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**STATE OF WISCONSIN COURT OF APPEALS
DISTRICT II**

CITY OF HARTFORD,
Plaintiff-Respondent,

v.

Appeal No.:
2024AP1813, 2024AP1814

EDWARD H. WHITE,
Defendant- Appellant,

RESPONSIVE BRIEF OF PLAINTIFF-RESPONDENT

Appeal from Washington County Circuit Court
Circuit Court Case No. 2021TR1951, 2021TR1950
The Honorable Sandra J. Giernoth, Presiding

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented in this appeal may be resolved using settled case law. The City of Hartford (the “City”), therefore, does not request oral argument or publication.

STATEMENT OF THE ISSUE

The issues raised by defendant-appellant include whether he was under constructive arrest at the time that he performed field sobriety tests, and assuming that he was under constructive arrest, whether his Fourth Amendment right to be free from unreasonable searches and seizures was violated when the arresting officer administered field sobriety tests to him after his constructive arrest.

STATEMENT OF THE CASE

For purposes of this Response Brief, the City adopts defendant-appellant’s Statement of the Case in his Brief (see Defendant’s Brief p. 7-8).

STATEMENT OF THE FACTS

Though the facts are largely undisputed, the City provides the following relevant facts. On June 24, 2021 at about 2:04 AM, Officers Knudson and Reiman were stopped on South Main Street in the City of Hartford facing in a northbound direction. R35 at 12:11 to 12:25. Officer Knudson was the driver and Officer Reiman was the field training officer sitting in the front passenger seat of the fully marked squad car. R35 at 12:11 to 12:20. Both officers observed a car driven by the defendant make an illegal U-turn on Main Street, and the defendant’s vehicle

continued in a southbound direction. R35 at 13:1 to 13:11. The officers began to follow the vehicle. R35 at 13:12 to 13:13.

While following the vehicle, the officers observed the defendant's vehicle cross over the centerline on two separate occasions. R35 at 13:20 to 13:25. Officer Knudson turned on the squad lights to initiate a stop. R35 at 14:6 to 14:11. The defendant's vehicle kept on driving southbound on Highway 83 and did not immediately pull over. R35 at 14:6 to 14:11. Officer Knudson sounded his horn and Officer Reiman intermittently used the siren of the squad car. R35 at 14:6 to 14:11. Eventually, the defendant turned left off of Highway 83 into the Oriole Ponds Apartments, pulling up to the garage area, opening the garage door and parking outside of the garage. R35 at 14:12 to 15:3. Officer Reiman and Officer Knudson directed the defendant to put his hands outside of the window and open the door of the vehicle using his left hand and the outside door handle. R35 at 15:4 to 15:22.

The driver had a hard time following the directions of the officers and could not initially open his door, but eventually opened the door from the inside and got out of the vehicle. R35 at 16:1 to 16:8. Officer Knudson directed the defendant to keep his hands up and walk away from the vehicle. R35 at 30:13 to 30:19. Neither officer had their service pistols drawn at any point. R35 at 18:21 to 18:25.

Officer Reiman initially approached the defendant, inquired as to why the defendant did not initially pull over, and the defendant responded that he wanted to get to a safe place before pulling over. R35 16:9 to 16:21. Officer Reiman accepted this explanation. R35 16:22 to 16:23. No arrest was made at that time. R35 16:22 to

16:23. Officers Knudson and Reiman informed the defendant that he was being pulled over for crossing the centerline and for an illegal U-turn. R35 at 20:21 to 21:4.

Officer Reiman identified the defendant as Edward White, by his Missouri driver's license. R35 at 17:9 to 17:12. Officer Reiman immediately detected the odor of intoxicants as well as red blood-shot eyes and very slow and slurred speech. R35 at 17:1 to 17:3. Officer Knudson observed the same. R35 at 17:1 to 17:3. Officer Reiman asked the defendant how much he had to drink and he indicated that he had had five drinks. R35 at 17:4 to 17:8. She then informed the defendant that Officer Knudson would be putting him through some standard field sobriety tests, "because you said that you had been drinking and stuff, okay?". R35 17:13 to 17:21. The defendant indicated that he would cooperate. R35 17:22 to 17:25. At no time did Officer Reiman or Officer Knudson order or force the defendant to do the field sobriety tests. R35 17:13 to 17:25.

At some point at the beginning of the conducting of the field sobriety tests by Officer Knudson, another squad car arrived on scene with Sergeant Hubbard and Officer Bahr. R35 at 21:11 to 21:17. Sergeant Hubbard was the field training officer for Officer Bahr. R35 at 21:20 to 21:22. Sergeant Hubbard and Officer Bahr stood back from Officer Knudson and Officer Reiman and the defendant, and merely observed. R35 at 21:23 to 22:3. Just as with Officer Knudson and Officer Reiman, the later arriving officers did not have their weapons drawn. R35 22:4 to 22:5.

After the initial field sobriety tests had been completed, Officer Knudson informed the defendant that “there would be one more test called the preliminary breath test, and Officer Reiman would be performing that, alright?”. R35 at 19:1 to 20:10. Neither Officer Knudson nor Officer Reiman ordered or stated that the defendant had to take the preliminary breath test. R35 at 19:17 to 20:10. Rather, after Officer Knudson informed the defendant that there would be one more test called the preliminary breath test and asked him if it was “alright,” the defendant indicated that he would cooperate. R35 at 19:1 to 20:10.

STANDARD OF REVIEW

Review of the trial court’s decision denying Appellant’s pretrial motions is a mixed question of law and fact which involves a “two-step analysis”. *State v. Anker*, 2014 WI App 107, ¶10, 357, Wis. 2d 565, 572-73, 855 N.W.2d 483, 486. A reviewing court defers to the trial court’s factual findings and assessments of witness credibility absent clear error, and it reviews de novo the trial court’s application of the law to the facts. *Id.*

ARGUMENT

I. THE DEFENDANT WAS NOT UNDER CONSTRUCTIVE ARREST AT THE TIME HE SUBMITTED TO FIELD SOBRIETY TESTS.

As noted by the circuit court in its April 8, 2022, oral ruling, there is no bright line rule in Wisconsin as to when an individual is under constructive arrest. R81 8:7-16. In addition, defendant is correct to point to the court’s analysis in *Anker* as the starting point, and that 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." *Anker*, 2014 WI App, ¶15 (citing *State v. Kiekhefer*, 212 Wis. 2d 460, 485, 569 N.W.2d 316 (Ct. App. 1997)). Reviewing courts are thus to employ an objective test to determine the moment of arrest.

It follows that a reviewing court must consider the totality of the circumstances when reaching its determination as to whether a reasonable person would believe he or she was in custody. In his brief, defendant points to "indisputable facts" that, when combined, show that he was under constructive arrest at the time of the encounter. Def's Brief at p. 11-12.

First, defendant notes that multiple law enforcement officers were involved in his detention. While there were four officers present during the encounter, two had virtually no involvement and did not participate in the stop or investigation in any way. R35 21:23-25. The fact that multiple law enforcement officers were present does not weigh in favor of determining that there was a constructive arrest.

Defendant additionally points to the fact that the officers were engaged in a "high- risk" stop at the time of the encounter as justification that he was under constructive arrest. More specifically, defendant points to (1) the distance between the vehicles at the time of the stop and (2) the verbal commands from the officers. Defendant attempts to distinguish these "atypical" characteristics and commands from that of an ordinary traffic stop.

However, while these features of a high-risk traffic stop were used by the responding officers at the beginning of the encounter, it was Officer Reiman's testimony that these features were used because the defendant was slow at pulling over. Once the responding officers had a chance to speak with the defendant, the "high-risk" features stopped, as the responding officers quickly accepted the defendant's explanation as to why he took so long to stop his vehicle. In addition, Officer Reiman testified that it is usual in any traffic stop to instruct the driver on what to do. R35 40:7-9. Almost immediately upon the officers' initial contact with the defendant, the encounter transformed into that of an ordinary traffic stop.

Defendant also focuses on the officer's removing the wallet during the encounter and maintaining possession of it. And while removing the defendant's wallet may weigh slightly more in favor of this encounter being more than an investigatory detention, it is but one factor that this Court must consider.

Under the totality of the circumstances, there is very little evidence of any seizure of the person or arrest. The defendant had not been taken into custody for any criminal offense. He was merely being temporarily detained based upon a justifiable traffic stop. There were no other factors which would show coercion or an arrest. Officer Reiman quickly resolved the issue of delay in pulling over and moved on to a normal traffic stop. As such, this Court should conclude that the degree of restraint involved prior to the officer's oral advisement of arrest and use of handcuffs is not such that a reasonable person in the defendant's position would have considered himself or herself under formal arrest. Because the defendant was

not under constructive arrest at the time that he submitted to field sobriety testing, this Court should affirm Judge Giernoth's ruling, and the analysis should stop here.

II. THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE NOT IMPLICATED WHEN HE PERFORMED FIELD SOBRIETY TESTS.

Though the City contends that the defendant was not in custody at the time he performed field sobriety tests—and thus, nothing further needs to be addressed—for the purposes of responding to defendant's argument that his Fourth Amendment rights were violated, it will assume in this section that the defendant was in custody when he performed his field sobriety tests.

Defendant, relying on *United States v. Dionisio*, 410 U.S. 1 (1973), asserts that a warrant is required to administer field sobriety tests after a person is in custody. *Dionisio* involved the application of the Fourth Amendment when a grand jury witness is compelled to provide a recording of his or her voice. *Dionisio*, 410 U.S. at 4. The Supreme Court held that the Fourth Amendment's protections only protect people from being compelled to expose things that are "not ... exposed to the public at large". *Dionisio*, 410 U.S. at 14. Defendant then devotes substantial time in his Brief attempting to extend *Dionisio*'s holding to assert that actions performed during field sobriety tests are not generally exposed to the public and because of that, cannot be requested after an arrest without a warrant.

In support of this position, defendant points to the specific tasks involved in completing field sobriety tests (such as walking heel-to-toe, balancing on one leg, and having one's eyes examined for nystagmus), yet importantly cites no legal

authority that has held that a warrant is required to administer field sobriety tests when reasonable suspicion exists pre- or post-arrest. Defendant additionally fails to cite to any Wisconsin law where a Wisconsin court has analyzed the administration of field sobriety tests post-arrest as anything more than an investigatory detention. As such, this Court should reject defendant's argument that a warrant is required to conduct field sobriety tests post arrest.

III. DEFENDANT CANNOT DISTINGUISH HIS CASE FROM 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).

Though *State v. Paul* is a summary disposition order—and thus, may not be cited as precedent or authority—the City addresses it because of defendant's own admission that the issues are identical and in response to defendant's citation. (See Def's Brief at p. 20 and Wis. Stat. Sec. 809.23(3)). It is readily apparent that the defendant—without citing to any binding precedent—recycles the same arguments here that this Court rejected in *Paul*.¹ Moreover, the defendant cannot argue that a case is both identical, yet distinguishable.


CONCLUSION

The City respectfully requests that this Court affirm Judge Giernoth's ruling that Mr. White was not under constructive arrest at the time that he performed field sobriety tests, and thus, that his Fourth Amendment rights were not violated.

¹Again, the defendant freely admits that his argument is the same as Mr. Paul's, stating that "Mr. Paul's argument was based upon sound Fourth Amendment jurisprudence . . . the same authority upon which Mr. White premises his argument." Def's Brief at p. 20.

Respectfully submitted this 1st day of April 2024.

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FORM AND LENGTH 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 2,141 words.

Dated this 1st day of April, 2024.

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