STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case Nos. 2023AP1813 & 2023AP1814

CITY OF HARTFORD,

Plaintiff-Respondent,

-vs-

EDWARD H. WHITE,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH IV, THE HONORABLE SUSAN J. GIERNOTH PRESIDING, TRIAL COURT CASE NOS. 21-TR-1950 & 21-TR-1951

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF AUTHORITIES

[1]Even though Mr. White's alleged offenses occurred under the law as it existed in 2021, for ease of reference, Mr. White cites to the Laws of 2023-24 since there has been no substantive change to the relevant statutes at issue in the interim.

Federal Court of Appeals & District Court Cases

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

STATEMENT OF THE ISSUE

WHETHER MR. WHITE'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WAS VIOLATED WHEN THE ARRESTING OFFICER ADMINISTER FIELD SOBRIETY TESTS TO HIM AFTER HIS CONSTRUCTIVE ARREST?

> Trial Court Answered: NO. The trial court denied Mr. White's motion from the bench, concluding that while the officers engaged in a "high risk stop" of Mr. White, because neither handguns nor handcuffs were used, Mr. White was not in custody at the time he submitted to field sobriety tests and therefore his Fourth Amendment rights were not violated when he submitted to the same. R83 at 4:15 to 8:25; D-App. at pp. 104-10.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal primarily presents a question of law based which can be addressed by the application of legal principles to the facts adduced at the evidentiary hearing in this matter and, therefore, is not the type of question which would 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 of such an esoteric nature that publishing this Court's decision would likely have little impact upon future cases.

STATEMENT OF THE CASE

Mr. White was charged in Washington County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—First Offense, contrary to Wis. Stat. § 346.63(1)(a); and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—First Offense, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on June 24, 2021. R1.

Mr. White retained private counsel who entered a plea of Not Guilty on his behalf to both foregoing counts, after which counsel for Mr. White filed several pretrial motions. R22; R23; R24 (2021-TR-1950); R21; R22; R23 (2021-TR-1951). An evidentiary hearing was held on Mr. White's motions on January 24, 2022. R37 (2021-TR-1950); R35 (2021-TR-1951).[2] At this hearing, the State called a single witness, Officer Kali Reiman of the Hartford Police Department. R35 at pp. 11-40. Among the issues raised at the hearing was whether Mr. White's Fourth Amendment right to be free from unreasonable searches and seizures was violated when the arresting officer had him submit to a battery of field sobriety tests after he was in constructive custody. R35 at 3:25 to 4:5.

Ultimately, by oral decision delivered on April 8, 2022, the circuit court denied Mr. White's motions. R83; D-App. at 102-09. The court concluded that while the officers engaged in a "high risk stop" of Mr. White, because neither handguns nor handcuffs were used, Mr. White was not in custody at the time he submitted to field sobriety tests and therefore his Fourth Amendment rights were not violated when he submitted to the same. R83 at 4:15 to 8:25; D-App. at pp. 104-08.

Subsequent to the court's decision, Mr. White tried his case to the court, after which he was found guilty of both operating while intoxicated and operating with a prohibited alcohol concentration. Thereafter, a conviction status report was prepared by the court and entered on September 22, 2023. R69; D-App. at 101.

It is from the adverse decision of the lower court that Mr. White appealed to this Court by Notice of Appeal filed on September 27, 2023. R65.

STATEMENT OF FACTS

On June 24, 2021, Mr. White, was stopped, detained and arrested in the City of Hartford by Officers Kali Reiman and Jaret Knudson of the Hartford Police Department for allegedly making an illegal U-turn and failing to stop his vehicle when signaled to do so. R35 at 13:1 to 14:13.

[2] For judicial economy, since both appellate cases arise out of a single incident, Mr. White will refer exclusively to Document Record No. 35 in Circuit Course Case No. 21-CT-1951 when referring to the transcript of the evidentiary hearing from this point forward.

After Mr. White stopped in front of his garage door, Officers Reiman and Knudson exited their squad, using it as cover, and over a loudspeaker system ordered Mr. White to place his hands outside his vehicle. R35 at 15:1-25; 23:3-20; 25:24 to 26:4. The officers then ordered him to turn off his vehicle, open his car door from the outside, and slowly step out. R35 at 26:21 to 27:12; 28:10-13.

During Mr. White's effort to open his car door, instead of doing it from the outside as commanded, he placed his hands back inside the vehicle to open the door, whereupon Officer Knudson instructed him to put his hands back outside of the vehicle. R35 at 27:13 to 28:9. Mr. White complied with this command, and upon exiting his vehicle, he was instructed to keep his hands over his head. R35 at 29:2-4. After Mr. White was outside of his vehicle with his arms raised, the officers elected to approach him. R35 at 29:5-9. As they approached Mr. White, he kept his hands above his head. R35 at 30:3-6.

Once Officer Rieman reached Mr. White, she asked him where his wallet was, and after she was told that it was in his back pocket, Mr. White was not allowed to remove it on his own accord, but rather, Officer Rieman "grabbed it" out of his back pocket. R35 at 30:21 to 31:5. After Mr. White's wallet was retrieved, Officer Rieman gave it to another officer who maintained possession of it throughout the entire time Mr. White was detained. R35 at 32:19 to 33:1. Shortly thereafter, two additional officers arrived in another squad car. R35 at 31:15 to 32:9.

At the evidentiary hearing, Officer Rieman testified that when they initially stopped Mr. White's vehicle, they parked "a couple of hundred feet" behind him, gave commands over the loudspeaker, and requested additional cover officers because they considered Mr. White's detention to be, in law enforcement vernacular, a "high-risk stop." R35 at 24:21 to 26:2; 32:10-18.

Once contact had been made with Mr. White, Officer Rieman observed that he had an odor of intoxicants about his person, bloodshot eyes, and slurred speech. R35at 17:1-3. Based upon these observations and Mr. White's statement that he had "five drinks" earlier, Officer Rieman directed Mr. White to perform a battery of field sobriety tests. R35 at 17:4-16. According to the officer, Mr. White submitted to the tests. R35 at 17:18-25. Mr. White apparently exhibited sufficient

indicia of impairment such that he was ultimately formally arrested for operating while intoxicated. R35 at 18:6-20; 20:16-20.

STANDARD OF REVIEW ON APPEAL

The question presented to this Court involves a mixed question of law and fact, "with the ultimate determination that an arrest was made is subject to *de novo* review." *State v. Anker*, 2014 WI App 107, ¶ 15 n.4, 357 Wis. 2d 565, 855 N.W.2d 483, citing *State v. Carroll*, 2008 WI App 161, ¶ 25, 314 Wis. 2d 690, 762 N.W.2d 404, *aff'd* 2010 WI 8, 332 Wis. 2d 299, 778 N.W.2d 1.

ARGUMENT

I. MR. WHITE WAS UNDER CONSTRUCTIVE ARREST AT THE TIME HE SUBMITTED TO FIELD SOBRIETY TESTS.

Before the core of the issue raised by Mr. White can be addressed, it is first necessary to establish that he was under constructive arrest at the time he submitted to field sobriety tests. Since the "ultimate determination that an arrest was made [is] subject to *de novo* review," an examination of how the facts of this case square with the constructive arrest standard is a natural starting point. *Anker*, 2014 WI App 107, ¶ 15 n.4.

The concept of a "constructive arrest" is not an undemanding one to wrangle. As the *Anker* court observed:

> Admittedly, "the distinction between an arrest and an investigatory stop is not of easy delineation." *Wendricks v. State*, 72 Wis. 2d 717, 723, 242 N.W.2d 187 (1976). Factual context is critical. *Id*. at 723-24. "The standard used to determine the moment of arrest is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." *State v. Kiekhefer*, 212 Wis. 2d 460, 485, 569 N.W.2d 316 (Ct. App. 1997).

Id. ¶ 15.

While the standard against which constructive arrest may not succumb to "easy delineation," it is clear from the *Anker* court's characterization that "the

degree of restraint under the circumstances" plays a central role in that determination. To this end, the following indisputable facts have been established regarding his encounter with law enforcement officers on the evening of his stop.

First, multiple law enforcement officers were involved in Mr. White's detention, notably four.

Second, the officers who detained Mr. White were engaged in a "high-risk" stop.

Third, the high-risk stop involved the officers parking a significant distance behind Mr. White's vehicle (for safety reasons) and issuing commands to him over a loudspeaker system. Clearly, this is *not* a typical characteristic of a traffic stop.

Fourth, the officers issued a very atypical command to Mr. White to place his hands outside of his vehicle, and then from the outside, open his car door. This too is not commonplace in a conventional traffic encounter between law enforcement and the public.

Fifth, when Mr. White made the mistake of placing his hands inside his vehicle to open his door, he was given yet another command to keep them in plain sight.

Sixth, after exiting his motor vehicle, Mr. White was ordered to hold his hands in a manner which they could be seen. Once again, such a command is not archetypal for the average traffic violation.

Seventh, when he was approached, instead of being allowed to retrieve his wallet on his own, Officer Rieman "grabbed it" from his back pocket. This is, unassailably, akin to a search incident to *arrest* rather than to a mere pat-down search permitted under *Terry v. Ohio,* 392 U.S. 1 (1968). As the Wisconsin Supreme Court has observed in *State v. Richardson*, 156 Wis. 2d 128, 456 N.W.2d 830 (1990), "[w]e know of no cases from the United States Supreme Court or this court which expand the scope of a *Terry* pat-down beyond a limited search for weapons to include other 'contraband.' . . . The plain language of *Terry* and its progeny do not sanction the pat-down as an evidentiary search." *Id*. at 147. Thus,

reaching into Mr. White's pocket to "grab" his wallet is endemic of an arrest rather than an investigatory detention.

Finally, the fact that law enforcement officers maintained possession of Mr. White's wallet throughout their encounter with him is also indicative of a custody rather than a mere detention. In *State v. Luebeck*, 2006 WI App 87, 292 Wis. 2d 748, 715 N.W.2d 639, the court of appeals acknowledged that "the fact that the person's driver's license or other official documents are retained by the officer is a key factor in assessing whether the person is "seized" and, therefore, whether consent is voluntary." *Id*. ¶ 16.

Although the notion of a constructive arrest is subject to *de novo* review, it is telling that the circuit court elected to assign significant weight to the fact that neither handcuffs nor handguns were used by the officers in a manner which discounted all of the other factors present. *See* D-App. at 102-09. Mr. White contends that when *all* of the evidence is given its *due* weight, he was under constructive arrest at the time he performed the field sobriety tests, and this, for the reasons described below, is where the problem lies for the Respondent.

II. GIVEN THAT MR. WHITE WAS CONSTRUCTIVELY ARRESTED, HE CANNOT BE COMPELLED TO PRODUCE PHYSICAL EVIDENCE OF HIS ALLEGED IMPAIRMENT IN THE ABSENCE OF A WARRANT.

A. Statement of the Law Relating to the Fourth Amendment in General.

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 is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

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).

With respect to the breadth and importance of the protections afforded by the Fourth Amendment, the U.S. Supreme Court has warned:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property **should be liberally construed**. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, 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**.

Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971)(emphasis added), quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886).

So jealously guarded are the rights protected by the Fourth Amendment that the Supreme Court has *repeatedly* exhorted 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). It has expressly 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). "[D]ecisions of [the Supreme] Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958). Ultimately, the lesson to be gleaned from Fourth Amendment jurisprudence is that "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added).

Understanding and appreciating the purpose underlying the Fourth

Amendment as outlined above provides the context in which the issue raised in the instant appeal must be examined. With the notion that "the Fourth Amendment ... should be liberally construed in favor of the individual," attention can now be turned to Mr. White's specific concerns.

B. The Law Relating to Warrantless Searches in General.

In the foregoing spirit, it is well-established that "[w]arrantless searches are *per se* unreasonable under the Fourth Amendment" and are subject to "specifically established and well-delineated exceptions to the warrant requirement." *State v. Williams*, 2002 WI 94, ¶ 18, 255 Wis. 2d 1, 646 N.W.2d 834, citing *Katz v. United States*, 389 U.S. 347, 357 (1967). The "Fourth Amendment has been liberally construed to protect the security of person and property when exceptions to the warrant requirement are sought. Such exceptions are "**jealously and carefully drawn**." *State v. Douglas*, 123 Wis. 2d 13, 21-22, 365 N.W.2d 580 (1985)(emphasis added), quoting *Jones*, 357 U.S. at 499.

Instructive on the scope and extent of the protection afforded by the Fourth Amendment's warrant requirement is *Katz v. United States*, 389 U.S. 347 (1967), in which the Supreme Court examined whether the FBI violated Katz's rights when it surreptitiously listened to telephone conversations he had from a public telephone booth. In *Katz*, the government argued that the Supreme Court should allow for a telephonic surveillance exception to the Fourth Amendment without the need for a warrant to be obtained from a magistrate. *Id*. at 358. In flatly rejecting this argument, the Court observed:

> Omission of such [judicial] authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' *Beck v. Ohio*, 379 U.S. 89, 96. **And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.**' *Id*. at 97.

Id. at 358-59 (emphasis added).

Due to the nature of the issue raised by Mr. White, special note should be taken of the *Katz* Court's specific warning that the *scope of a search should* ***not*** *be*

left to the discretion of the police lest the Fourth Amendment be violated. Id.

In the foregoing regard, the Supreme Court has counseled that "the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." *Byars v. United States*, 273 U.S. 28, 32 (1927). The guarantee against illegal searches and seizures contained in the Fourth Amendment is a "jealously and carefully" guarded prerogative of the people "and the burden of showing that a case falls within an exception is upon the state." *Bies v. State*, 76 Wis. 2d 457, 463, 251 N.W.2d 461 (1977)(emphasis added), citing *Coolidge*, 403 U.S. 454; *State v. Pries*, 55 Wis. 2d 597, 603, 201 N.W.2d 153 (1972).

C. Specific Constitutional Prohibitions Against Compelled Production of Evidence.

Just as well-settled as the warrant requirement is the constitutional protection against compelling a person to provide evidence against him or herself absent an exception to the Fourth Amendment. *See, e.g., Schmerber v. California*, 384 U.S. 757 (1966).

A lengthy litany of Wisconsin and United States Supreme Court precedent has examined the question of what evidence, if any, a person may be compelled to provide the government during an ongoing criminal investigation. *See e.g., id.*; *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973); *Gilbert v. California*, 388 U.S. 263 (1967); *State v. Doe*, 78 Wis. 2d 161, 254 N.W.2d 210 (1977). What each of these cases has in common, *inter alia*, is that the evidence being compelled to be given was of such a nature that it was "open for all to see or hear." *Doe*, 78 Wis. 2d at 169, quoting *United States v. Doe (Schwartz)*, 457 F.2d 895, 898 (2d Cir.1972). That is:

> The physical characteristics of a person's voice, its tone and manner, **as opposed to the content of a specific conversation**, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

Dionisio, 410 U.S. at 14 (emphasis added). Along these same lines, it has been

held that a person has no expectation of Fourth Amendment protections in a photograph of his face, *United States v. Emmett*, 321 F.3d 669, 672 (7th Cir. 2003); nor is it an intrusion upon the Fourth Amendment to videotape an individual, *Caldarola v. County of Westchester*, 142 F. Supp. 2d 431, 439 (S.D.N.Y. 2001); nor does the Fourth Amendment protect an individual from having to stand in a line up, *Wade*, 388 U.S. at 221-22; nor can a person claim a violation of his Fourth Amendment rights in an ink-printing of his feet, *United States v. Ferri*, 778 F.2d 985, 995 (1985); *et al.*

What the foregoing precedent demonstrates is that those characteristics of a person which may directly be gleaned about them simply by walking down the street are not protected under the Fourth Amendment. However, when the line is crossed between what may be gleaned by any member of the public from ***casual*** observation of the individual to those things which, by their nature, reveal facts which a casual passerby may not be able to glean but for some compelled behavior—such as the seizure of a person's breath or requiring the performance of specific tasks[3]—the Fourth Amendment *is* then implicated.

The *Dionisio* Court based its conclusions upon a two-step inquiry. It noted that "[a]s the Court made clear in *Schmerber*, the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the 'seizure' of the 'person' necessary to bring him into contact with government agents . . . and the subsequent search for and seizure of the evidence." *Dionisio*, 410 U.S. at 8 (citations omitted). Interestingly, the *Dionisio* Court observed that ***Fourth Amendment concerns are heightened in circumstances of arrest*** as opposed to grand jury subpoena because an arrest is "abrupt, is effected with force or the threat of it and often in demeaning circumstances, and . . . results in a record involving social stigma." *Id*. at 10, citing *Deo (Schwartz)*, 457 F.2d at 898.

The reason that law enforcement officers must obtain a warrant to search or seize after they have established probable cause to arrest an individual was best expressed in *Johnson v. United States*, 333 U.S. 10 (1948). *Johnson* involved a circumstance in which a law enforcement officer, while walking through the hallway of a hotel, recognized the odor of burning opium. *Id*. at 12. The officer

[3]This is precisely what the *Dionisio* Court was referring to when it distinguished the "content of a specific conversation" from the sound of a person's voice alone.

knocked on the door from which the odor came, and when it was answered, informed the suspect that she was under arrest and thereafter proceeded to search the room. *Id*. The *Johnson* Court, in reversing the defendant's conviction, admonished that:

> [t]he point of the Fourth Amendment, **which often is not grasped by zealous officers**, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14 (emphasis added).

It is Mr. White's position that applying the two-pronged *Dionisio* test to the circumstances of his case yields but one result, namely: compelling him to perform field sobriety tests *after* he has been taken into custody without a cognizable exception to the Fourth Amendment or a warrant violates the Federal and State Constitutional protections against unreasonable searches and seizures.

III. APPLICATION OF THE LAW TO THE FACTS.

A. Determining When a Suspect Is in "Custody" for Constitutional Purposes.

Before it can be established that Mr. White's Fourth Amendment rights were violated, the first prong of the *Dionisio* test must be addressed: Was Mr. White in custody at the time he was asked to perform certain tasks by the arresting officer in this case? The question regarding whether Mr. White was in custody at the time he was required to submit to field sobriety testing was addressed in Section I., *supra*, and Mr. White stands on the conclusion drawn above.

B. Field Sobriety Testing & the Fourth Amendment Under Dionisio.

The second question under *Dionisio* becomes whether asking Mr. White to perform field sobriety tests implicates the Fourth Amendment. The answer to this question turns on whether his performance on these tests is akin to the general information any member of the public may glean about him by passing him on the

street, or alternatively, whether his performance is more analogous to the "content of a specific conversation" warned about in *Dionisio.*

Mr. White proffers that because the field sobriety tests themselves constitute tasks which one does *not* regularly perform while they are about in public, and further, because they reveal *specific* information about a person's balance and coordination, they are more akin—in the *post*-arrest context[4]—to the "specific conversation" distinguished in *Dionisio* than they are to how a person's face appears or voice sounds as they traverse the public streets.

Based upon the foregoing, Mr. White's Fourth Amendment right to be free from being compelled to provide evidence to the government regarding his alleged operation of a motor vehicle while under the influence of an intoxicant *after* arrest was violated, and therefore, any evidence obtained after the illegal compulsion should have been suppressed by the court below.

An unarguable line is crossed when what may be gleaned by any member of the public from casual observation of an individual—such as their hair color, ostensible gender, or approximate height and weight—moves to those things which, by their nature, reveal facts which a casual passerby may not glean but for some ***compelled*** behavior—such as the seizure of a person's breath or requiring the performance of specific tasks. When this line is crossed, the Fourth Amendment is implicated.

Requiring Mr. White to perform field sobriety tests is something which is intended to provide law enforcement officers with evidence which can be used against him. Field sobriety tests constitute tasks which one does *not* regularly perform while they are about in public. Individuals who walk down the street do not do so in a "heel to toe" fashion, nor do they periodically stop to either balance on one leg for thirty seconds or to have their eyes examined for nystagmus by passers-by. Because the field tests reveal *specific* information about a person's

[4]The Respondent may attempt to argue pursuant to *State v. Babbitt*, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994), that field sobriety tests have already been deemed non-testimonial in nature, and therefore, are not subject to the Appellant's analysis. This is a misleading interpretation of the *Babbitt* court's holding in that: (1) the court was addressing a Fifth Amendment question in *Babbitt* and not the Fourth Amendment question presented here; and (2) the question regarding the inferences to be drawn from a person's *pre*-arrest performance on field tests is different than one in which a person is being compelled to provide evidence *post*-arrest.

balance and coordination, they are more akin to the "specific conversation" distinguished in *Dionisio* than they are to any "general information."

What should not be lost on this Court is that *all* of the observations of the sound of a person's voice, his height, how he looks in a photograph, *et al*., are things which can be observed about the individual *without* requiring the person first to perform precise and particular tasks *before* the information sought from them can be scrutinized, assessed, or ascertained and *then* evaluated. Mr. White's point in this regard is perhaps best characterized by distinguishing between what could be labeled as "primary" or "first-tier" information versus that which could be labeled as "derivative" or "second-tier" information. In other words, if one wanted to determine the tambor of a person's voice, the subject need only to speak. If one wanted to ascertain a person's hair color, the subject need only to be passively viewed. If one wanted to estimate a person's height, the subject again need only be passively assessed. All the foregoing examples, among others, are "first-tier" observations in that the subject individual needs to do *nothing* for the assessor to draw their conclusions.

On the other hand, if one wanted to determine whether a person exhibited the onset of nystagmus prior to 45º, the subject would need to follow a stimulus through a series of passes across their field of vision. If one wanted to evaluate whether a person could walk a straight line heel-to-toe, the subject would have to walk in a fashion which is *not* a typical method of ambulation. If one wanted to evaluate a person's ability to balance, the subject would have to stand on one leg for a predetermined length of time. If one wanted to evaluate a person's breath alcohol concentration, the subject would need to provide a sample of their breath not into the common air we all breathe, but rather into an electronic instrument for capture and analysis. All the foregoing examples are "second-tier" or "derivative" observations because the conclusions to be drawn from them *only* come about as a result of the subject having to engage in *atypical* conduct. In other words, they are not cut from the same fabric as those things which "are constantly exposed to the public." *Dionisio*, 410 U.S. at 14.

It is Mr. White's position that when Officer Rieman directed him to perform field sobriety tests after he had already been taken into constructive custody, and to do so in the absence of a warrant or an exception to the Fourth Amendment, Mr. White's right to be free from unreasonable searches and seizures as set forth in

Dionisio.

It is likely the City will protest that Mr. White was not "compelled" to perform the field sobriety tests, however, the record in this matter betrays it. More particularly, the circuit court made a finding that **"[f]ield sobriety tests ensued"** after Mr. White admitted to drinking alcohol but it did not find that *actual* consent to testing was given. R83 at 5:17 to 6:1; D-App. at 105-06. Even if Mr. White can be characterized as "cooperating" with field sobriety tests, it has long been understood that consent is not voluntary if the City proves "no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

IV. DISTINGUISHING THIS COURT'S DECISION IN *STATE v. RANDY L. PAUL*, Case No. 2022AP464-CR, 2023 Wisc. App. LEXIS 1060, 2023 WL 6458678 (Wis. Ct. App. Oct. 4, 2023)(unpublished).[5]

The issue which Mr. White raises in this appeal is identical to that raised by Randy Paul in *State v. Randy L. Paul*, Case No. 2022AP464-CR, 2023 Wisc. App. LEXIS 1060, 2023 WL 6458678 (Wis. Ct. App. Oct. 4, 2023)(unpublished). Mr. Paul argued that his case rested upon the notion that the Fourth Amendment protected individuals from being compelled to provide the government with incriminating evidence *after* they have been arrested—just as Mr. White does. Mr. Paul's argument was based upon sound Fourth Amendment jurisprudence, as described in such cases as *Dionisio*, 410 U.S. 1; *Mara*, 410 U.S. 19; *Katz*, 389 U.S. 347; *Gilbert*, 388 U.S. 263; *Schmerber*, 384 U.S. 757; and *Doe*, 78 Wis. 2d 161—the same authority upon which Mr. White premises his argument.

Nevertheless, in an odd twist of logic which is beyond Mr. White's understanding, the court of appeals concluded that in post-arrest scenarios, a law enforcement officer may administer field sobriety tests to a suspected impaired driver because no "warrant is required to administer FSTs when reasonable suspicion exists." Slip Op. at p.3; D-App. at 112. What Mr. Paul does not grasp about the court of appeals' decision is that the court's "reasoning" is inconsistent with both logic and common sense. More specifically, the court of appeals' reliance on the "reasonable suspicion" standard to justify field testing post-arrest fails to comprehend that, from a Fourth Amendment perspective, there is a

[5] *State v. Paul* is not cited as binding precedent, but rather, as relevant authority pursuant to Wis. Stat. § 809.23(3) since it addresses an issue identical to that raised herein.

significant change in circumstances from a mere "investigatory detention" to a full-blown "formal custody."

Mr. White's point in the foregoing regard is best made by analogy. For example, a law enforcement officer may, during an investigatory detention, ask for a person to provide virtually any kind of evidence the officer desires, so long as the person being asked to provide the evidence "freely and voluntarily" consents under the Fourth Amendment to provide the same. *See generally*, *Schneckloth*, 412 U.S. 218; *Bumper*, 391 U.S. 543; *State v. Artic*, 2010 WI 83, 327 Wis. 2d 392, 768 N.W.2d 430. Thus, if an officer asks for consent to view a detainee's cell phone texts, so long as there is no coercion on the part of the officer —either implied or expressed—the individual may allow the search of his or her text messages, stored photographs, and other data. **After the person has been taken into custody**, **however, the officer must obtain a warrant under the Fourth Amendment in order to justify a search of the phone's data constitutionally.** *See Riley v. California*, 573 U.S. 373 (2014). Similarly, a law enforcement officer could, theoretically, ask a person to submit to a blood test during an investigatory detention, again so long as the individual is allowed to make a "free and voluntary" choice regarding whether to submit to, or decline, the test. Post-arrest, however, absent an exception to the Fourth Amendment, a warrant is presumptively required. *Missouri v. McNeely*, 569 U.S. 141 (2013)(holding that there is no *per se* exigent circumstances exception to the Fourth Amendment created by the dissipation of alcohol from the blood).

What conclusion should be drawn from the foregoing examples? There is but one: What is permissible during an investigatory detention may not be *post*-arrest and this is where the decision in *Paul* falls short of the mark. This is precisely the premise underlying Mr. White's appeal. Instead of acknowledging the considerable distinction between pre- and post-arrest circumstances, the court of appeals erroneously concluded that whatever "reasonable suspicion" existed prior to custody carried over to permit field sobriety testing **post-custody**. This "logic" wholly undermines cases like *Riley* which may allow for a pre-arrest search based upon consent, but unequivocally prohibits the same searches post-arrest in the absence of a warrant under, or an exception to, the Fourth Amendment. The United States Supreme Court expressly and plainly recognized the difference between an investigatory detention and an arrest when it held that Fourth Amendment concerns are *heightened* after a person has been taken into custody. *Dionisio*, 410 U.S. at 8.

CONCLUSION

Mr. White respectfully requests that this Court reverse the decision of the court below on the ground that his 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 when he was compelled to submit to field sobriety testing after he had been taken into formal custody.

Dated this 29th day of February, 2024.

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 6,971 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 29th day of February, 2024.

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