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COURT OF APPEALS

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

**Appeal No. 2023AP000755
Jefferson County Circuit Court Case Nos. 2023TR000124**

In the Matter of the Refusal of Jacob Karl Schindler:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB KARL SCHINDLER,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING MR. SCHINDLER'S REFUSED
CHEMICAL TESTING IN JEFFERSON COUNTY, THE
HONORABLE BENNETT J. BRANTMEIER, JUDGE,
PRESIDING**

**THE REPLY BRIEF OF THE DEFENDANT-APPELLANT
JACOB KARL SCHINDLER**

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ARGUMENT

The State argues Deputy Eisenberg possessed sufficient probable cause to arrest Mr. Schindler for OWI after he refused field sobriety testing. The State suggests that even though multiple deputies opened Mr. Schindler's car door, pulled him to the ground, handcuffed him and placed him in the rear of their squad car, he was not under arrest at that moment. Brief of Responded page 10.

An officer can clearly temporarily detain an individual for purposes of investigating criminal activity. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868 20 L.#d.2d 889 (1968). However, an initial detention is transformed into an arrest if a reasonable person in the defendant's position would have considered himself to be 'in custody' given the degree of restraint under the circumstances." *State v. Swanson*, 164 Wis.2d 437, 446-48, 475 N.W.2d 148 (1991) abrogated on other grounds by *State v. Sykes*, 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277. "The circumstances of the situation including what has been communicated by the police officers, either by word or action, shall be controlling under the objective test." *Id.*

Here, Mr. Schindler was sitting in his vehicle when officers arrived. The vehicle was stuck in a ravine. Mr. Schindler's window was down, and officers asked him questions, and Mr. Schindler indicated he did not answer questions. Deputies asked him to get out of the vehicle. When Mr. Schindler reached for a pen Deputy Eisenberg opened Mr. Schindler's door, pulled him out of his vehicle to the ground, held him against the vehicle until another officer arrived, handcuffed him once the third officer arrived, finally placing him into the rear of the officer's squad. Sometime later, officers asked Mr. Schindler (while he was still in handcuffs) to perform field sobriety tests. Employing the objective reasonable person standard and considering the degree of restraint and the actions communicated by the officers, it is apparent that a reasonable person in Mr. Schindler's position would have considered himself to be in custody when he was handcuffed in the rear of the deputy's squad. The State's argument that the arrest occurred only after Mr. Schindler refused field sobriety tests fails.

The State also contends deputies possessed the requisite probable cause to arrest Mr. Schindler for OWI. The State correctly concedes the record does not support the fact that

deputies had knowledge of Mr. Schindler's prior offenses when the arrest occurred.

The evidence established the deputies came upon a vehicle in a ravine. The vehicle was off the roadway. Deputies provided no information as to anyone observing the vehicle being driven on the roadway and did not provide information as to the time of operation. When deputies came upon Mr. Schindler, they observed indicia of intoxication.

The State cites several cases in support of their proposition. However, each case has significantly different facts than those herein. In *In re Refusal of Smith*, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243, the arresting officer actually observed the deviant driving, and thus established the specific time of operation. *Id* at para 8-9. Here, the deputies did not observe Mr. Schindler operating the vehicle on the roadway.

Similarly, in *State v. Dunn*, 158 Wis.2d 138, 462 N.W.2d 538, the arresting officer observed the vehicle drive into the gas station and stop at the pumps. *Id* at 142. Again, the arresting officer actually observed the driving and specifically established the moment of operation.

In *State v. Pfaff*, 2004 WI App 31, 269 Wis.2d 786, 676 N.W.2d 562, the deputies were dispatched to a two-vehicle

accident. Both vehicles were at the scene, and the defendant admitted driving and being the lone occupant of the vehicle. The officer overheard the defendant on his phone indicate he was driving a vehicle and another vehicle crossed the center line toward his vehicle. The defendant's version was inconsistent with the evidence at the scene.

In *State v. Kasian*, 207 Wis.2d 611, 558 N.W.2d 687, officers came upon a one vehicle accident. The officers observed a vehicle had struck a telephone pole and observed an individual lying on the ground next to the vehicle. The engine of the vehicle was running and smoking. The officer recognized the injured man as Kasian. *Id* at 622. Due to the extent of Mr. Kasian's injuries, officers did not perform field sobriety tests.

Here, the arrest occurred when officers pulled Mr. Schindler out of the vehicle, forced him to the ground, handcuffed him and placed him in the rear of their squad. The distinction here is there is no evidence that Mr. Schindler was injured. Furthermore, prior to pulling Mr. Schindler out of the vehicle, while they asked him to exit the vehicle, they specifically did not request him to exit the vehicle to perform field sobriety tests.

CONCLUSION

Based on the degree of restraint and conduct of the officers, a reasonable person in Mr. Schindler's position would have believed he was in custody when officers opened his car door, pulled him to the ground, held him until another officer arrived, handcuffed him and placed him in the rear of a squad car. The arrest was not supported by probable cause. Because of this, the court's finding of refusal should be reversed and vacated and the matter should be dismissed.

Dated this 9th day of October, 2023.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 10 pages. The word count is 1700.

Dated this 9th day of October, 2023.

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of October, 2023.

Respectfully submitted,

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