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

CITY OF DELAFIELD,

Plaintiff-Respondent,

Appeal No. 2024AP000227

v.

SHAWN M. OFFICE,

Defendant-Appellant.

On Appeal From the Circuit Court of Waukesha County
Honorable Dennis P. Moroney, Presiding
Case No. 2022CV000266

PLAINTIFF-RESPONDENT'S RESPONSE BRIEF

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STATEMENT OF THE ISSUES

1. Was there sufficient probable cause to place the defendant under arrest for operating a motor vehicle while intoxicated?

Trial court: Yes.

The correct answer is yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent believes oral argument is unnecessary because the briefs fully develop the theories and legal authorities of the limited issues brought in this appeal.

Publication of this case is not warranted because the issues presented may be resolved by applying the specific facts of this matter to controlling precedent, there is no reason to question or qualify the precedent, and the case has no significant value as precedent.

STATEMENT OF THE CASE

This case involves the trial court's denial of a motion to suppress evidence brought by Shawn M. Office ("Office"), who was thereafter convicted of operating a vehicle while under the influence. R. 15; App. 3–5.¹ Below are the facts presented at the evidentiary hearing related to Office's motion, which confirmed that the City of Delafield ("City") had probable cause to place Office under arrest.

Just after 2:00 a.m. on January 9, 2021, a City police officer was generally patrolling Highway 16. R. 55:8–9; App. 19–20. While traveling eastbound on Highway 16, the City police officer observed a vehicle approaching from behind at a high rate of speed. R. 55:9; App. 20. The officer activated the police vehicle's rear radar unit, which identified the approaching vehicle was traveling at a speed of 85 miles per hour. *Id.* Highway 16's posted speed limit is 65 miles per hour. *Id.*

The speeding vehicle then passed and moved in front of the City's police vehicle. R. 55:10; App. 21. The officer quickly entered the speeding vehicle's license plate information and confirmed that the vehicle's registration was expired. *Id.* After passing the police vehicle, the subject vehicle slowed to 50 miles per hour. R. 55:11; App. 22. The City officer planned to follow the vehicle through an upcoming curve on Highway 16 to determine how the driver navigated. *Id.*

Prior to entering the curve, the subject vehicle activated the hazard lights and entered Highway 16's median shoulder. *Id.* The City police officer pulled in behind the vehicle and activated the police vehicle's emergency lights with the intention of completing a traffic

¹ The City's citations to Defendant-Appellant's Appendix are to the pagination in the header applied by the Court's electronic filing system, not the number referenced at the bottom of each page. *See* Wis. Stat. Rule 809.19(8)(bm).

stop. R. 55:10–11; App. 21–22. After the vehicle came to a stop, Office immediately exited, and began checking the body or tires of the vehicle’s passenger side. R. 55:12, 16; App. 23, 27.

The City officer then exited the police vehicle, and asked Office to move away from the traffic lane and sit back in the driver’s vehicle. R. 55:13; App. 24. Office was first hostile toward the officer but subsequently complied. R. 55:13–14; App. 24–25. The officer then approached the vehicle’s passenger side window. R. 55:14; App. 25. The front passenger seat was occupied by a female. *Id.*

The officer inquired with the individuals about where they had come from and their destination. R. 55:15; App. 26. Office was hostile toward, and yelled at, the police officer in his response. *Id.* He then refused to identify himself or provide identification, demanded a police supervisor be present, and thereafter rolled up the vehicle window. *Id.* During the exchange, the officer detected the odor of intoxicants emanating from the passenger side of the vehicle and observed Office’s speech being slurred. R. 55:17; App. 28.

After the interaction, the officer retreated to her police vehicle until additional police units arrived. R. 55:16; App. 27. The City officer subsequently approached Office’s vehicle a second time after two additional officers arrived at the scene from the Town of Oconomowoc and the Village of Hartland. R. 55:16–17; App. 27–28. Office again refused to identify himself and informed the City officer that he would be leaving. R. 55:18; App. 29. Office was then removed from the vehicle to prevent him from fleeing the scene and moved to the vehicle’s rear. *Id.* The City officer, in a face-to-face interaction with Office, observed

his slurred speech and detected the odor of intoxicants emanating from him. R. 55:18–19; App. 29–30.

Office was then asked if he had anything to drink, which he denied. R. 55:19; App. 30. While Office remained at the rear of his vehicle with the Town/Village officers, the City officer approached the passenger side to speak with the female. R. 55:20–21; App. 31–32. Office became hostile, attempted to interrupt the interaction, and ultimately made an aggressive movement toward the vicinity of the City police officer. *Id.* Office was then detained to the City police vehicle for safety reasons (but not yet placed under arrest). R. 55:21, 52–53; App. 32, 63–64. The Village police officer also detected the odor of intoxicants from Office while detaining Office in the police vehicle. R. 55:52; App. 63.

Based on Office's driving behavior (speeding past a police vehicle and pulling over for no apparent reason), slurred speech, and the odor of intoxicants emanating from him, it was the City officer's belief that Office had operated a motor vehicle while intoxicated. R. 55:22–23; App. 33–34. Therefore, a few minutes after Office was detained, the City officer requested Office submit to a field sobriety test. *Id.* Office refused. *Id.* The City officer then informed Office that he was under arrest for operating a motor vehicle while intoxicated. R. 55:23; App. 34.²

Office filed a motion to suppress, arguing that there was insufficient probable cause for the arrest. R. 15; App. 3–5. The trial court denied the motion, ruling that probable cause existed based on the odor of intoxicants, Office's belligerent attitude, and his consistent

² During the interaction, for a third time, the City officer detected the odor of intoxicants emanating from Office and observed Office had slurred speech. R. 55:21–22; App. 32–33.

failure to cooperate with police. R. 55:68–69; App. 79–80. The trial court further concluded that, based on the entirety of the circumstances, there were reasonable grounds for the City police officer to arrest Office based on the belief that a traffic violation had occurred. R. 55:69; App. 80.

Office appealed.

STANDARD OF REVIEW

When reviewing a motion to suppress evidence, an appellate court will “uphold a circuit court’s findings of historical fact unless they are clearly erroneous.” *State v. Blatterman*, 2015 WI 46, ¶ 16, 362 Wis. 2d 138, 864 N.W.2d 26 (citation omitted). The application of constitutional principles to those facts is a question of law. *Id.*

There are two different types of seizures under the Fourth Amendment of the U.S. Constitution and Article I, Section 11 of Wisconsin’s Constitution: investigatory stops (*Terry* stops), and arrests. *State v. Young*, 2006 WI 98, ¶¶ 18, 20, 22, 294 Wis. 2d 1, 717 N.W.2d 729; *see also Terry v. Ohio*, 392 U.S. 1 (1968).

Under *Terry*, “a police officer may, under certain circumstances, temporarily detain a person for purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest.” *Blatterman*, 362 Wis. 2d 138, ¶ 18; *see also* Wis. Stat. § 968.24 (“a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime.”).

There must be “reasonable suspicion” to justify an investigatory stop. *Young*, 294 Wis. 2d 1, ¶ 20. “Reasonable suspicion requires that a

police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *Id.*, ¶ 21; *see also id.*, ¶ 59 (“[T]he suspicion necessary to justify an investigatory stop is ‘considerably less than proof of wrongdoing by a preponderance of the evidence.’” (citation omitted). An investigatory stop “must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Blatterman*, 362 Wis. 2d 138, ¶ 20 (citation omitted). Police may, during an investigatory stop, “take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.” *United States v. Hensley*, 469 U.S. 221, 235 (1985).

In contrast to an investigatory stop, an arrest “is a more permanent detention that typically leads to ‘a trip to the station house and prosecution for crime,’” and must be justified by probable cause. *Young*, 294 Wis. 2d 1, ¶ 22 (citation omitted). “Probable cause requires that an arresting officer have sufficient knowledge at the time of the arrest to ‘lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.’” *Id.* (citation omitted).

The test for whether a person has been arrested is whether a reasonable person in the defendant’s position, given the degree of restraint, would consider himself or herself to be in custody. *Blatterman*, 362 Wis. 2d 138, ¶ 30; *see also State v. Vorburger*, 2002 WI 105, ¶ 68, 255 Wis. 2d 537, 648 N.W.2d 829 (“[W]e use an objective test, assessing the totality of the circumstances, to determine whether a seizure has escalated into an arrest....”).

Depending on the circumstances, an officer may physically restrain an individual without necessarily transforming an

investigatory stop into an arrest. *See State v. Goyer*, 157 Wis. 2d 532, 538, 460 N.W.2d 424 (Ct. App. 1990); *State v. Wortman*, 2017 WI App 61, ¶¶ 5, 7, 10, 378 Wis. 2d 105, 902 N.W.2d 561 (concluding that officer's activation of squad lights, blocking of defendant's path by squad car, requesting that defendant ride in back of squad car to scene, and taking of defendant's driver's license did not constitute arrest).

The use of handcuffs “does not necessarily render a temporary detention unreasonable [or transform a] detention into an arrest.” *Blatterman*, 362 Wis. 2d 138, ¶ 31 (alterations in original) (citation omitted). “However, for such measures to be reasonable, they must be justified by particular circumstances, such as the risk of harm to the officers.” *Id.*; *see also Vorburger*, 255 Wis. 2d 537, ¶ 38 (“Reasonableness is the ‘ultimate standard’ embodied in the Fourth Amendment.”).

ARGUMENT

I. There was no *de facto* arrest.

Office first argues that a *de facto* arrest occurred when he was detained in the police vehicle prior to refusing a field sobriety test. Office Br. at 14–15. Office ignores the fact that he was detained for aggressively moving toward the vicinity of the City officer while she was questioning Office's female companion. R. 55:20–21; App. 31–32. Despite having been verbally hostile toward the City officer and rejecting almost every police command, he was not placed in handcuffs until he aggressively moved in the City officer's direction. R. 55:13–15, 18; 20–21; App. 24–26, 29, 31–32.

“In assessing a detention's validity, courts must consider the totality of the circumstances—the whole picture, because the concept of

reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules.” *State v. Wilkens*, 159 Wis. 2d 618, 626, 465 N.W.2d 206 (Ct. App. 1990) (internal quotation marks and citation omitted). Temporary detainment is appropriate to ensure officer safety.

Here, by the time he was detained, there had been two instances in which the City officer observed Office’s slurred speech and detected the odor of intoxicants emanating from him (first in his car generally, then confirmed in the face-to-face interaction at the rear of his vehicle). R. 55:17–19; App. 28–30. After a few minutes, he was asked to complete a field sobriety test. R. 55:22–23, 49; App. 33–34, 60. He refused, which resulted in his arrest. R. 55:22–23; App. 33–34.

Office was handcuffed by the officers when he repeatedly refused to abide by lawful commands, was generally combative during each police interaction, and made an aggressive movement toward the City officer. It was entirely reasonable for the officers to temporarily detain him with handcuffs at that point of the investigation to ensure police safety and maintain the status quo. *See Hensley*, 469 U.S. 221 at 235.

The trial court properly concluded that Office was not under arrest when he was detained.

II. There was probable cause to arrest Office for operating a motor vehicle while intoxicated.

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, 525 N.W.2d 102 (Ct. App. 1994) (citation and

quotation omitted). “Probable cause to arrest does not require proof beyond a reasonable doubt or even that guilt is more likely than not.” *Id.* at 357 (citation and quotation omitted). “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.* (citation omitted). A refusal to submit to a field sobriety test may be used as evidence of probable cause to arrest because it shows consciousness of guilt. *Id.* at 363.

The testimony presented at the suppression hearing established that there were sufficient circumstances and evidence to lead the City officer to believe Office had operated a motor vehicle while under the influence of an intoxicant. The following confirms that probable cause existed:

- Office’s speeding in excess of the posted speed limit. R. 55:9; App. 20.
- Office’s immediate reduction in speed by approximately 35 miles per hour after passing the City officer. R. 55:11; App. 22.
- The abrupt manner in which Office pulled his vehicle over toward Highway 16’s median. *Id.*
- During the City officer’s initial approach upon the vehicle’s passenger window, she observed Office’s slurred speech and detected the odor of intoxicants emanating from the vehicle. R. 55:17; App. 28.
- During the City officer’s interaction with Office at the rear of the vehicle, she observed Office’s slurred speech and detected the odor of intoxicants emanating from him. R. 55:18–19; App. 29–30.

- Office's belligerent attitude, including the consistent refusal to comply with almost every police command. R. 55:13–15, 18, 20–21; App. 24–26, 29, 31–32.
- Office's aggressive jolt toward the City officer, which necessitated his detainment to a police vehicle for safety reasons. R. 55:20–21, 52–53; App. 31–32, 63–64.
- While detaining Office, the Village officer also detected the odor of intoxicants emanating from Office. R. 55:52; App. 63.
- During the City officer's interaction with Office while he was detained in the police vehicle, she observed his slurred speech and detected the odor of intoxicants emanating from him. R. 55:20–21; App. 31–32.

Office argues that he was placed under arrest prior to a request to conduct a field sobriety test or preliminary breath test. Office Br. at 17. However, the testimony confirms that Office was not placed under arrest until after he refused to complete a field sobriety test and after the City officer confirmed all of the circumstances listed above. R. 55:21–23; App. 32–34. *See Babbitt*, 188 Wis. 2d at 359–60 (“The most plausible reason for a Defendant to refuse [a field sobriety test] is the fear that taking the test will expose the Defendant’s guilt. Thus, because the defendant’s refusal to submit to a field sobriety test is some evidence of consciousness of guilt, this evidence should be admissible for the purpose of establishing probable cause to arrest.”).

Further, contrary to Office's assertion that he was verbally informed that he was under arrest after he declined to be transported to the Village Police Department, the fact is he was placed under arrest after he declined to perform a field sobriety test. R. 55:22–23; App. 33–34. It was only after he refused to perform a field sobriety test and after

he was placed under arrest that there was any discussion with him about being transported to the Village to perform a field sobriety test. R. 55:22–24, 33–34; App. 33–35, 44–45.

The trial court properly concluded that there was probable cause to arrest Office for operating a vehicle while under the influence.

CONCLUSION

In sum, probable cause existed to arrest Office. The trial court's ruling on Office's motion to suppress should be affirmed and the conviction upheld.

Dated this 11th day of December, 2024.

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CERTIFICATION

I hereby certify that this response brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a response brief. The length of this response brief is 10 pages and 2,652 words.

Dated this 11th day of December, 2024.

BY: *Electronically signed by Michael P. Van Kleunen*
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