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**STATE OF WISCONSIN**

**COURT OF APPEALS**

**DISTRICT IV**

**APPELATE CASE NO. 2022AP1839**

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**NICHOLAS STILWELL,**

**Defendant-Appellant.**

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**ON APPEAL FROM AN ORDER FINDING MR. STAUDE  
UNREASONABLY REFUSED TO PROVIDE A SAMPLE OF HIS BLOOD,  
PURSUANT TO WIS. STAT. 343.305(9)(A), ENTERED IN DODGE  
COUNTY CIRCUIT COURT ON OCTOBER 7, 2022, THE HONORABLE  
MARTIN J. DE VRIES PRESIDING.**

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**PLAINTIFF-RESPONDENT'S BRIEF**

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**STATEMENT ON ORAL ARGUMENT AND  
PUBLICATION**

The Respondent agrees with the Appellant, in that, oral argument and publication is not necessary for the reasons already stated by the Appellant.

## STATEMENT OF THE CASE

The Respondent supplements the following facts in addition to the facts provided by the Appellant. Officer Cypert was dispatched to a hit-and-run at approximately 10:38 pm on November 1, 2020. (Refusal Hearing Transcript [RHT] pg. 7, lines 10-11; 18). The information provided from dispatch was that the caller observed a red passenger vehicle crash into an unattended parked vehicle in the rear parking lot of that area and leave the scene. (RHT pg 8, lines 1-3). Dispatch advised that the registered owner of the suspect vehicle was Nicholas Stilwell. (RHT pg 8, lines 18-25).

Officer Cypert made contact with Mr. Stilwell at the address from the registration. (RHT pg 8, lines 14-17; pg 9, lines 16-17). Officer Cypert observed a strong odor of intoxicants, glassy and bloodshot eyes and slurred speech. (RHT pg 10, lines 4-7). Mr. Stilwell admitted to drinking. (RHT pg 11, lines 12-13). Officer Cypert received information from dispatch that Mr. Stilwell has five prior OWI related convictions. (RHT pg 12, lines 16-21). Mr. Stilwell removed a set of keys from his pocket that were later determined before leaving the address to be the keys from the suspect vehicle. (RHT pg 13, lines 1-3; pg 34, lines 5-16). Mr. Stilwell indicated he is the only one with access to the suspect vehicle and would be the only person driving the vehicle. (RHT pg 13, lines 13-15).

Officer Cypert puts Mr. Stilwell through field sobriety tests with the following results: 6/6 on the HGN, 3/4 on the one leg stand, and 7/8 on the walk and turn (RHT pg 14 line 4- pg 15, line 25). Officer Cypert administers a PBT to Mr. Stilwell which comes back at 0.287. (RHT pg 17, line 3). Officer Cypert then transports Mr. Stilwell 3 minutes back to the incident scene. (RHT pg 32, lines 16-19). Officer Cypert was aware that the C & C Coin Laundry business is located in the area of the crash. (RHT pg 17, lines 10-11). Officer Cypert testified that the owner of the laundry business is also employed in law enforcement and he knows there is security footage through that business. (RHT pg 17, lines 9-15; pg 24, lines 6-9). Officer Cypert

observes Mr. Stilwell on the security footage entering the suspect vehicle in the driver's seat, driving the vehicle in reverse in the parking lot, colliding with the unattended parked car, and leaving the scene. (RHT pg 17, lines 17-21). Officer Cypert estimated that from the time Mr. Stilwell was detained until the time Officer Cypert had reviewed the video footage and placed Mr. Stilwell under arrest was 30 minutes. (RHT pg 32, line 22- pg 33, line 1).

## **ARGUMENT**

### **I. IT WAS REASONABLE FOR OFFICER CYPERT TO TRANSPORT MR. STILWELL BACK TO THE SCENE OF THE INCIDENT.**

Under certain circumstances, a law enforcement officer may temporarily detain a person for the purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest. *State v. Blatterman*, 2015 WI 46, ¶ 18, also citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), additional citations omitted. When someone is detained under a *Terry* investigation they may be moved “in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest” *State v. Quartana*, 213 Wis.2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). There is a two prong test to determine the legality of the move. *Id.* The first prong is whether the person was moved within the vicinity of the stop. *Id.* The second prong is whether the purpose of moving the person to that vicinity is reasonable. *Id.*

Prong 1. Officer Cypert testified that when he transported Mr. Stilwell back to the scene that it was a mere three minutes, (RHT pg 32, lines 16-19), which clearly indicates that Mr. Stilwell was moved within the vicinity of the stop.

Prong 2. Officer Cypert had conducted the OWI investigation was wanted to do his due diligence in confirming the identity of the driver of the vehicle, which is why Officer Cypert transported Mr. Stilwell back to the vicinity of the crash, so that he could review

the security footage. While Mr. Stilwell denied being the driver, law enforcement is NOT required to take someone at their word and accept an innocent explanation of the events. *Navarette v. California*, 572 U.S. 393, 403, 134 S. Ct. 1683, 1691, 188 L. Ed. 2d 680 (2014). In fact to do so would mean that Officer Cypert would be derelict in his duties as a law enforcement officer. This Court would be hard pressed to find an officer that hasn't heard "I've only had two drinks" or "I wasn't the driver" when in fact further investigation leads to the exact opposite conclusion. This is exactly why law enforcement conducts investigations, both for the safety of the community and the rights of the accused. In the present case Mr. Stilwell was well aware of the consequences of drunk driving, having been through it 5 other times, so it would not be in his best interest to confess that in fact he had been driving the vehicle, especially in light of his .02 restriction and his PBT result of 0.287. (RHT pg 17, line 3).

Once reasonable suspicion of drunk driving arises, "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." *Sokolow*, 490 U.S., at 11, 109 S.Ct. 1581. This would be a particularly inappropriate context to depart from that settled rule, **because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.**

*Navarette v. California*, 572 U.S. 393, 404 (2014). emphasis added. The alternative to Officer Cypert detaining the defendant would be to leave him at his residence with the opportunity to leave his residence again and commit a 7<sup>th</sup> OWI and potentially harm or kill someone, which is not a reasonable alternative. Thirty minutes in the back of a squad car is a minor intrusion versus the public interest of keeping drunk drivers off the road.

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more

information, **may be most reasonable** in light of the facts known to the officer at the time.

*State v. Jackson*, 147 Wis.2d 824, 434 N.W.2d 386 (1989), citations omitted.

The move was clearly reasonable under the circumstances based on the information known to Officer Cypert and the purpose for the move, that being to view the security footage and confirm the identity of the driver.

### CONCLUSION

In conclusion, it was reasonable for Officer Cypert to transport Mr. Stilwell back to the scene of the incident in order to review the security footage. The respondent respectfully requests that Mr. Stilwell's refusal conviction be upheld and affirmed.

Respectfully submitted April 10, 2023.

*Electronically signed by Andrea Will*  
Andrea Will  
District Attorney  
Dodge County District Attorney's Office  
State Bar No. 1064389



**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 9 pages and 1,679 words.

Dated April 10, 2023,

*Electronically signed by Andrea Will*  
Andrea Will  
District Attorney  
Dodge County District Attorney's Office  
State Bar No. 1064389

**CERTIFICATE OF COMPLIANCE WITH RULE 19-02**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule of Wisconsin's Appellate Electronic Filing Project, Order NO. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the Court and served on all parties either by electronic filing or by paper copy.

Dated April 10, 2023,

*Electronically signed by Andrea Will*  
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