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 SANDRA J. GIERNOTH PRESIDING, TRIAL COURT CASE NOS. 21-TR-1950 & 21-TR-1951

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. MR. WHITE WAS UNDER CONSTRUCTIVE ARREST.

The City contends that Mr. White was not in constructive custody at the time he was required to submit to field sobriety tests. *See* City's Response Brief, at pp. 7-10 [hereinafter "CRB"]. More specifically, it picks apart Mr. White's argument on a fact-by-fact basis, but in looking "at the trees," it fails to see "the forest." For example, the City's lead contention is that because two of the four officers "had virtually no involvement" in the stop and investigation in this matter, one cannot "weigh [that] in favor of determining that there was a constructive arrest." CRB at p.8. This is a misstatement of the law. In *United States v. Mendenhall*, 446 U.S. 544 (1980), the Supreme Court stated that among the relevant considerations for whether there has been a constructive arrest is whether "*several* officers" are present at the time. *Id*. at 554. While the *Mendenhall* Court characterized the officers as having a "threatening presence," it did *not* indicate *how* much participation the officers had to have in the investigation, *how long* they had to remain on the scene, *whether* more than one of them drew a weapon, *in what proximity* they had to be relative to the defendant, *etc*. The *Mendenhall* Court did not qualify the presence of "multiple officers" in this fashion, so when the City attempts to convince this Court that Mr. White was not in custody because two of the four officers "had virtually no involvement" in this case, it is imposing a standard not found in the law. The City is literally creating its own version of the *Mendenhall* test without justification.

Next, the City focuses its attention on the "high risk" nature of Mr. White's detention, impliedly asserting "it's Mr. White's fault" because he did not stop his vehicle immediately, and therefore, any argument premised upon the nature of Mr. White's detention being high risk adds nothing to the constructive custody calculus. CRB at p.9. Frankly, it does not matter what the *underlying* reason was for the high-risk stop. What matters is that Mr. White was subjected to a high-risk stop and that fact does not simply evaporate just because "the encounter transformed into that of an ordinary traffic stop." CRB at p.13. A reasonable person in Mr. White's circumstance is not simply going to be able to "wipe his hard drive clean" and forget that he was just ordered out of his vehicle over a loudspeaker by two uniformed law enforcement officers, told to do so with his hands out in front of him, and have his wallet removed from his pocket not of his own volition, but by a

law enforcement officer who then maintains possession of the same. Together, these facts clearly conspire to establish a constructive arrest.

II. IMPLICATION OF THE FOURTH AMENDMENT IN FIELD SOBRIETY TESTING.

The City apparently believes that the Fourth Amendment is not implicated in field sobriety testing, although its argument in this regard is somewhat muddled. CRB at pp. 10-11. In proffering its argument, the City mischaracterizes Mr. White's argument when it complains that he has provided no legal authority which has "held that a warrant is required to administer field sobriety tests when reasonable suspicion exists pre- or post-arrest." CRB at p.11. This is an odd argument for two reasons. First, Mr. White has *never* contended that a warrant is required "pre-arrest." Such an argument is nowhere within the four corners of his initial brief.

The second problem with the City's position is that Mr. White *did* provide authority that **a warrant is required when seeking to obtain evidence post-arrest**, namely *United States v. Dionisio*, 410 U.S. 1 (1973). *See also, 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). While Mr. White must concede that *Dionisio* is not "directly on point" with his contention, it is nevertheless highly instructive because it addresses the extent to which an accused is obligated to cooperate with the government once the person has been arrested or charged. As the *Dionisio* Court noted, "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. Clearly, Mr. White's point in his initial brief was that having a person perform field sobriety tests is *not* the equivalent of simply describing his characteristics as he walks down the street. Incriminating inferences are derived from the tests by an officer observing "standardized clues" which were developed as the end product of multiple "scientific" studies. Having to create a

set of measurable criteria from a series of scientific studies hardly sounds like the *Dionisio* Court's "every man's" evidence.

Finally, Mr. White finds it aggravating that the City accuses him of providing this Court with "no authority" for his argument when he relied on multiple authorities in his initial brief. What is even more exacerbating is the City's failure to recognize that simply because an issue is one of "first impression" is not a reason to dismiss it out-of-hand. At some point in Wisconsin's jurisprudential history, *every* issue was one of "first impression." If issues had to be rejected solely on the basis of their being novel, original, or of first impression, then the common law would never develop and the entirety of Callaghan's *Wisconsin Reports* series would fit on less than one bookshelf in a law library. The only way the law develops and matures is through courts of supervisory jurisdiction addressing novel issues as they arise. The City's "no authority" argument must, therefore, be rejected as meaningless.

III. THE *STATE v. RANDY PAUL* CASE.

The City's last volley comes in the form of a single, conclusory paragraph in which it claims that Mr. White cannot prevail because he "recycles the same arguments" as those made 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). Contrary to the City's assertion, Mr. White can "recycle" the same issue because *Paul* is unpublished and, therefore, is *not* binding precedent. In fact, *Paul* was a Summary Disposition and thus not an "authored opinion" per sec. 809.23(3)(b), stats.

Apart from the foregoing, the City weirdly asserts that "the defendant cannot argue that a case is both identical, yet distinguishable." CRB at p.11. Yes, a defendant can—and frequently does—make precisely this kind of argument. More specifically, as the City correctly observes in a footnote, *Paul* raised the same argument as that which Mr. White presents, *to the extent that both cases involve the same Fourth Amendment foundation*. CRB at p.11 n.1. Where the cases diverge, however, is in Mr. White's explanation as to how the *Paul* court reached an erroneous result. To this extent, the case *is* distinguishable, and there is no truth in the City's assertion that "the defendant cannot argue that a case is both identical, yet distinguishable."

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 15th day of April, 2024.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
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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 1,968 words.

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 15th day of April, 2024.

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