STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP000777 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. PHELAN,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in the Columbia County Circuit Court, the Honorable W. Andrew Voigt, Presiding.

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ISSUE PRESENTED

> Did the Department of Natural Resources warden lack statutory authority to investigate and detain John Phelan and, thus, unlawfully prolong the stop?

The circuit court answered no and denied the motion to suppress evidence. This Court should reverse the circuit court's order denying that motion.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issue will be sufficiently addressed in the briefs. Publication may be warranted because the issue involves the novel interpretation of a statute for which there is little-to-no existing court authority.

STATEMENT OF THE CASE

This case is unusual for a criminal matter as it turns entirely on this Court's interpretation of the statutes governing the authority of wardens of the Department of Natural Resources ("DNR") under Wis. Stats. §§ 29.921(1), (5), and 29.924(1).

The procedural history of the case spans almost seven years and includes numerous motions and hearings on the suppression issue, a jury trial, and a

guilty plea. This section provides the background of the single issue on appeal.

DNR Warden Ryan Volenberg was conducting "fishing enforcement" when he believed that he saw Mr. Phelan discard a can on the ground. (110:7). This did not take place on DNR lands. (192:15).

Based on the belief that Mr. Phelan had littered and then driven away, Warden Volenberg pursued Mr. Phelan in his vehicle. (110:7). While following Mr. Phelan, Warden Volenberg believed Mr. Phelan was driving poorly and could possibly be impaired. (110:7). Mr. Phelan disputed this and stated that any driving irregularities were related to Warden Volenberg pursuing him very closely in a non-police car. (47:33-34).

Warden Volenberg then stopped Mr. Phelan and smelled the odor of marijuana when Mr. Phelan rolled down his window. (110:7-8). This was also not on DNR lands. (192:15-16). At this point, Warden Volenberg also determined that Mr. Phelan had not littered. (110:8-9). Because of this, Warden Volenberg testified that "the focus of my investigation shifted to determining whether [Mr. Phelan] was impaired while he was driving." (110:9).

In testifying about his training regarding marijuana or lack thereof, Warden Volenberg stated that the smell of raw and burnt marijuana is "fairly similar" and that "it just smells like smoke." (110:21). Details of Volenberg's training with respect to marijuana detection were sparse, with Volenberg

admitting that he was not sure about the smells or difference between raw and burnt marijuana and stating that he was largely going off of what he had been told by others. (110:19-21).

Warden Volenberg continued the detainment by asking Mr. Phelan to exit his vehicle. (110:9). Warden Volenberg then conducted field sobriety tests and determined that Mr. Phelan had not passed them. (110:9). Based on this, Warden Volenberg had Mr. Phelan take a preliminary breath test that showed Mr. Phelan was not under the impairment of alcohol as his blood alcohol content was one-tenth of the legal limit. (23:8; 110:9, 41). After Warden Volenberg determined that Mr. Phelan was not under the influence of alcohol, Warden Volenberg contacted the Columbia County Sheriff's Department to have a drug recognition expert ("DRE") come to the scene. (23:8; 110:9, 12). Warden Volenberg kept Mr. Phelan detained and continued to question him until the arrival of the additional officers. (110:12).

Relevantly, trial counsel filed a motion to suppress the evidence on the basis that Volenberg, as a DNR warden, did not have the authority to investigate, detain, or arrest Mr. Phelan for committing an OWI or drug-related offense. (117:6-9).

The circuit court ultimately denied the motion to suppress evidence. (190:2). In denying the motion, the court stated that Warden Volenberg had the authority to do what he did, "[a]nd I just don't know how else to say it [other] than that." (190:2).

STATEMENT OF FACTS

On November 18, 2015, the state charged Mr. Phelan in a four-count criminal complaint: possession of THC, OWI (3rd offense), misdemeanor bail jumping, and possession of drug paraphernalia. (3:1-2). A fifth count of operating with a restricted controlled substance in the blood (3rd offense) was later added. (21:2).

The first appointed defense attorney filed a motion to suppress the evidence on the basis that the pursuit was pretextual and that there was not reasonable suspicion to justify the stop. (23:2). The circuit court denied this motion after a hearing. (47:51-52).

Eventually, Mr. Phelan petitioned the court asking for a new attorney, the court permitted trial counsel to withdraw, and a new attorney was appointed. (60; 69; 71; 73).

The court then allowed trial counsel to file a new motion to suppress evidence. (84; 88). In this suppression motion, as set forth in the statement of the case, trial counsel argued that a DNR warden did not have the statutory authority to investigate, detain, or arrest Mr. Phelan in these circumstances. (117:6-9).

The state argued for a broad view of a warden's powers. (133). While § 29.921(5) states that "[a] warden may not conduct investigations for violations of state law except as authorized in" three specific statutes not applicable to Mr. Phelan's case, the state

contended that a plain reading of that section created an "absurd" outcome. (133:3-4).

Eventually, the circuit court denied the defense motion to suppress the evidence. (190:2). In denying the motion, the court noted that the defense's argument was "substantially more creative and more challenging" than the first suppression motion filed. (190:2). Regarding the warden's authority, the court only offered that the warden had the authority to do what he did, with a passing reference to § 29.921(5). (190:2-5). The court also found that there was probable cause to arrest immediately during the encounter. (190:3-4).

The case then proceeded to a jury trial. (198). In a stipulation, Mr. Phelan agreed that he would enter a plea to the charge of misdemeanor bail jumping if the jury found him guilty of any criminal offense. (154:1). Additionally, the state chose not to seek a conviction for the possession of THC charge. (151:1). This left three charges to be tried before the jury: it found Mr. Phelan not guilty of operating a motor vehicle while under the influence of a controlled substance; and found Mr. Phelan guilty of operating with a detectable amount of restricted controlled substance in his blood and possession of drug paraphernalia. (160:1-3; 198:285-286).

While the parties initially agreed to a sentence of probation after the jury verdict, the court held a second sentencing hearing to correct minor errors. (198:291-294; 188). At the second hearing, the parties

offered a joint recommendation for a total of 80 days of jail. (188:8-11). The court agreed with the joint recommendation and noted, "[t]his case has wandered into, frankly, almost bizarre territory on so many levels, it's hard to even fathom." (173:1-2; 188:11-12).

Mr. Phelan filed a timely notice of intent to pursue postconviction relief. (177). This appeal follows.

ARGUMENT

The court erred when it denied the motion to suppress evidence because the DNR warden did not have statutory authority to detain and investigate, or arrest John Phelan.

Wisconsin law is clear about the authority of a DNR warden in criminal matters. The statutes relevant to this case are Wis. Stats. §§ 29.921(1), (5), and 29.924(1). They provide limited and enumerated instances under which wardens have investigative authority. *See* § 29.921(5).

Those statutes are clear on their face in this situation: DNR Warden Ryan Volenberg did not have the authority to detain and investigate or subsequently arrest John Phelan for OWI or drug-related offenses. As a result, this Court should reverse the circuit court's denial of the motion to suppress evidence, remand with directions to grant that motion, and vacate the convictions.

A. Standard of review.

An order granting or denying a motion to suppress evidence presents a question of constitutional fact. *State v. Howes*, 2017 WI 18, ¶17, 373 Wis. 2d 468, 893 N.W.2d 812. This Court reviews a circuit court's finding of fact under the clearly erroneous standard, but reviews the circuit court's application of constitutional principles to those facts *de novo*. *State v. Anker*, 2014 WI App 2017, ¶10, 357 Wis. 2d 565, 855 N.W.2d 483 (citations omitted). As Mr. Phelan does not dispute the facts below, *de novo* is the proper standard of review. Furthermore, a question of statutory interpretation is also reviewed *de novo*. *Estate of Miller v. Storey*, 2017 WI 99, ¶25, 378 Wis. 2d 358, 903 N.W.2d 759.

B. Applicable law.

The following relevant portions of statutes govern the authority of DNR wardens with respect to police powers, including arrests and investigations:

> [29.921(1)] The department and its wardens may execute and serve warrants and processes issued under any law enumerated in ss. 23.50 (1), 167.31, 346.19, 940.24, 941.20, 948.60, 948.605 and 948.61 in the same manner as any constable may serve and execute the process; and may arrest, with or without a warrant, any person detected in the actual violation, or whom the officer has probable cause to believe is guilty of a violation of any of the laws cited in this subsection, whether the violation is punishable by criminal penalties or by forfeiture, and may take the person before

> any court in the county where the offense was committed and make a proper complaint. For the purpose of enforcing any of the laws cited in this subsection, any officer may stop and board any boat and stop any vehicle, if the officer reasonably suspects there is a violation of those sections.

The above subsection references eight other statutes. Respectively, these statutes relate to (1) procedures in forfeiture actions; (2) transportation of firearms and bows; (3) yielding to emergency vehicles; (4) injury by negligent handling of weapons; (5) endangering safety by use of a dangerous weapon; (6) possession of a dangerous weapon by a person younger than 18; (7) gun-free school zones; and (8) dangerous weapons other than firearms on school premises. Wis. Stats. §§ 23.50(1), 167.31, 346.19, 940.24, 941.20, 948.60, 948.605, and 948.61. Generally speaking, these are areas of law that one might naturally expect the DNR to exercise authority in.

> [29.921(5)] In addition to the arrest powers under sub. (1), a warden who has completed a program of law enforcement training approved by the law enforcement standards board, has been certified as qualified to be a law enforcement officer under s. 165.85 (4) (a) 1. and has complied with any applicable requirements under s. 165.85 (4) (a) 7. while on duty and in uniform or on duty and upon display of proper credentials may assist another law enforcement agency as defined under s. 165.85 (2) (bv) including making an arrest at the request of the agency, may arrest a person pursuant to an arrest warrant concerning the commission of a felony or may arrest a person who

> has committed a crime in the presence of the warden. If the warden makes an arrest without the presence of another law enforcement agency, the warden shall cause the person arrested to be delivered to the chief of police or sheriff in the jurisdiction where the arrest is made, along with the documents and reports pertaining to the arrest. The warden shall be available as a witness for the state. *A warden may not conduct investigations for violations of state law except as authorized in ss. 23.11 (4), 29.924 (1) and 41.41 (12)* [Emphasis added].

A plain reading of this statute reveals that a warden can only conduct investigations for violations of state law in three circumstances: (1) incidents on state-owned lands; (2) those enumerated statutes previously referenced in § 29.921(1) (none of which are relevant here); and (3) areas in the Kickapoo Valley Reserve. Wis. Stats. §§ 23.11(4), 29.921(1), and 41.41(12).

> [29.924(1)] The department and its wardens shall, upon receiving notice or information of the violation of any laws cited in s. 29.921 (1), as soon as possible make a thorough investigation and institute proceedings if the evidence warrants it.

The above statute reiterates that the investigatory power of wardens is very limited to just those previously-listed statutes in § 29.921(1).

C. Warden Volenberg unlawfully detained Mr. Phelan because he did not have the statutory authority to continue the investigation.

A warden cannot conduct investigations for violations of state law outside of specifically enumerated situations. Wis. Stat. § 29.291(5). The legislature has limited the warden's investigatory power to incidents on state-owned lands, yielding to emergency vehicles, the transport of firearms or other hunting tools, and areas in the Kickapoo Valley Reserve. Wis. Stat. § 29.291(5).

Warden Volenberg's observation, pursuit, stop, and investigation of Mr. Phelan did not fall under any of these categories. Neither Volenberg's inaccurate assumption that Mr. Phelan had littered, nor his pursuit, stop, and investigation of Mr. Phelan took place on state-owned lands. (192:15-16). Nor did these actions invoke any of the warden's authorities under Wis. Stat. § 29.291(1) or the Kickapoo Valley Reserve. Therefore, Volenberg's actions were unlawful as the detention of Mr. Phelan was not supported under Volenberg's statutory authority or probable cause.

While there is a dearth of caselaw on a warden's authority to conduct investigations or arrests, the plain language of the statutes limits it to the above situations. Regarding these statutes, "interpretation begins with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). "If the

meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*, ¶45. Therefore, this Court should not find that an expansive view of a warden's police powers where they effectively have all the authority of a police officer with less of the training.

To this end, the Attorney General has previously offered its opinion as to a warden's authority:

> The power of arrest of department of natural resources wardens is limited by this section; they do not have general law enforcement authority except on state-owned lands, and property, under the department's supervision, management and control including the power to arrest violators of state law on all bodies of water which lie exclusively within such area, as determined by facility boundaries.

Op. Atty. Gen., Nov. 6, 1979.

Warden Volenberg pursued and stopped Mr. Phelan for the suspected littering of a can (which did not occur). (110:7-9). When Warden Volenberg learned that Mr. Phelan had not littered, Volenberg stated that "the focus of my *investigation* shifted to determining whether [Mr. Phelan] was impaired while he was driving." (110:9, emphasis added). These events did not occur on DNR-controlled lands. (192:15-16). Volenberg specified that Mr. Phelan was not under arrest at this point, as there was not probable

cause to arrest Mr. Phelan. (110:10). It is at this moment in time that the detainment of Mr. Phelan became unlawful. Because Mr. Phelan was not operating a motor vehicle on state-owned lands, or within areas of the Kickapoo Valley Reserve, Volenberg had no authority to investigate the suspected OWI investigation.

The circumstances of this case present a perfect example of why Wisconsin law does not authorize DNR wardens to investigate or enforce laws wherever they happen to be in the state.

Warden Volenberg testified that if Mr. Phelan was impaired, the substance could have been alcohol or drugs. (110:18). This apparently necessitated making Mr. Phelan submit to field sobriety tests. (110:9).

One might refrain from calling these "standardized" field sobriety tests for a number of reasons. First, Warden Volenberg testified that it had been "six years or four years since[he had] done any field sobriety tests." (110:25). Volenberg later testified that he had done field sobriety tests "[p]robably fairly recently" before his encounter with Mr. Phelan. (192:12-13). Second, and ignoring that a DNR warden is almost certainly not required to be as up-to-date on training as a police officer, Volenberg also testified that he does not know how to interpret the test results: "All I'm trained is how to administer the test and how to look for the clues that the test is designed to look for and to record those. I don't interpret the results. I just

administer the tests. I look for the observations." (110:27). Third, even though Volenberg was apparently concerned about marijuana, he conducted the field sobriety tests and offered the following explanation:

> [Question:] The field sobriety tests, what were they designed for?
>
> [Volenberg:] To determine impairment.
>
> [Question:] Impairment by what substance?
>
> [Volenberg:] I don't know. I assume alcohol.

(110:25).

Mr. Phelan did not pass the field sobriety tests according to Warden Volenberg's opinion. (110:9, 27). Warden Volenberg then had Mr. Phelan take a preliminary breath test that showed Mr. Phelan was not under the impairment of alcohol as his blood alcohol content was .008, or one-tenth of the legal limit. (23:8; 110:9, 41). As shaky as Warden Volenberg's investigations were, it is clear from these circumstances that Warden Volenberg did not have probable cause to arrest Mr. Phelan. Mr. Phelan was clearly not under the influence of alcohol, Volenberg had not observed any poor driving that would lead to the establishment of probable cause for an arrest, and his testimony revealed that he did not have the proper training or experience in detection of controlled substances or marijuana.

Further extending the detainment, Warden Volenberg did not contact the Columbia County Sheriff's Department to send out a DRE until after determining that Mr. Phelan was not under the influence of alcohol. (23:8; 110:9, 12). Warden Volenberg then kept detaining and questioning Mr. Phelan until additional officers arrived. (110:12).

What began as a DNR warden pursuing and stopping Mr. Phelan based on (an incorrect) suspicion of littering ultimately turned into an unlawful detainment. The statute governing wardens' arrest powers plainly states that "[a] warden may not conduct investigations for violations of state law" outside of enumerated instances not relevant here. Wis. Stat. § 29.921(5). Wisconsin law provides limitations on the investigation authority of wardens, and Mr. Phelan's case is an example as to why that is: Warden Volenberg conducted a shoddy investigation, administered field sobriety tests without being familiar with the reasons for them, and kept Mr. Phelan detained during this investigation before actually requesting help from someone with training.

The court misinterpreted the law regarding those DNR statutes when it denied the motion to suppress evidence. The court's decision only glancingly touched on the applicable statutes when it said, "Warden Volenberg clearly had authority in the Court's opinion in Sec. 29.921(5) to do what he did. . . [a]nd I just don't know how else to say it [other] than that." (190:2). Because Volenberg did not have the authority to perform this investigation or arrest

Mr. Phelan, the detainment was unlawful, and all evidence, including any subsequent statements from Mr. Phelan or blood test results, should be suppressed. This Court should reverse the convictions and reverse the circuit court's decision denying the motion to suppress evidence.

CONCLUSION

For all the reasons set forth, the circuit court improperly denied Mr. Phelan's motion to suppress evidence. Mr. Phelan respectfully asks this Court to vacate the judgment of conviction and to remand with directions to grant the motion to suppress.

Dated this 26th day of June, 2024

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,092 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of June, 2024.

Signed:
Electronically signed by
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