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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

APPEAL NO. 2024 AP 000227

CITY OF DELAFIELD,

Plaintiff – Respondent,

v.

SHAWN M. OFFICE,

Defendant – Appellant.

BRIEF OF DEFENDANT–APPELLANT

APPEAL FROM AN ORAL JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE DENNIS P. MORONEY PRESIDING

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ISSUE PRESENTED FOR REVIEW

Did sufficient probable cause exist to arrest Defendant-Appellant for Operating a Motor Vehicle While Intoxicated.

The Circuit Court answered: Yes.

Suggested Answer on Appeal: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Defendant-Appellant does not request publication as the issues raised in this appeal deal with the application of well-settled legal standards to its unique facts.

STATEMENT OF THE CASE

This is an appeal from an Oral Judgment of Conviction entered in Waukesha County Circuit Court, the Honorable Dennis P. Moroney, presiding judge (R. 49).

On January 9, 2021, Defendant-Appellant was issued municipal citations for Operating while Suspended, Operating while Under the Influence First Offense, Non-Registration of Automobile, and Operating after Revocation/Suspension of Registration. On January 10, 2022, a municipal court trial was held at which time the Honorable C. Michael Hausman found Defendant-Appellant guilty on all four citations. (R. 3). Defendant-Appellant promptly filed a Notice of Appeal on January 28, 2022, wherein he sought a Trial De Novo in the Waukesha County Circuit Court. (R. 43).

On July 22, 2022, Defendant-Appellant filed a *Notice of Motion and Motion to Suppress - Illegal Arrest* arguing that he was unlawfully seized (R. 15; App. 2-4). On August 5, 2022, the City of Delafield filed a *Response Brief in Opposition to Motion to Suppress*. (R. 17; App. 5-10). An

evidentiary motion hearing was held on March 20, 2023. (R. 55; App. 11-85). At the conclusion of the evidentiary motion hearing, the Honorable Michael Bohren found that law enforcement had probable cause to arrest Defendant-Appellant under the circumstances that existed. (*Id.* at 68-69; 78-79). In so finding, the Court denied Defendant-Appellant's *Motion to Suppress*. (*Id.*)

On November 15, 2023, a De Novo Court Trial was held in front of the Honorable Dennis P. Moroney. (R. 49). At the conclusion of the trial, Judge Moroney found Defendant-Appellant guilty of all charged offenses. (R. 49). Defendant-Appellant timely filed a Notice of Appeal on February 7, 2024. (R. 43). A timely Docketing Statement was filed on February 7, 2024. (R. 44). A timely Statement on Transcripts was filed on February 21, 2024. (R. 48).

STATEMENT OF THE FACTS

Defendant-Appellant filed a motion to suppress evidence on July 22, 2022. (R. 15; App. 2-4). The motion first alleged that Defendant-Appellant was seized and detained in the absence of an arrest warrant. (*Id.* at 1; 2). The motion next alleged that the information known to the officer at the time of Defendant-Appellant's detention was insufficient probable cause to believe that Defendant-Appellant was committing a crime, specifically operating a motor vehicle while under the influence. (*Id.*)

An evidentiary motion hearing was held on March 20, 2023. (R. 55; App. 11-85). The first officer to testify was Officer Kimberly Kuehl-Zoch. (*Id.* at 3; 13). Officer Kuehl-Zoch, employed by the City of Delafield Police Department, testified that on January 9, 2021, she was on duty as a third shift patrol officer in the City of Delafield. (*Id.* at 8; 18). At approximately 2:18 a.m., while driving on Highway 16 between highways C and 83, Officer Kuehl-Zoch noticed a vehicle traveling behind her and quickly

approaching. (*Id.* at 9; 19). This observation prompted Officer Kuehl-Zoch to activate her radar which received a reading of 85 miles per hour on the vehicle approaching behind her. (*Id.*) As the vehicle passed her squad vehicle, Officer Kuehl-Zoch obtained its Wisconsin registration plate number and subsequently conducted a vehicle registration check. (*Id.* at 10; 20). Through that check, Officer Kuehl-Zoch learned that the vehicle's registration expired as of October of 2020 and was suspended for a damage judgment. (*Id.*). Officer Kuehl-Zoch intended on following the vehicle through a curve to observe the driving and then initiate a traffic stop but prior to doing so the vehicle activated its hazard lights and pulled onto the median shoulder. (*Id.* at 11; 21). Once the vehicle was stopped, Officer Kuehl-Zoch activated her emergency lights to conduct her intended traffic stop. (*Id.*).

Officer Kuehl-Zoch next observed the driver of the vehicle exit the driver's side door and walk to the passenger side. (*Id.* at 12; 22). To her, it appeared as though the driver was checking either the body or the tires on the passenger side. (*Id.*). Officer Kuehl-Zoch then approached the driver and asked if he was having tire issues. (*Id.* at 13; 23). He confirmed he was and at no point was Officer Kuehl-Zoch able to determine if this was untrue. (*Id.* at 40-41; 50-51). As part of that conversation, she asked the driver to move out of the traffic lane and have a seat back in the vehicle. (*Id.*). She described the driver's response to this as hostile but that he complied with her instruction to return to the driver's seat of the vehicle. (*Id.* at 13-14; 23-24). Officer Kuehl-Zoch did not note any signs of intoxication based on the driver's physical movements nor did she note any odor of intoxication during this interaction. (*Id.* at 41, 43; 51, 53).

Officer Kuehl-Zoch approached the passenger side of the vehicle and motioned for the female passenger to roll the window down to which the passenger did comply. (*Id.* at 15; 25). As she was at the passenger side window, Officer Kuehl-Zoch testified that she detected an odor of intoxicants

emanating from the passenger compartment. (*Id.* at 17; 27). She then questioned the occupants of the vehicle as to where they were going and the occupants responded home. (*Id.* at 15-25). When she asked where the occupants were coming from, she again testified that the driver became hostile. (*Id.*). Officer Kuehl-Zoch later testified that the driver's speech sounded slurred but admitted that she was not familiar with how this driver normally speaks. (*Id.* at 17, 42; 27, 52). Officer Kuehl-Zoch attempted to obtain identification from the occupants who both stated they were not going to identify themselves. (*Id.* at 15; 25). Officer Kuehl-Zoch then returned to her squad vehicle to identify the driver and to wait for an additional unit that she had already requested. (*Id.* at 16; 26).

Once back in her squad, Officer Kuehl-Zoch identified the registered owner of the vehicle as Shawn M. Office, located a DOT image of that individual, and observed that it matched the driver of the vehicle. (*Id.* at 42; 52). When Officers Gurgul and Kranz arrived on scene, Officer Kuehl-Zoch briefed them on her encounter with the driver and asked that they attempt to speak with and identify him as it appeared she had developed bad rapport. (*Id.* at 17; 27). Officer Kuehl-Zoch made no mention of having any suspicion of intoxication. (*Id.* at 43; 53). Despite the debriefing, Officer Kuehl-Zoch testified that she then went back up to the vehicle on the passenger side and she again spoke further with the driver in an attempt to identify him. (*Id.* at 18; 28). The driver responded that he would not identify himself and was going to leave. (*Id.*). Officer Kuehl-Zoch told Officers Gurgul and Kranz to remove the driver from the vehicle. (*Id.*). The driver exited the vehicle on his own. (*Id.*).

Officer Kuehl-Zoch next spoke with the driver at the rear of the vehicle during which time she testified that she continued to detect the odor of intoxicants. (*Id.* at 18-19; 28-29). When she asked the driver whether he had anything to drink that day or night, he advised that he did not. (*Id.* at 19; 29). At some point, Officer Kuehl-Zoch told the driver she

already knew who he was to which he then confirmed his identity. (*Id.*). She also, at some point, told him of the original reason for the traffic stop. (*Id.*).

When Officer Kuehl-Zoch was done speaking with Mr. Office, she left him at the back of his vehicle with Officers Gurgul and Kranz and went to speak to the passenger who was still in the vehicle. (*Id.* at 19-20; 29-30). During her conversation with the passenger, Mr. Office was handcuffed by one of the other officers and placed in the rear of Officer Kuehl-Zoch's squad which can only be opened by someone on the outside. (*Id.* at 19-20, 47; 29-30, 57).

The next time Officer Kuehl-Zoch spoke to Mr. Office was after he was handcuffed and locked in the rear of her squad for five to six minutes. (*Id.* at 22, 49; 32, 59). Officer Kuehl-Zoch testified that during this interaction she continued to smell the odor of intoxicants and his speech continued to sound slurred. (*Id.*). The following exchange then occurred:

Officer Kuehl-Zoch: One thing I do want to ask you though is I can smell the odor of intoxicants [] why we took you into custody. Are you willing to do field sobriety tests?

Mr. Office: No. Absolutely not.

Officer Kuehl-Zoch: Okay. Understand that based on everything you are under arrest for operating while intoxicated in addition to the traffic citations you are going to receive.

(*See* R. 24 at 20:00-20:30).¹

Immediately after this exchange, Officer Kuehl-Zoch shuts the door and Mr. Office begins to yell "excuse me." (*Id.*). Officer Kuehl-Zoch comes right back and opens the door again. (*Id.*). At this time, the following exchange occurs:

¹ A complete recording of Officer Kuehl-Zoch's squad video was admitted as Exhibit 2 at the March 20, 2023, evidentiary motion hearing. (R. 55 at 28, 36; App. 38, 46). This exhibit is R. 24.

Mr. Office: Yeah, I'll do your field sobriety tests. Let's do it.

Officer Kuehl-Zoch: You want to do the field sobriety tests?

Mr. Office: Yeah, absolutely. Let's go.

(*See* R. 24 at 20:30-20:37).

Approximately one minute and a half later, Officer Kuehl-Zoch returns and tells Mr. Office that due to it being twenty four degrees outside, they are going to go to the police department to conduct the field sobriety tests. (*See Id.* at 21:55). Mr. Office responds by stating he is not willing to go to the police department but will perform the field sobriety tests on scene. (*See Id.*). Officer Kuehl-Zoch refuses to allow Mr. Office to submit to the field sobriety tests on scene and takes Mr. Office's lawful response of not wanting to be transported to the police department as a refusal to complete the tests. (*See Id.*; R. 55 at 23-24, 33-34).

Officer Kuehl-Zoch testified that her request for Mr. Office to complete field sobriety tests was based on his driving behavior, his behavior towards her, the odor of alcohol, and the slurred sounding speech. (*Id.*). She admitted on cross-examination that the driving behavior consisted solely of speeding and slowing down of the vehicle while passing her, both of which are common driving behaviors of individuals who are not intoxicated. (*Id.* 48-49; 58-59). She further admitted that throughout her past experience she has encountered sober individuals who are openly not happy with her. (*Id.* at 48; 58).

At approximately 2:38 a.m., Officer Kuehl-Zoch told Mr. Office that he was under arrest for operating a motor vehicle while intoxicated. (*Id.* at 23; 33). While Officer Kuehl-Zoch testified that she already believed that Mr. Office was operating while intoxicated prior to asking him to complete field sobriety tests, she also testified that his refusal

to do so impacted her decision to arrest him for that offense. (*Id.*).

The next officer to testify at the March 20, 2023, motion hearing was Officer Gurgul. (*Id.* at 50; 60). Officer Gurgul testified that on January 9, 2021, at approximately 2:18 a.m. he was working on duty as a Village of Hartland police officer. (*Id.*). He recalled being dispatched as backup to Officer Kuehl-Zoch's traffic stop. (*Id.*). Officer Gurgul recalled speaking with Mr. Office both while he was in the vehicle and out of the vehicle and noting an odor of intoxicants. (*Id.* at 52; 62). Other than this odor of intoxicants, Officer Gurgul testified that he observed no other indicators of intoxication during his interactions and conversations with Mr. Office. (*Id.* at 54; 74).

Officer Gurgul testified that while Officer Kuehl-Zoch was at the vehicle speaking with the female passenger, he handcuffed Mr. Office for what he described as being officer safety reasons. (*Id.*). Specifically, Officer Gurgul testified that Mr. Office was argumentative, belligerent, and potentially intoxicated and Officer Gurgul "did not want to give him the opportunity to become physical with anybody..." (*Id.*). At the time Mr. Office was handcuffed, there were a total of five officers on scene. (*See* R. 24 at 14:00). Officer Gurgul places Mr. Office in the back seat of Officer Kuehl-Zoch's squad which effectively locked him in. (*Id.* at 53; 63). During cross-examination, Officer Gurgul admitted that Mr. Office did not run at anybody, did not shove or push anybody, and was cooperative while being placed into handcuffs and locked in the back of the squad. (*Id.* at 54; 64).

Following the conclusion of the testimony at the March 20, 2023, motion hearing, the court heard oral arguments. The City, relying on its August 5, 2022, response brief, argued that the testimony demonstrated sufficient factors for Officer Kuehl-Zoch to conclude that Mr. Office had been operating a motor vehicle while intoxicated and that she had probable cause to place him under arrest for that

offense (*Id.* at 56; 66). Mr. Office’s counsel argued that Officer Kuehl-Zoch did not have probable cause to arrest him for operating a motor vehicle while under the influence as the only real indicator of intoxication was an observed odor of intoxicants. (*Id.* at 59; 69). Mr. Office’s counsel further argued that when Mr. Office was handcuffed and locked into the back of a squad, the officers had made a *de facto* arrest as there was no legitimate officer safety concern (*Id.* at 61; 71). Therefore, any noted refusal of field sobriety tests could not be factored into the probable cause analysis. (*Id.*).

After hearing the testimony and argument, the court found “that the odor of intoxicants with the exceptional belligerent attitude in and of itself was a basis to arrest him for operating under the influence.” (*Id.* at 68; 78). Additionally, the court found that there was not a *de facto* arrest and considered the absence of the field sobriety tests in its probable cause analysis. (*Id.* at 69; 79). Ultimately, the court determined that probable cause existed for the arrest and denied Mr. Office’s motion to suppress. (*Id.*).

STANDARD OF REVIEW

Review of issues that concern the suppression of evidence is a question of constitutional fact. *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182. Courts apply a two-step standard of review to questions of constitutional fact as they are mixed questions of law and fact. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. This Court reviews the “circuit court’s findings of historical fact under the clearly erroneous standard” and “independently [reviews] the application of those facts to constitutional principles.” *Ibid.*

SUMMARY OF THE ARGUMENT

Mr. Office was unlawfully arrested for operating a motor vehicle while intoxicated. Law enforcement made a *de*

facto arrest when they placed Mr. Office in handcuffs and locked him into the back of a squad. Probable cause did not exist to support the de facto arrest as the arresting officer had only an indication of an odor of intoxicants. Even if the court finds that a de facto arrest did not occur, probable cause still did not exist at the time Mr. Office was told he was under arrest.

ARGUMENT

I. Mr. Office was unlawfully arrested for operating a motor vehicle while intoxicated as probable cause did not exist.

The Fourth Amendment to the United States Constitution and Article 1, Section 11, of the Wisconsin Constitution protect an individual's right to be free from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶ 18, 292 Wis. 2d 1, 717 N.W.2d 729. Any time an individual is seized - either in an arrest situation or during the course of an investigative detention - the Fourth Amendment is implicated and either probable cause or a reasonable suspicion must exist for the seizure of the person to be constitutional. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Henry v. United States*, 361 U.S. 98 (1959).

Probable cause for an arrest without a warrant requires more than an officer's subjective good-faith belief or mere suspicion. *See Hill v. California*, 401 U.S. 797 (1971); *State v. DiMaggio*, 49 Wis. 2d 565, 182 N.W.2d 466 (1971). Probable cause is defined as "the quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Whether probable cause exists requires the court to "look to the totality of the circumstances to determine whether the 'arresting officer's

knowledge at the time of the arrest would lead a reasonable police officer to believe...that the defendant was operating a motor vehicle while under the influence of an intoxicant’.” *State v. Babbitt*, 188 Wis. 2d 349, 356, 626 N.W.2d 102 (Ct. App. 1994) (quoting *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300, 308 (1986)). “Probable cause to arrest does not require ‘proof beyond a reasonable doubt or even that guilt is more likely than not’.” *Id.* at 357 (quoting *State v. Welsh*, 108 Wis. 2d 319, 329, 321 N.W.2d 245, 251 (1982)). “It is sufficient that a reasonable officer would conclude, based upon the information in the officer’s possession, that the ‘defendant probably committed [the offense]’.” *Id.* (quoting *State v. Koch*, 175 Wis. 2d, 684, 701, 499 N.W.2d 152, 161 (1993)).

Here, Mr. Office was subjected to a *de facto* arrest when, while in the presence of five police officers, he was handcuffed and left locked in the back of a marked squad for five to six minutes. (R. 55 at 22, 49; 32, 59). At the time this arrest occurred, there was no probable cause to believe that Mr. Office was committing the crime of operating a motor vehicle while intoxicated. The only indicia of any intoxication observed by the officer who made this arrest was an odor of intoxicants coming from Mr. Office’s person. (*Id.* at 54; 74). This alone is not probable cause to believe Mr. Office was committing a crime. Even if it is determined that Mr. Office was not arrested until after he first refused to complete field sobriety tests, probable cause still did not exist.

A. A *de facto* arrest unsupported by probable cause occurred when Mr. Office was handcuffed and locked in the back of a marked squad vehicle.

When Mr. Office, in the presence of five law enforcement officers, was handcuffed and locked in the back of a marked squad vehicle and then left alone for five to six minutes, a *de facto* arrest unsupported by probable cause occurred. In certain circumstances, a police officer may “detain a person for purposes of investigating possible

criminal behavior even though there is no probable cause to make an arrest.” *State v. Quartana*, 213 Wis. 2d 440, 445, Wis. Ct. App. 1997. Some detentions, however, “may be reasonable for investigative purposes, yet violative of the Fourth Amendment.” *Id.* at 448. For instance, “[t]he police [may not] seek to verify their suspicions by means that approach the conditions of arrest.” *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

In this case, Mr. Office was handcuffed and locked into the back of a marked squad vehicle during a routine traffic stop without any probable cause. This occurred while five law enforcement officers were on scene. (*See* R. 24 at 14:00). He was then left locked in the squad while handcuffed for five to six minutes before any further contact with law enforcement was had. (R. 55 at 54; 74). According to law enforcement, this was a detainment that occurred for officer safety reasons. (*Id.*). However, the facts of the case show that there was no legitimate officer safety concern. Rather, Mr. Office was only speaking loudly and refusing to answer investigatory questions. (*See* R. 24). He did not become physically aggressive with the officers nor did he threaten to become physically aggressive. (*Id.*). The only documented concern the officers had was his tone and volume and at one point taking a few steps towards an officer that he was trying to speak with. (*Id.*). Moreover, he was fully compliant with getting in and out of his vehicle and remained compliant while he was being handcuffed and locked in the back of the squad. (R. 55 at 54; 64).

With these facts, any reasonable person in Mr. Office’s position would believe that they were in custody and not free to leave. A reasonable person would not expect to be placed in handcuffs and locked in a squad vehicle during a routine traffic stop. While a restraint on freedom of movement is not by itself indicative of an arrest, *Quartana* at 449, being handcuffed and locked in the back of a marked squad vehicle for five to six minutes with no further interaction with law

enforcement officers certainly is. Once Mr. Office was locked in the squad, the focus of the investigation strayed from the traffic violations making it reasonable for Mr. Office to believe he was under arrest.

At the time Mr. Office was arrested and locked in the back of the squad, the officer making the de facto arrest had observed only one indication of possible intoxication - an odor of intoxicants. An odor alone is certainly not probable cause to believe that an individual is operating a motor vehicle while intoxicated.

B. Probable cause to arrest Mr. Office for operating a motor vehicle while intoxicated did not exist at any time.

At no time did officers have probable cause to arrest Mr. Office for operating a motor vehicle while intoxicated. Officer Kuehl-Zoch testified that her request for Mr. Office to complete field sobriety tests was based on his driving behavior, his behavior towards her, the odor of alcohol, and the slurred sounding speech. (*Id.*). She admitted on cross-examination that the driving behavior consisted solely of speeding and slowing down of the vehicle while passing her, both of which are common driving behaviors of individuals who are not intoxicated. (*Id.* 48-49; 58-59). She further admitted that throughout her past experience she has encountered sober individuals who are openly not happy with her. (*Id.* at 48; 58).

Other than this odor of intoxicants, Officer Gurgul testified that he observed no other indicators of intoxication during his interactions and conversations with Mr. Office. (R. 55 at 54; 74). Further, the video exhibits that were submitted support a finding that Mr. Office was not being belligerent. While he may have had a loud voice, there is nothing in this record to suggest that Mr. Office was aggressive or combative. (*See* R. 24).

The fact that no field sobriety tests occurred should not have been used by the court's probable cause analysis for several reasons. First, prior to asking Mr. Office whether he would participate in field sobriety tests, Officer Kuehl-Zoch had formed the opinion that Mr. Office was operating a motor vehicle while intoxicated. (R. 55 at 23, 33). Second, while Mr. Office's initial response was that he would not conduct field sobriety tests, this response came after he had spent five to six minutes handcuffed and locked in the back of a squad without any further contact from law enforcement. Additionally, after his initial response, Mr. Office almost immediately changed his response to "yes". Third, after Mr. Office stated he would perform field sobriety tests, Officer Kuehl-Zoch decided she would only perform that after transporting him to a police station. Such transport would have certainly confirmed that a *de facto* arrest had occurred. (See *State v. Quartana*, 213 Wis. 2d 440, 450 (holding that a person being transported to "a more institutional setting" such as a police station for further investigation may reasonably believe that they are under arrest)). Mr. Office was given the opportunity to complete the field sobriety tests *only* at a police station, despite his willingness to perform them right away at the scene. (See *Id.*; R. 55 at 23-24, 33-34).

Thus, in considering the totality of the circumstances of this case, the only real indicator of possible intoxication in this case is an odor of intoxicants. This is not probable cause to believe that Mr. Office was committing or was about to commit the offense of operating a motor vehicle while intoxicated.

CONCLUSION

It is respectfully requested that this Court reverse the circuit court's denial of the motion to suppress evidence in this matter and remand with directions that the circuit court issue an order suppressing the same.

Dated this 19th day of October 2024.

Respectfully Submitted,

KIRK OBEAR & ASSOCIATES

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CERTIFICATION OF FORM AND LENGTH

I, Stephanie M. Rock, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,679 words.

Dated this 18th day of October 2024.

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CERTIFICATION OF ELECTRONIC BRIEF

I, Stephanie M. Rock, hereby certify in accordance with Sec. 801.18(6) that I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 19th day of October 2024.

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