

FILED
12-23-2024
CLERK OF WISCONSIN
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.

REPLY 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

KIRK OBEAR & ASSOCIATES
Attorney Stephanie M. Rock
State Bar No.: 1117723
Attorney for Defendant-Appellant

603 South Eighth Street
Sheboygan, Wisconsin 53081
Telephone: (920) 395-6960
Facsimile: (920) 395-6968
E-Mail: stephanie.rock@kirkobear.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
ARGUMENT.....	5
I. When Mr. Office was handcuffed and placed in the back of the squad vehicle, a de facto arrest unsupported by probable cause occurred.....	5
II. Mr. Office was unlawfully arrested for operating a motor vehicle while intoxicated as probable cause did not exist at any time.....	7
CONCLUSION.....	9
CERTIFICATION OF FORM AND LENGTH.....	10
CERTIFICATION OF ELECTRONIC BRIEF.....	10

TABLE OF AUTHORITIES

United States Supreme Court

United States v. Hensley, 469 U.S. 221 (1985).....5

Wisconsin Supreme Court

State v. Blatterman, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26.....6

State v. Nordness, 128 Wis. 2d 15, 381 N.W.2d 300 (1986).....7

State v. Swanson, 164 Wis. 2d 437, 475 N.W.2d 148 (1991).....6

Wisconsin Court of Appeals

State v. Babbitt, 188 Wis. 2d 349, 626 N.W.2d 102 (Ct. App. 1994).....7

State v. Quartana, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997).....5, 8

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NO. 2024 AP 000227

CITY OF DELAFIELD,

Plaintiff – Respondent,

v.

SHAWN M. OFFICE,

Defendant – Appellant.

REPLY 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

KIRK OBEAR & ASSOCIATES
Attorney Stephanie M. Rock
State Bar No.: 1117723
Attorney for Defendant-Appellant

603 South Eighth Street
Sheboygan, Wisconsin 53081
Telephone: (920) 395-6960
Facsimile: (920) 395-6968
E-Mail: stephanie.rock@kirkobear.com

ARGUMENT

I. When Mr. Office was handcuffed and placed in the back of the squad vehicle, a *de facto* arrest unsupported by probable cause occurred.

A *de facto* arrest unsupported by probable cause occurred 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. While there can be circumstances in which 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,” these detentions must remain reasonable and not violate the Fourth Amendment. *State v. Quartana*, 213 Wis. 2d 440, 445, 448, 570 N.W.2d 618 (Ct. App. 1997).

The City asserts that Mr. Office being handcuffed and locked in the back of a marked squad vehicle and then left alone for five to six minutes was for officer safety. City’s Br. 10-11. In support of this, the City relies on Mr. Office’s so-called aggressive movement in Officer Kuehl-Zoch’s direction. Such characterization of Mr. Office’s movement is a gross exaggeration. (*See* R. 24 at 13:45-14:15). Police may protect their personal safety during an investigatory stop; however, the steps they take to do so must be reasonable. *United States v. Hensley*, 469 U.S. 221, 235 (1985). To say that it was entirely reasonable for the officers to handcuff Mr. Office at that point of the investigation to ensure police safety is nonsensical when viewed in context of the stop.

Here, Mr. Office, in the presence of five law enforcement officers, was handcuffed and locked into the back of a marked squad. (*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). This was not done for officer safety

reasons. (*Id.*). Rather, an examination of the totality of the circumstances shows that there was no legitimate officer safety concern. It is true that Mr. Office was speaking loudly and refusing to answer investigatory questions. (*See* R. 24). What is not true is the assertion that Mr. Office aggressively moved in Officer Kuehl-Zoch's direction. (*Id.*). A review of the record shows that Mr. Office only took a few steps toward Officer Kuehl-Zoch while he was attempting to speak with her. (*Id.*; *see* R. 24 at 13:45-14:15).). He did not become physically aggressive with the officers nor did he threaten to become physically aggressive. (*Id.*). Moreover, he was fully compliant with getting in and out of his vehicle and remained compliant while the *de facto* arrest occurred. (R. 55 at 54; 64).

When determining whether a person has been arrested, Wisconsin courts must assess whether a "reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraining under the circumstances." *State v. Blatterman*, 2015 WI 46, ¶ 30, 362 Wis. 2d 138, 864 N.W.2d 26. "The circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test." *Id.* (quoting *State v. Swanson*, 164 Wis. 2d 437, 447, 475 N.W.2d 148 (1991)).

In light of the totality of circumstances present in this case, any reasonable person in Mr. Office's position would have believed that they were in custody and not free to leave. 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 can be explained as nothing other than an arrest.

II. Mr. Office was unlawfully arrested for operating a motor vehicle while intoxicated as probable cause did not exist at any time.

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)). A court may consider a defendant’s refusal to submit to a field sobriety test when determining whether probable cause to arrest existed. *Id.* at 363.

Here, at the time of the *de facto* arrest, there was no probable cause to believe that Mr. Office was committing or about to commit 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.

Assuming *arguendo* that Mr. Office was not arrested until after the initial request to complete field sobriety tests was made, probable cause still did not exist. The City argues that Mr. Office’s initial, mere seconds refusal to complete field sobriety tests should be considered in the probable cause analysis without acknowledging the full circumstances surrounding the request for the tests. 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. After his initial response, Mr. Office almost immediately changed his response to “yes”. When 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 lawful request to perform them right away at the scene. (*See Id.*; R. 55 at 23-24, 33-34). This complete examination reveals that any so-called refusal by Mr. Office to perform field sobriety tests should not be considered when analyzing whether probable cause existed to arrest at that time.

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). Her opinion was based on Mr. Office’s driving behavior, his behavior towards her, the odor of alcohol, and the slurred sounding speech. (*Id.*). On cross-examination, however, Officer Kuehl-Zoch admitted that the observed 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). Officer Kuehl-Zoch further admitted that throughout her past experience she has encountered sober individuals who are openly not happy with her. (*Id.* at 48; 58). Additionally, 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*).

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 and slurred sounding speech observed by only one of five law enforcement officers. 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. Probable cause simply did not exist at the time of the *de facto* arrest nor did it exist at any time afterwards.

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 20th day of December 2024.

Respectfully Submitted,

KIRK OBEAR & ASSOCIATES
Electronically signed by:

By: Stephanie M. Rock
Attorney Stephanie M. Rock
State Bar No.: 1117723
603 S. 8th St.
Sheboygan, WI 53081
T: (920) 396-6960
F: (920) 396-6968
E: stephanie.rock@kirkobear.com

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 1,401 words.

Dated this 20th day of December 2024.

Electronically signed by:

Stephanie M. Rock
Attorney Stephanie M. Rock
State Bar No.: 1117723
603 S. 8th St.
Sheboygan, WI 53081
T: (920) 396-6960
F: (920) 396-6968
E: stephanie.rock@kirkobear.com

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 20th day of December 2024.

Electronically signed by:

Stephanie M. Rock
Attorney Stephanie M. Rock
State Bar No.: 1117723
603 S. 8th St.
Sheboygan, WI 53081
T: (920) 396-6960
F: (920) 396-6968
E: stephanie.rock@kirkobear.com