at 102-03.

It is from the adverse decision of the circuit court that Mr. Stilwell now appeals to this Court by Notice of Appeal filed on October 27, 2022. R20.

STATEMENT OF FACTS

On November 1, 2020, Nicholas Stilwell was detained at his residence in the City of Juneau by Officer Michael Cypert of the Juneau Police Department for allegedly having been involved in a property damage accident. R29 at 7:10 to 9:17. Mr. Stilwell was approached by Officer Cypert at his residence because law enforcement officers could not locate the vehicle matching the description of the vehicle involved in the accident while it was being driven, however, his dispatcher eventually provided Officer Cypert with the name of the registered owner. R29 at 8:1 to 9:3.

After arriving at the Stilwell residence, Officer Cypert examined the Stilwell vehicle "to look for signs of involvement in a crash." R29 at 9:4-6. Officer Cypert did not find any indication that Mr. Stilwell's vehicle had been involved in a crash. R29 at 9:7-8; 21:21 to 22:5; 22:9-12. Nevertheless, Officer Cypert elected to ring "the buzzer to [Mr. Stilwell's] apartment complex," after which Mr. Stilwell answered the door. R29 at 9:12-17.

After Mr. Stilwell answered the door, Officer Cypert observed that he had slurred speech, bloodshot eyes, and an odor of intoxicants emanating from his person. R29 at 10:3-7. Based upon these observations, the officer asked Mr. Stilwell whether he had been drinking, and Mr. Stilwell responded that he had. R29 at 11:7-13. When Officer Cypert asked Mr. Stilwell whether he had been driving his vehicle, Mr. Stilwell *repeatedly* denied that he had been operating the vehicle. R29 at 11:14-16; 22:20-22; 23:18-20.

Officer Cypert then asked Mr. Stilwell for identification, to which Mr. Stilwell replied that his identification was in his apartment, whereupon Mr. Stilwell gave permission to Officer Cypert and his cover officer to enter the apartment while he retrieved his identification. R29:11-18-21. During this time, Officer Cypert asked Mr. Stilwell further questions about his potential involvement in the incident under investigation. R29 at 12:2. It was during this interrogation that Officer Cypert observed Mr. Stilwell remove a set of keys from the pocket on his sweatshirt. R29 at 12:23 to 13:6. Officer Cypert also believed that during questioning, Mr. Stilwell

"provided inconsistent statements unusual to [him] relative to what [he] believed to be reasonable or normal for most people." R29 at 13:3-6.

Based upon the foregoing observations, Officer Cypert asked Mr. Stilwell to submit to field sobriety testing. R29 at 13:7-11. Mr. Stilwell consented to perform the requested tests, allegedly failing the same. R29 at 14:2 to 16:7. Additionally, the officers had Mr. Stilwell submit to a preliminary breath test which yielded a result above the prohibited limit. R29 at 16:8 to 17:3.

After he failed both the field sobriety tests and a preliminary breath test, Mr. Stilwell was handcuffed behind his back and secured in the locked, rear portion of Officer Cypert's squad. R29 at 25:7-14. Despite being handcuffed and secured in a squad car, Officer Cypert informed Mr. Stilwell that he was only being "detained," not arrested. R29 at 17:4-6; 24:10-15; 24:25 to 25:2.

The reason that Officer Cypert told Mr. Stilwell that he was not under arrest was due not only to the fact that he denied driving his vehicle and that his vehicle had no damage, but additionally, "no description of the person the citizen saw driving the vehicle" had been given. R29 at 13:20-23; 20:8-12; 23:12-17. In fact, it was not even known whether the citizen witness personally observed the accident occurring. R29 at 21:11-20. Similarly, the time at which the accident occurred was not even known. R29 at 22:13-14; 33:20-24.

Based upon the foregoing, it was necessary for Officer Cypert to determine the identity of the alleged hit-and-run suspect, and in order to do this, he had to return to the location of the incident to review the "video surveillance of that area" which was maintained by "the C&C Coin Laundry business . . . ." R29 at 17:7-12. To accomplish this end, Officer Cypert indicated that the trip from the Stilwell residence to the scene of the incident took approximately three minutes, and after arriving at the laundry, it took another thirty minutes for Officer Cypert to locate and review the video recording. R29 at 32:16 to 33:1. Throughout this thirty-three minute period, Mr. Stilwell remained handcuffed behind his back and secured in the rear seat of the officer's squad. R29 at 33:2-4. During this time as well, the "doors of the squad car were closed . . . ." R29 at 33:5-7.

Ultimately, Officer Cypert concluded that Mr. Stilwell had been operating his vehicle at the time of the accident and it was then that he informed Mr. Stilwell that he was "under arrest" for operating while intoxicated. R29 at 18:1-6.

STANDARD OF REVIEW

This appeal presents a question of whether an undisputed set of facts rises to the level of establishing a constitutional violation. As such, this Court upholds the lower court's findings of fact unless they are clearly erroneous, but independently reviews whether those facts meet the constitutional standard. *State v. Samuel*, 2002 WI 34, ¶ 15, 252 Wis. 2d 26, 643 N.W.2d 423.

ARGUMENT

I. FRAMING THE ISSUE PRESENTED.

Before beginning the analysis of the issue Mr. Stilwell presents for this Court's review, it is first incumbent upon him to clarify precisely what it is he is alleging.

As a starting point for focusing the issue presented by this appeal, there is one important constitutional notion which must be recalled throughout the entirety of Mr. Stilwell's argument, namely that "reasonableness" is the *sine qua non* of Fourth Amendment jurisprudence. Fourth Amendment "reasonableness" is among the most fundamental and well settled of all constitutional concepts. *See, e.g., State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d (1983); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). To pass constitutional muster under the Fourth Amendment, a search or seizure must, among all other things, be reasonable. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996)("[T]he 'touchstone of the Fourth Amendment is **reasonableness**.'"); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Questions arising under the Fourth Amendment "turn[] on considerations of reasonableness . . . ." *State v. Richter*, 2000 WI 58, ¶ 30, 235 Wis. 2d 524, 612 N.W.2d 29; *see also, State v. Smith*, 131 Wis. 2d 120, 230, 388 N.W.2d 601 (1986). It is to this standard to which all government conduct must ultimately conform.

Thus framed, Mr. Stilwell proffers that it was constitutionally ***un***reasonable under the rubric of the Fourth Amendment for Officer Cypert to remove him from his residence in handcuffs, secured in the rear seat of a squad car, and left there for thirty-three minutes, to further investigate whether he was actually the operator of the vehicle alleged to have been involved in a hit-and-run property-damage accident.

II. IT WAS CONSTITUTIONALLY UNREASONABLE FOR OFFICER CYPERT TO REMOVE MR. STILWELL IN THE MANNER HE DID IN ORDER TO FURTHER INVESTIGATE THE OFFENSE AT ISSUE.

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 police action is not tolerated under the umbrella of the Fourth Amendment. As the Wisconsin Supreme Court noted in *Boggess*, 115 Wis. 2d 443, "[t]he basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id*. at 448-49; *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). Ultimately, "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added).

B. Constitutional and Statutory Authority to Remove a Suspect to an Alternate Location.

Terry v. Ohio, 392 U.S. 1 (1968), permits law enforcement officers to temporarily detain individuals in order to investigate whether a violation of the law is afoot. Otherwise known as an "investigatory detention," the Wisconsin Legislature has codified the *Terry* stop in Wis. Stat. § 968.24 which allows for the temporary detention of a suspect "in the vicinity where the person was stopped." The plain language of § 968.24 thus allows for the removal of a suspect from one

location to another, so long as it is in the same "vicinity." Wis. Stat. § 968.24 (2021-22).[1]

If there was any question regarding whether a suspect may be removed from one vicinity to another during an investigatory detention, it was settled by the Wisconsin Supreme Court in *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (1997). The *Quartana* court concluded that both *Terry* and § 968.24 allowed for an individual to be removed from the scene of their original detention to another location so long as that removal to another location was "reasonable" under the auspices of the Fourth Amendment. *Id*. at 448; *see generally*, *Florida v. Royer*, 460 U.S. 491, 496 (1983).

More particularly, *Quartana* involved a circumstance in which law enforcement officers were investigating an automobile accident, as was precisely the case with Mr. Stilwell. *Quartana*, 213 Wis. 2d at 443. During the course of their investigation, they learned that the driver of the automobile had walked to his parent's house approximately one mile away. *Id*. at 443-44. A Brookfield Police Officer was dispatched to ask Quartana whether he had been involved in the accident. *Id*. at 444. Upon making contact with Quartana and discovering that he had been operating the vehicle and appeared to have bloodshot eyes and smelled of intoxicants, the officer informed Quartana that he would need to accompany him back to the scene of the accident to speak with the investigating Wisconsin State Trooper. *Id*. Quartana consented after asking whether his parents could drive him there—a request which was denied—and was returned to the scene where he was eventually arrested for operating a motor vehicle while under the influence of an intoxicant. *Id*.

On appeal, Quartana argued that the investigatory detention of his person was transmogrified into an illegal custody when he was non-consensually removed from his parent's home back to the scene of the accident. *Id*. at 444-45. The *Quartana* court framed the question before it this way: "[W]e must determine, given the totality of the circumstances, whether a reasonable person in the suspect's position

[1]For purposes of judicial economy, Mr. Stilwell will refer to the Laws of 2021-22 even though the date of the incident at issue herein was controlled under the Laws of 2019-20 because the statutes at issue have not substantively changed in the interim.

would not have considered himself or herself to be in custody given the degree of restraint under the circumstances." *Id.* at 449-50. The *Quartana* court further admonished that "[a]s courts, we must guard against police misconduct through overbearing or harassing techniques that tread upon people's personal security without the objective evidentiary justification the Constitution requires." *Id*. at 448 (citations omitted).

For the reasons set forth below, Mr. Stilwell posits that "given the degree of restraint under the circumstances" of his removal from his residence to the alternate location at issue, his detention violated the Fourth Amendment's overarching "reasonableness" requirement.

C. Application of the Law to the Facts.

In the instant case, it cannot be gainsaid that the circumstances surrounding Mr. Stilwell's "detention" are light years distant from those describe as "reasonable" in *Quartana*. For example, *unlike* Mr. Stilwell, Quartana was not handcuffed behind his back during his transportation from his parent's residence to the scene of the incident in that case. Likewise, Quartana did *not* have to perform field sobriety tests prior to his transportation, nor was he directed to submit to a preliminary breath test. Finally, but perhaps most importantly, Quartana was not left in the locked rear seat of a squad car for **thirty-three minutes in handcuffs** when he was returned to the scene of his accident.

This last distinguishing fact is worth further emphasis. Investigatory detentions "are meant to be brief interactions with law enforcement officers, ..." *State v. Floyd*, 2017 WI 78, ¶ 21, 377 Wis. 2d 394, 898 N.W.2d 560, citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). "[T]he principal function of the investigative stop is to ***quickly*** resolve" whether the officer's suspicion is founded or unfounded. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Any action on the part of law enforcement officers which causes an undue delay in the processing of an individual for Fourth Amendment purposes is, itself, constitutionally unreasonable as it is beyond the permissible scope of what is tolerated under the umbrella of the Fourth Amendment. The *Terry* stop is supposed to conform itself to "***the least intrusive means*** reasonably available to verify or dispel the officer's

suspicion in a ***short period of time***." *State v. Wilkens*, 159 Wis. 2d 618, 626, 465 N.W.2d 206 (Ct. App. 1990)(emphasis added), quoting *Royer*, 460 U.S. at 500.

In the instant case, both the "short period of time" and "least intrusive means" notions described above were grossly violated. First, with respect to the use of the "least intrusive means" to investigate this matter, Officer Cypert's testimony establishes that the least intrusive means were not employed to investigate whether Mr. Stilwell could be identified as the driver involved in the accident because he was handcuffed behind his back and locked into the rear seat of a squad car for thirty-three minutes before the identity of the driver could be ascertained. If anything, this conduct can only be characterized as the "***most*** intrusive means" by which officers could have conducted an investigation.

Second, there was nothing "brief" about the duration of Mr. Stilwell's confinement. Instead of "formally arresting" Mr. Stilwell, Officer Cypert elected to return him to the scene of the incident to conduct an investigation into the identity of the driver involved in the accident. According to Officer Cypert's testimony, he left Mr. Stilwell handcuffed in the secured rear seat of his squad for a ***full thirty-three (33) minutes*** during his investigation before taking Mr. Stilwell into formal custody. If this does not fail to meet the "quickly resolve" and "brief interaction" standards set forth in *Floyd* and *Anderson*, one would be hard pressed to ascertain what would violate them. Would an hour of handcuffed custody violate the standard? Thirty-four minutes instead of thirty-three? The officer's entire shift? Surely, the *Quartana* court could not have contemplated that removal of a subject from one location to another for the purpose of conducting an investigatory detention would include over one-half hour of handcuffed confinement.

Law enforcement officers should not be permitted to "haul suspects about in handcuffs" while they investigate alleged criminal activity. Clearly, as Officer Cypert conceded during his direct and cross-examinations, the reporting witness in this case did not provide a description of the driver of the vehicle at issue; it was not even known whether the reporting citizen even witnessed the accident; the time at which the accident occurred remained unknown; and Mr. Stilwell *repeatedly* denied being the driver of the vehicle involved. Based upon this paucity of information, it was absolutely necessary for Officer Cypert to establish the identity of the suspect

before he could make a "formal" arrest of Mr. Stilwell. That is not what was "unreasonable" about the officer's conduct. What made his conduct unreasonable was the manner in which he conducted his investigation—a manner which is utterly distinguishable from the facts of *Quartana*.

Mr. Stilwell's point in the foregoing regard is perhaps best made by posing a hypothetical. Assume, *arguendo*, that the surveillance video Officer Cypert reviewed at the C&C Laundry irrefutably established that Mr. Stilwell was *not* the operator of the vehicle involved in the incident. Is the officer supposed to return to his squad, unlock the rear door, extricate and uncuff Mr. Stilwell after he has been confined for **thirty-three minutes**, and release him with nothing more than a "Hey, sorry buddy, you're not our guy" send-off? Is that a situation the Framers of the Constitution would find "reasonable," let alone tolerable, given that they just left a country which once had "presentment juries" and issued Bills of Attainder? Mr. Stilwell doubts it, and if this Court doubts it as well, it should find his detention constitutionally unreasonable and reverse the judgment of the court below. An officer whose instinct is to arrest first and get proof later should not be left unchecked.

CONCLUSION

Mr. Stilwell respectfully requests that this Court reverse the decision of the circuit court on the ground that Mr. Stilwell's right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution was violated given the circumstances surrounding his detention and relocation.

Dated this 5th day of January, 2023.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 3,727 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 5th day of January, 2023.

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