STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP000777 - CR
Circuit Case No. 2015CF000467

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. PHELAN,

Defendant-Appellant.

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

REPLY BRIEF OF PLAINTIFF-RESPONDENT

Respectfully submitted,

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State Bar No. 1116140

Noah L. Jaraczewski
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES (cont.)

CONSTITUTIONAL CITATIONS

STATUTES

STATUTES (cont.)

ISSUE PRESENTED

I. Under Wis. Stat. 29.921(5), do board-certified Department of Natural Resources wardens have statutory authority to extend a stop and investigate if they believe a crime has been committed in their presence?

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication.

STATEMENT OF THE CASE

Statement of Facts

In the spring of 2000, then-Warden Ryan Volenberg became a board-certified law enforcement officer for the State of Wisconsin and started his employment as a DNR warden. Doc. 192, 8: 2–5. The training he received included attending the Wisconsin Law Enforcement Academy and Mid-State Technical College. Doc. 198, 75:3–7. After this training, he took a standardized field sobriety testing course, additional standardized field sobriety testing courses for situations such as those operating a boat or equipment where standardized field sobriety testing would not be appropriate, and a course on Advanced Roadside Impairment Detection Enforcement Course which discusses drugged driving. Doc. 198, 75:8–16. He maintained this board-certification status during the entirety of his employment as a warden—including on October 14th, 2015. Doc.192, 22: 16–19. Throughout his tenure as a DNR warden, Warden Volenberg conducted over a hundred field sobriety tests. Doc.192, 11:10–11.

On October 14th, 2015, Warden Volenberg was on duty, in uniform staking out a fishing area near Lake Wisconsin by Okee, WI, on County Highway V within Columbia County, Wisconsin. Doc.197, 15:19–21. This area had a lot of littering and fishing issues. Doc.197, 17:11–12.

At about 9:45 PM, Warden Volenberg observed John Phelan walking back from a bridge with fishing gear. Doc. 197, 16: 1–2. Phelan had an aluminum can in one of his hands. Doc. 197, 16:1–2. At one point Phelan stopped and looked around. Doc. 197, 16:5–6. Based on Warden Volenberg's sixteen years of experience, Phelan appeared to be preparing to illegally litter the can. Doc. 197, 16:6–9.

Phelan continued to his vehicle, aluminum can still in hand. Doc. 197, 16:11–13. Once Phelan reached his vehicle, the warden could not see where the can went. *See* Doc.197, 17:19–20. The warden watched Phelan from his rear view mirror. Doc. 197, 16:15–17. It appeared that he was putting his gear away in the back of the truck. Doc. 197, 16:15–17. Once he finished,

Phelan drove away. Doc. 197, 17:9–11. Based on Warden Volenberg's experience, people commonly littered in the parking area along the road, the area Phelan parked in. Doc. 197, 17:20-22.

Warden Volenberg got out of his vehicle and briefly checked Phelan's now empty parking space. Doc. 197, 17:23. He saw a can on the ground near this parking space which confirmed his suspicions. Doc.197, 18:1–3. The warden, knowing Phelan might escape receiving a citation due to a five-way split in the road a couple miles away rushed back to his vehicle. Doc.197, 18: 5–8. After later investigation, Warden Volenberg discovered this can was not the same can he saw Phelan holding. Doc. 110, 9:5–6.

The warden followed Phelan without emergency lights. Doc.197, 18:21–19:2; 19:24–20:2. While following Phelan, the warden maintained a safe 3-second distance between Phelan and himself. Doc.197, 27:18–21. The warden had his headlights on and did not use his high beams. Doc.197,24:9–16. While following Phelan, Warden Volenburg observed Phelan cross the double center line at least four times and the fog line at least three times. Doc.197,19:5–9.

Once the pair arrived at a safe area for the warden to pullover Phelan, he initiated a traffic stop. Doc.197, 19:14–15; 20:1–3. Phelan was the only person in the pickup truck. Doc.110, 35:8–9. After pulling over on Highway 113, Warden Volenberg radioed dispatch to inform them about the stop. Doc. 179, 9:21–22. The warden approached the vehicle and noticed Phelan struggle to get his window down. Doc.110, 8:17.

As soon as the window opened, the warden immediately smelled the odor of burnt marijuana. Doc. 110, 8:19–20. During this initial contact, Phelan had bloodshot, glossy eyes and slurred speech. Doc. 179, 10:12–15. Phelan gave the warden permission to look in the back of his vehicle at the cans he discarded in the back. Doc. 110, 9:4–5. At this point, Warden Volenberg's investigation shifted towards investigating the smell of marijuana. Doc. 110, 8:21–23.

Warden Volenberg asked Phelan to exit his vehicle and conducted several field sobriety tests to determine any impairment. Doc. 110, 9:13–15. Phelan agreed to do the tests. Doc. 179, 11:2–3. Notably, Warden Volenberg had recently conducted field sobriety tests having performed substantial OWI enforcement in his role as a warden. Doc. 192, 13:2–5. When Warden Volenberg testified to that fact in 2021, he was no longer a DNR warden and

had not conducted a field sobriety test since he left the DNR in September of 2017. Doc. 192, 12:4–6.

First, the warden administered a horizontal gaze nystagmus test. Doc. 179, 11:6–7. He observed Phelan exhibit a total of four out of six possible clues. Doc. 179, 12:5–6. Second, the warden administered a walk and turn test. Doc. 179, 12:15–16. Phelan demonstrated a total of six out of eight possible clues. Doc. 179, 13:6–9. Lastly, Warden Volenberg administered the one leg stand test. Doc. 179, 15:4–5. Phelan exhibited three out of four possible clues. Doc. 110, 28:5–6. After conducting the field sobriety tests, Warden Volenberg administered a preliminary breath test. Doc. 110, 9:19–20. The results were below the legal limit suggesting to Warden Volenberg that alcohol was not the source of Phelan's impairment. Doc. 110, 9:20–22.

Since alcohol did not cause Phelan's impairment, Warden Volenberg contacted dispatch requesting a drug recognition expert ("DRE"). Doc. 110, 9:23–24. Dispatch contacted a DRE, then-Deputy Sheriff Wesley Austin-Nash, at approximately 10:15 PM. Doc. 110, 34:12–17; 35:11–13.

While waiting for DRE to arrive, the warden questioned Phelan about the marijuana odor. Doc. 110, 10:3–4. Eventually, Phelan admitted ingesting marijuana earlier and having marijuana in his vehicle. Doc. 110, 10:9–11.

At 10:26 PM, Deputy Austin-Nash arrived on the scene. Doc. 110, 35:4–5. Warden Volenberg told the deputy everything that occurred up to that point. Doc. 110, 36:17–18. A minute later, then-Deputy Mark Smit arrived. Doc. 114, 7:21–22. Deputy Austin-Nash conducted an additional field sobriety test, the Modified Romberg test. Doc. 110, 36:23–25. The results further established Phelan's impairment. Doc. 110, 37:1–9. Deputy Austin-Nash inspected Phelan's tongue and observed a green film and elevated taste buds suggesting habitual marijuana use if they recently smoked. Doc. 110, 37:16–38:5.

Deputy Smit arrested Phelan at 10:34 PM. Doc.114, 10:21.

Procedural History

On November 18, 2015, the State filed a four-count criminal complaint in the Columbia County Circuit Court: possession of THC (2nd and subsequent offense), operating while under the influence (3rd offense), misdemeanor bail jumping, and possession of drug paraphernalia. Doc. 3, 1–

2. In 2016, a fifth-count was added to the amended information: operating with restricted controlled substance in blood (3rd offense). Doc. 21, 2.

Phelan filed a motion to suppress evidence with his first defense attorney on July 1, 2016. Doc. 23, 2. In this motion, he argued that he was pretextually pursued and stopped without reasonable suspicion nor probable cause. Doc. 23, 2–3. Further, that Warden Volenberg may have contributed to the driving that he observed. Doc. 23, 2–3.

On August 26, 2016, the circuit court held a suppression hearing regarding this motion. Warden Volenberg and Phelan testified. The circuit court noted that there is no law or rule that prevents a warden from following anyone. Doc. 197, 52:7–8. Further, there was sufficient basis to conduct the traffic stop. Doc. 197, 52:4–6. In explaining its reasoning, the circuit court found that the Phelan's testimony was not particularly credible. Doc. 197, 53:4–11. Despite this, the court reasoned that even if Phelan's testimony were 100% accurate, nothing would necessitate a finding that the warden caused any traffic violations. Doc. 197, 54:19–55:11.

Phelan and his defense attorney filed a motion to reconsider the circuit court's decision on February 20, 2018. Doc. 40. The court held a hearing on the matter on January 16, 2019 where it denied the motion. Doc. 195, 5:18–25. Again, the court emphasized that even if it completely believed Phelan's testimony, it would not rise to the level of granting his motion to suppress. Doc. 195, 7:15–20.

During the summer of 2019, Phelan petitioned the court for a new attorney. Doc. 69, 1. The circuit court granted this request on August 2, 2019, and a new attorney was appointed. Doc. 60; Doc. 69; Doc. 71; Doc.73.

The circuit court allowed Phelan's new attorney to file a second motion to suppress evidence. Doc. 84; Doc. 88. This second motion to suppress argued that Warden Volenberg's traffic stop extension was unlawful after ruling out marijuana and alcohol as the source of Phelan's impairment. Doc. 89, 1, 6. The court held two evidentiary hearings in response to this motion: (1) on April 22, 2021, where Warden Volenberg and then-Deputy Austin-Nash testified, Doc. 110, and (2) on June 4, 2021, where Deputy Smit testified. Doc. 114, 2:3.

Phelan filed a brief on its motion to suppress where it argued Warden Volenberg did not have any statutory authority as a DNR warden to detain

Phelan nor did the warden have reasonable suspicion to detain Phelan. Doc. 117, 6, 9. Phelan listed several statutes wardens have statutory authority to enforce outside their jurisdiction; however, he did not disclose any of the statutes cited within those statutes which would have indicated the source of Warden Volenberg's authority. Doc. 117, 6–9).

The State in objecting to Phelan's motion argued for a complete reading of Wis. Stat. 29.921(5). Doc. 133, 1. It pointed out that taking sentences out of the statute and citing it as authoritative creates an absurd conflict with the rest of the statute. Doc. 133, 3.

The circuit court denied Phelan's motion to suppress. *See* Doc. 190, 2:10–15. The court, in explaining its reasoning to Phelan's argument about the scope of a DNR warden's authority, "simply put, the defense argument about that just appears to be wrong. Then[-]Warden Volenberg clearly had authority in this Court's opinion in Sec. 29.921(5) to do what he did on October 14th of 2015. . . ." Doc. 190, 2:18–23. When explaining its holding to Phelan's second argument, the court held that as soon as Warden Volenberg detected the odor of marijuana he had probable cause to arrest Phelan. Doc. 190, 3:19–4:5). It cites its reasoning to State v. Seacrist, 224 Wis.2d 201 (1999). Doc. 190, 3:21–23.

The case continued to trial and was held on February 23, 2023. Doc. 198. Phelan agreed in a stipulation that he would enter a plea to the misdemeanor bail jumping charge if the jury found him guilty of any criminal offense. Doc. 154, 1. Although the State chose not to pursue count one: possession of THC, it only did so due to an analyst's unavailability for other scheduled jury trials that day. Doc. 151, 1. Only three counts were tried by the jury: operating while under the influence, operating with a restricted controlled substance, and possession of drug paraphernalia. Doc. 160, 1–3. Although Phelan was found not guilty for operating while under the influence, the jury found Phelan guilty of operating with a restricted controlled substance and possession of drug paraphernalia. Doc. 160, 1–3.

Immediately after the jury verdict, the parties agreed to two years of probation. Doc. 198, 296:17–297:9. The court held a second sentencing hearing to correct minor errors on March 10, 2023. Doc. 188. During this hearing, Phelan's attorney mentioned that Phelan agreed he would not appeal this conviction if he liked the sentence. Doc. 188, 4:23–5:8. The parties

jointly recommended a sentence for 80 days in jail along with a 24-month revocation of Phelan's license and order for an ignition interlock device. Doc. 188, 9:24–25; 12:20–13:14. The court followed this recommendation and said, "to be blunt, I think what's proposed now is a better result than what we did before for a lot of reasons." Doc. 188, 12:18-20.

Phelan filed a timely notice of intent to pursue postconviction relief. Doc. 177.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DENIED THE MOTION TO SUPPRESS EVIDENCE BECAUSE WARDEN VOLENBERG HAD THE AUTHORITY TO ARREST JOHN PHELAN.

Standard of review

Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. ***State v. Hughes***, 233 Wis.2d 280, 2000 WI 24, ¶15 , 607 N.W.2d 621, 626 (2000). A circuit court's findings of fact should be upheld unless they are clearly erroneous. ***State v. Secrist***, 224 Wis.2d 201, 589 N.W.2d 387 (1999). Statutory interpretation is question of law reviewed *de novo*. ***State v. Setagord***, 211 Wis.2d 397, 405–06, 565 N.W.2d 506 (1997).

Statutory Interpretation

The goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. ***Stockbridge Sch. Dist. v. Dep't of Pub. Instruction Sch. Dist. Boundary Appeal Bd.***, 202 Wis.2d 214, 550 N.W.2d 96, 98 (Ct. App. 1996). To achieve this goal, the Court first resorts to the plain language of the statute itself. ***Jungbluth v. Hometown, Inc.***, 201 Wis.2d 320, 548 N.W.2d 519, 522 (1996). One basic rule of statutory construction that effect is to be given to every word of a statute if possible, so that no portion of the statute is rendered superfluous. ***Cnty. of Columbia v. Bylewski***, 94 Wis.2d 153, 288 N.W.2d 129, 135 (1980). It is also a fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided. ***In re Redev. Auth. Green Bay v. Bee Frank, Inc.***, 120 Wis.2d 402, 355 N.W.2d 240, 244 (1984). If the statutory language is ambiguous or unclear, the Court may examine the statute's history, scope, context, subject matter, and objective in its efforts to ascertain

the legislative intent. ***Lake City Corp. v. City of Mequon***, 207 Wis.2d 155, 558 N.W.2d 100 (1997).

Applicable Statutes

Conservation wardens from the Department of Natural Resources ("DNR wardens") have police supervision over all state-owned lands and property under its supervision, management and control. WIS. STAT. § 23.11(4) (2021). *All* DNR wardens have the power to arrest for certain enumerated offenses. *See* WIS. STAT. § 29.921(1) (2021) (enumerating offenses contained in WIS. STAT. §§ 23.50(1), 167.31, 346.19, 940.24, 941.20, 948.60, 948.605, and 948.61). Under both the 4th Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution, a warrantless arrest must be based on probable cause that a crime occurred in the presence of the arresting officer. ***State v. Paszek***, 50 Wis.2d 619, 184 N.W.2d 836, 839 (1971). For example, the odor of a controlled substance provides probable cause to arrest so long as (1) the odor is unmistakable and (2) traceable to a specific person based on the totality of the circumstances in which it is discovered. ***State v. Secrist***, 224 Wis.2d 201, 589 N.W.2d 387, 394 (1999).

All DNR wardens have the power to investigate the enumerated offenses under section 29.921(1). WIS. STAT. § 29.924(1) (2021). With the powers to investigate and arrest, and by falling under the definition of law enforcement, DNR wardens have the power to conduct an investigative stop under section 23.58(1). These stops are otherwise known as a *Terry*, 392 U.S. 1 (1968), stop. ***State v. Iverson***, 365 Wis. 2d 302, 2015 WI 101, ¶12, 871 N.W.2d 661, 665-66 (2015). For context, section 23.58(1) applies to non-traffic civil forfeitures. Officers may conduct investigative stops when the officer "reasonably suspects" someone has committed, was committing, or is about to commit a crime in their presence or a violation of statutes enumerated in section 23.50(1). *See* WIS. STAT. § 23.58(1) (2021).

The power to arrest is not just limited to enumerated offenses; rather depending on the individual warden's qualifications, his power may be expanded. *Compare* WIS. STAT. § 921(1) (2021) *with* WIS. STAT. § 29.921(5) (2021). Should a warden completes three requirements, then while on duty, in uniform, displaying proper credentials, section 29.921(5) grants additional arrest powers. First, these wardens must complete a program of law

enforcement training approved by the law enforcement standards board. WIS. STAT. § 29.921(5) (2021). Second, they must receive a certification indicating they qualify to be a law enforcement officer under section 165.84(4)(a) 1. WIS. STAT. § 921(5) (2021).[1] Third, they must comply with any applicable requirements under section 165.85(4)(a) 7. WIS. STAT. § 29.921(5) (2021).[2] Once a warden receives a board-certification section 29.921(5) wardens may use their law enforcement training to make an arrest at the request of another law enforcement agency, arrest a person pursuant to an arrest warrant for a felony, or arrest a person who has committed a crime in the presence of the warden. WIS. STAT. § 29.921(5) (2021).

As of note, Warden Volenberg meets the requirements for the additional arrest power in section 29.921(5) as a board-certified law enforcement warden. On October 14th, 2015, the Warden possessed the requisite credentials, experience, and training; maintained these credentials regularly; and while on duty, in uniform, he conducted a traffic stop on Phelan. Therefore, he had the authority to make arrests for any crimes committed in his presence.

When a stop is conducted for a suspected violation of the statutes enumerated under section 23.50(1), the enforcing officer must have authority to make an arrest for such a violation. WIS. STAT. § 23.58(1) (2021). The laws *all* DNR wardens have the power to arrest are enumerated under section 29.921(1), one of which is section 23.50(1) and any offenses contained therein. One such offense listed is section 287.81 ("the Littering Statute"). *See* WIS. STAT. § 23.50(1) (2021). The Littering Statute states, in part, that a person who "discharges any solid waste on or along any highway, in any waters of the state, on the ice of any waters of the state or *on any other public or private property*" might be required to forfeit not more than $500. WIS. STAT. § 287.81(2)(a) (2021). Since this statute is an enumerated statute within a

[1] Section 165.84(4)(a) 1 describes the required standards for law enforcement training, specifying a minimum of 600 hours of training for law enforcement officers. The outcomes, curriculum, and objectives are decided by the law enforcement standards board.

[2] Section 165.85(4)(a) 7 has three requirements which the officer must meet regularly: (1) maintain employment and complete 24 hours of annual recertification training starting the fiscal year after their certification; (2) every two years, officers must complete 4 hours of training based on board standards for police pursuit; and (3) annually complete a handgun qualification course based on board standards. The second and third requirement count towards the first requirement.

DNR warden's power to enforce and this statute criminalizes activity committed anywhere within the State of Wisconsin, then DNR wardens have the power to enforce this law anywhere within the State of Wisconsin.

Phelan draws attention to an opinion by the Wisconsin Attorney General that the power of arrest is limited by section 29.05(1) (later recodified as WIS STAT. § 29.921(1)). When considering the context of this statute, the question the attorney general responded to focused on the general peace officer power for conservation wardens and makes no reference to section 29.05(2) (later recodified as WIS STAT. § 29.921(5)). *See* 68 Wis. Op. Att'y. Gen. 327 (1979). Immediately after the attorney general identifies the statutes his opinion addresses he explains his opinion regarding the warden's authority to make arrests for enumerated laws:

> I am of the opinion that duly appointed DNR law enforcement personnel may arrest a violator of any of the state laws enumerated in sec. 29.05 (1), Stats., anywhere in the State of Wisconsin, including on any of the state's navigable waters. This conclusion is supported by the provision in sec. 29.05 (1), Stats., that the arresting DNR officer "may stop and board any boat.

Id. The Wisconsin Department of Justice and attorney general still maintain this position, as indicated by a handbook they compile and distribute to all law enforcement in the State of Wisconsin. WIS. DEP'T OF JUST., WISCONSIN LAW ENFORCEMENT OFFICERS CRIMINAL LAW HANDBOOK 17 (2009) ("Conservation wardens may act as [peace officers] anywhere in the state.").

A. Warden Volenberg acted within the scope of his jurisdiction, pursued Phelan for an enumerated offense, and had the power to arrest and conduct a traffic stop

Phelan only challenges the legality of Warden Volenberg's actions once the littering investigation ended. Br. Def.-Appellant 14 ("Warden Volenberg unlawfully detained Mr. Phelan because he did not have the statutory authority to continue the investigation"). Any argument that Warden Volenberg did not have reasonable suspicion of Phelan potentially littering does not have to be proven; however, understanding the warden's authority to even conduct the stop in the first place is necessary in understanding Warden Volenberg's authority to continue the stop. Furthermore, Phelan asserts several times, Br. Def.-Appellant 14, 15, 17, that Warden Volenburg did not see any circumstances amounting to probable cause to arrest Phelan

without any authority supporting this claim other than Warden Volenburg's testimony. Because this is a question of constitutional fact, this Court is required to independently examine the facts known to Warden Volenberg at the time of Phelan's detention and disregard what the warden subjectively believed or what inferences he actually drew. ***State v. Coffee***, 391 Wis.2d 831, 2020 WI 53, ¶20, 943 N.W.2d, 845, 849 (2020). Therefore, a probable cause analysis is necessary in understanding Warden Volenberg's ability to continue the stop.

1. Warden Volenberg reasonably suspected Phelan littered an aluminum can which justified conducting a traffic stop on Phelan.

The determination of reasonableness is a common sense test. ***State v. Post***, 301 Wis.2d 1, 2007 WI 60, ¶13, 733 N.W.2d 634, 638 (2007). What matters is whether the facts of the case would lead a reasonable officer, in light of his training and experience, to suspect that the individual committed, was committing, or is about to commit a crime. ***Id.***, ¶13. Any of the facts, alone, might well be insufficient, but that is irrelevant because the reasonableness of a stop is determined based on the totality of the facts and circumstances. ***Id.***, ¶13, ¶16.

Concededly, there is a lack of caselaw pertaining to a warden's ability to conduct a traffic stop based on section 23.58(1). Despite this, section 23.58(1) is the codification of a *Terry* stop for forfeiture offenses. Therefore, cases where a *Terry* stop occurred are relevant.

For example, in ***State v. Allen***, 226 Wis.2d 66, 593 N.W.2d 504, 509 (Ct. App. 1999), this Court held that based on the high-crime reputation of the area, time of day, facts known by the police officers, and their training and experience, reasonable suspicion existed for the defendant's stop. Late at night in a high-drug activity area, officers observed a car pull over, a man briefly enter it for one minute out of their view, then exit before the car drove away, and stand around for five to ten minutes, consistent with drug trafficking behavior. ***Id.*** at 68, 74. Based on the law enforcement officers' training, experience, and the totality of the circumstances, this Court held that the officers had a reasonable suspicion. ***Id.*** at 77.

The circumstances this Court considered relevant to its analysis in *Allen* resemble the circumstances in the present case. Like *Allen*, law

enforcement observed the defendant in an area known for the very same illicit behavior it investigated. ***Id.*** at 68. Meanwhile, in this case Warden Volenberg observed Phelan in an area known for littering. Law enforcement in *Allen* observed the defendant briefly enter a car that stopped by him, then stand around for five to ten minutes. ***Id.*** at 74. This behavior was consistent with drug trafficking. ***Id.*** at 74. Likewise, Warden Volenberg observed Phelan look around consistent with someone about to litter. Furthermore, the Court noted the fact that the officers could not observe the contact made inside the car joined the totality of the circumstances test amounting to a reasonable suspicion. ***Id.*** at 77. In this case, Warden Volenberg could not see what Phelan did with the aluminum can behind the truck. Based on the law enforcement officers' training, experience, and the totality of the circumstances, this Court found that the officers had a reasonable suspicion. ***Id.*** at 77. Similarly here, based on the totality of the circumstances and the warden's training and experience, Warden Volenberg had a reasonable suspicion that Phelan unlawfully discarded the aluminum can.

Phelan argues this case is the, "perfect example of why Wisconsin law does not authorize DNR wardens to investigate or enforce laws wherever they happen to be in the state." Br. Def.-Appellant 16. Considering the facts and the law laid out, it is axiomatic that wardens have the authority to enforce the Littering Statute anywhere in Wisconsin. Reading nuances into certain statutes while ignoring the plain meaning of other relevant statutes would prevent wardens from effectively enforcing the law. The position Phelan takes would prevent wardens from investigating and enforcing statutes like the Littering Statute simply because the offender walked onto private property or land not under the DNR's direct police supervision before committing the offense.

The facts justify Warden Volenberg's traffic stop. The offense that Warden Volenberg suspected Phelan of committing was littering. The warden could cite this offense anywhere within Wisconsin. They were in fact in Wisconsin. Finally, Warden Volenberg made several observations rising to the level of reasonable suspicion based on his experience: a can in hand, quick head turns as if anticipatorily preparing to litter, a can near Phelan's parking space, all in an area where people commonly litter. Based on the totality of these circumstances the Warden did not act on just mere 'hunch;' rather, he had a reasonable suspicion based on his training and experience.

Taking this reasonable suspicion and the applicable statutes together, Warden Volenberg made a completely legal traffic stop.

2. Incident to traffic stop, Warden observed probable cause that a crime occurred in his presence giving him the power to arrest and continue investigating

When making a warrantless arrest, law enforcement must have probable cause. ***Paszek***, 50 Wis.2d 619 at 624. Probable cause to arrest refers to the quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. ***Id.*** This standard of proof is not at the level of beyond a reasonable doubt or more probable than not. ***Id.*** at 839-40. Although, the Supreme Court hesitates to create categorical exceptions for the Fourth Amendment, *see* ***Coffee***, 391 Wis.2d 831, ¶40; categorically, the odor of a controlled substance provides probable cause to arrest so long as (1) the odor is unmistakable and (2) traceable to a specific person based on the totality of the circumstances in which it is discovered. ***Secrist***, 589 N.W.2d at 394.

Section 29.921(5) permits investigations for any incident anywhere on state-owned lands, offenses enumerated in section 29.921(1), such as the Littering Statute, and areas in the Kickapoo Valley despite the fact that the statute does direct wardens abstain from investigating anything else. If, during a valid traffic stop, the officer observes additional suspicious factors which give rise to, minimally, an articulable suspicion that the person committed or is currently committing an offense separate from the acts which prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. ***State v. Betow***, 226 Wis.2d 90, 593 N.W.2d 499, 502 (Ct. App. 1999).

Considering the concept of a traffic stop, its mission is not just limited to investigating the particular violation warranting the stop. It also includes "conducting ordinary inquiries incident to the stop and taking negligibly burdensome precautions to ensure officer safety." ***State v. Wright***, 386 Wis.2d 495, 2019 WI 45, ¶9, 926 N.W.2d 157, 160 (2019). Therefore, board-certified wardens may only be able to initiate a stop outside their jurisdiction based on suspicion of an enumerated offense violation, but the scope of their

stop would not be limited to just that enumerated offense, but also anything incidental to that stop, such as the smell of marijuana.

Phelan's position would have board certified law enforcement wardens disregard their specialized and additional training in recognizing the commission of a crime during a valid investigational stop simply because a statute directed at all wardens does not enumerate a particular crime. This undermines the significance in granting board certified law enforcement wardens any additional arrest power. All wardens have the power to make an arrest pursuant to any enumerated offenses under section 29.921(1). Construing the word "crime" in section 29.921(5) to only apply to enumerated offenses would make section 29.921(5) a superfluous reiteration of section 29.921(1) making the differentiation between board certified law enforcement wardens and non-certified wardens that section 29.921(5) seeks to create irrelevant and meaningless.

A proper reading of section 29.921 (5) permits a board-certified DNR warden to exercise police powers, including the power to investigate and arrest, under limited circumstances. Specifically, the statutes grants a board-certified DNR warden the power to arrest an individual for a crime committed in the warden's presence. This power implies that the Warden has the ability to determine whether a crime has been committed. That is, to perform an investigation. Which is exactly what happened in this case.

As soon as the window opened, the warden immediately smelled the odor of burnt marijuana. Doc. 110, 8:19–20. Although Warden Volenberg's investigation shifted towards investigating marijuana at this point, Doc. 110, 8:21–23, based on the quantum of the evidence, Warden Volenberg already had probable cause to arrest Phelan. Based on *Secrist*, probable cause for possession of THC presented itself as soon as Phelan opened his window because Warden Volenberg unmistakably smelled marijuana and, based on the totality of the circumstances, traced it to Phelan. Furthermore, Warden Volenberg had more than just the smell of marijuana to establish probable cause. He saw Phelan improperly cross the center double lines and fog lines multiple times, saw Phelan struggle to open his own vehicle's window, observed Phelan's bloodshot, glossy eyes and slurred speech. Taking all these circumstances together, Warden Volenberg had probable cause to arrest Phelan at this moment.

Warden Volenberg's stop, detainment, investigation, and arrest of Phelan were all legal. Warden Volenberg, a board-certified law enforcement warden properly investigated an offense he has the authority to enforce anywhere in Wisconsin. He had reasonable suspicion to briefly detain Phelan for the commission of that offense. Prior and incident to that detention, Warden Volenberg observed numerous facts which gave rise to probable cause that Phelan committed a crime in the warden's presence. Therefore, Warden Volenberg had the authority to extend the traffic stop and investigate Phelan with field sobriety tests, contact the Sheriff's department, question Phelan, and transfer Phelan to Deputy Smit's and Deputy Nash's custody. For these reasons this Court should deny Phelan's motion.

B. Even if Warden Volenberg acted outside the scope of his authority, the arrest and investigation was valid as a citizen's arrest.

Actions taken without lawful authority may still be within an officer's official capacity, ***State v. Barrett***, 96 Wis.2d 174, 291 N.W.2d 498, 501 (1980), even though police officers who act outside of their jurisdiction are not acting in their official capacity and do not have any official power to arrest. ***State v. Slawek***, 114 Wis.2d 332, 338 N.W.2d 120, 121 (Ct. App. 1983). Where officers make an arrest beyond their official capacity, the arrest is a citizen's arrest. ***Id.*** at 122. This comes from the principle that although officers in adjoining jurisdictions cease to be officers they do not cease to be persons. ***Id.*** at 121 (quoting *State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973)). Similarly, when wardens potentially act outside the scope of their authority, they may cease to be law enforcement, but they do not cease to be persons. Even though law enforcement is considered to be mere persons, they may use their law enforcement training, special expertise, and equipment in effectuating their citizen arrests. ***City of Waukesha v. Gorz***, 166 Wis.2d 243, 479 N.W.2d 221, 223 (Ct. App. 1991) ("It makes no sense that, as citizens, [law enforcement] should be prohibited from using their expertise or equipment they may properly avail themselves of").

Public security justifies and requires that a citizen's arrest be made. ***Radloff v. Nat'l Food Stores, Inc.***, 20 Wis.2d 224, 121 N.W.2d 865, 867 (1963) (quoting *Stittgen v. Rundle*, 99 Wis. 78, N.W. 536, 537 (1898)). The Supreme Court of Wisconsin recognizes two specific situations where public security requires a citizen's arrest: (1) the commission of a felony and (2) the

commission of a misdemeanor committed in the citizen's arrest amounting to a breach of peace. ***Id.*** The Supreme Court of Wisconsin and this Court has ruled that a diverse range of crimes could validly result with a citizen's arrest. *E.g.*, ***Keenan v. State***, 8 Wis. 132 (1858) (Where a witness conducted a valid citizen's arrest after observing a homicide); ***Slawek***, 113 Wis.2d at 334 (holding several Chicago police officers conducted a valid citizen's arrest after observing a robbery in Chicago and crossed state lines when following the defendant into Wisconsin); ***State v. Mieritz***, 193 Wis.2d 571, 543 N.W.2d 632 (Ct. App. 1995) (holding an undercover law enforcement officer made a valid citizen's arrest for delivery of cocaine, party to a crime, after purchasing cocaine outside her jurisdiction).

The absence of an authority stating whether private citizens can or cannot conduct an investigative stop is inconsequential. Phelan's traffic stop was based on reasonable suspicion for littering, an offense Warden Volenberg can enforce anywhere in Wisconsin. Furthermore, this Court observed in ***State v. Keith***, 260 Wis.2d 592, 2003 WI App 47, ¶9, 659 N.W.2d 403, 406 (Ct. App. 2003), that suppression is not required for a citizen's arrest merely because law enforcement acts without authority outside its jurisdiction. This is still true today.

One example where this Court held that law enforcement effectuated a valid citizen's arrest for breach of peace is ***Gorz***, 166 Wis.2d at 247. In that case a police officer from Brookfield left his jurisdiction while transporting two persons to Waukesha. ***Id.*** at 245. Likewise, Phelan argues Warden Volenberg left his jurisdictional authority when he continued the traffic stop after the end of his littering investigation. In *Gorz*, the officer conducted a traffic stop after observing an automobile cross the center line several times. ***Id.*** Similarly, Warden Volenberg chose to extend Phelan's traffic stop when he observed Phelan cross the double center lines and fog lines several times, the smell of marijuana, Phelan's red-glossy eyes and slurred speech. Furthermore, based on the officer's observations in *Gorz*, the defendant appeared to operate a motorized vehicle while under the influence which constituted a breach of peace allowing a citizen's arrest. ***Id.*** at 247.

Since probable cause is the standard arrests need to be valid, it is not the fact that a jury found the defendant guilty in *Gorz* that made it a valid citizen's arrest. Instead, the officer's observations gave him probable cause to believe the defendant was intoxicated while driving. Similarly here, based on

Warden Volenberg's observations Phelan operated a motorized vehicle while under the influence. This constituted a breach of peace. The fact that Phelan was found not guilty of operating a motorized while under the influence is irrelevant here because the totality of the circumstances amounted to probable cause that Phelan operated a motorized vehicle while under the influence. In holding that operating a motorized vehicle while under the influence constituted a breach of peace, this Court reasoned that those who drive while under the influence put their own lives plus the lives of those they encounter on the road in serious danger. ***Id.*** Even the Wisconsin Supreme Court and United States Supreme Court acknowledge the "slaughter" and "carnage" that make driving while intoxicated an inherently dangerous activity. ***South Dakota v. Neville***, 459 U.S. 553, 558 (1983); ***State v. Caibaiosai***, 122 Wis.2d 587, 363 N.W.2d 574, 577 (1985).

Even if Warden Volenberg's authority ended when his littering investigation ended the warden still had authority to continue the stop and investigate as a citizen's arrest. Prior and incident to that detention, Warden Volenberg observed numerous facts which gave rise to probable cause that Phelan committed a crime that constituted a breach of peace in the warden's presence. Therefore, Warden Volenberg had the authority to extend the traffic stop and investigate Phelan as a citizen's arrest. For these reasons this Court should deny Phelan's motion.

C. Even if Warden Volenberg lacked authority to investigate beyond Phelan's potential littering, suppression is inappropriate because his actions met the objective of section 29.921(5) by contacting the Sheriff's office.

Suppression of evidence is not a constitutional right. ***Stone v. Powell***, 428 U.S. 465, 482 (1976). Rather, suppression is a judge-made requirement to deter problematic or bad-faith police conduct. ***State v. Verkuylen***, 120 Wis.2d 59, 352 N.W.2d 668, 669 (Ct. App. 1984). Absent a constitutional violation of the defendant's rights, the defendant "is not to go free because the constable has blundered." ***State v. Mieritz***, 193 Wis.2d 571, 534 N.W.2d 632, 633 (1995) (quoting *Conrad v. State*, 63 Wis.2d 616, 218 N.W.2d 252, 264 (1974)).

Suppression is only necessary in three situations: (1) evidence obtained by violating the defendant's constitutional rights, ***State v. Hochman***, 2

Wis.2d 410, 86 N.W.2d 446, 451 (1957) (quoting *Ware v. State*, 201 Wis. 425, 427, 230 N.W. 80 (1930)); (2) evidence obtained violating a statute specifically providing for suppression, ***State ex rel Arnold, v. County Court of Rock County.***, 51 Wis.2d 434, 187 N.W.2d 354, 357 (1971); and (3) evidence obtained violating a statute absent an explicit suppression provision whose objective can only be achieved with suppression, ***State v. Popenhagen***, 309 Wis.2d 601, 749 N.W.2d 611, 625 (2008) (citing and reinterpreting *State ex rel Arnold, v. Cnty. Ct. of Rock Cnty.*, 51 Wis.2d 434, 187 N.W.2d 354, 357 (1971)).

In this case, Phelan does not cite any constitutional provision violated nor any statute where suppression is an explicit required remedy. Therefore, the third situation is the only possible argument Phelan could be making; however, it is unclear due to a lack of any cited authority where suppression is a necessary remedy. Instead, he appears to read in a suppression remedy into sections 29.921(1) and 29.921(5) while arguing for a plain reading of the statute.

Since Warden Volenberg is a board-certified law enforcement warden the applicable statute to this situation is section 29.921(5). This statute indicates that when DNR wardens receive additional arrest powers by becoming board-certified, they may use these additional arrest powers by "assisting another law enforcement agency." WIS. STAT. § 29.921(5). The statute continues by listing examples the legislature intended "assisting another law enforcement agency" to mean: (1) by making an arrest at the request of the agency, (2) arresting an individual pursuant to a felony arrest warrant, or (3) arresting a person who has committed a crime in the presence of the warden. WIS. STAT. § 29.921(5). Regardless of which situation occurs, if the warden makes an arrest without the presence of another law enforcement agency, the warden is required to deliver that person to the chief of police or the sheriff. WIS. STAT. § 29.921(5). The objective of this statute is clear: ensuring a law enforcement agency other than the Department of Natural Resources is involved. This objective is, therefore, not intended to protect a the rights of criminal defendants; rather, it is to ensure that law enforcement with the proper training are involved.

Warden Volenburg ensured law enforcement with proper training was involved and therefore any possible investigation he made that would violate section 29.921(5) does not implicate suppression as an appropriate remedy.

First, during his investigation of the potential littering violation, Warden Volenburg observed the smell of marijuana, red glossy eyes, slurred speech, and Phelan cross the double center lines and fog lines multiple times. Then, he used his training to conduct standardized field sobriety tests and administer a preliminary breath test. Doc. 110, 9:14–15, 19–23. After confirming Phelan's impairment and ruling out alcohol as the impairment source, Warden Volenburg contacted sheriff's deputies trained as drug recognition experts (DRE). Doc. 110, 10:19–20.

Furthermore, Warden Volenburg's subsequent decision to contact sheriff's deputies was not solely based on the field sobriety tests results though. Rather, because of the multiple double line and fog line deviations, Phelan's struggle to open his window, Phelan's red and glossy eyes, Phelan's slurred speech, the immediate smell of burnt marijuana emanating from Phelan's vehicle, and Phelan's performance on the administered field sobriety tests, Warden Volenberg contacted sheriff's deputies to arrest Phelan.

Warden Volenberg observed the majority of Phelan's impairment indicators before he even finished his investigation into littering. What occurred here is a post-probable cause, but pre-arrest investigation into marijuana possession as an incident to an investigation into littering. Warden Volenberg followed proper procedure for this incidental investigation. *See* Doc. 110, 14:22–15:4. Then, he contacted the Sheriff's office; meeting the objective of section 29.921(5): involving the appropriate law enforcement agency. By meeting the objective of this statute, the need for a suppression remedy is not necessary; therefore, this Court should deny Phelan's motion.

CONCLUSION

The Legislator gave DNR wardens, board-certified as law enforcement, the power to arrest for crimes committed in their presence. The Columbia County Circuit Court correctly held that Warden Volenberg had the authority to detain and investigate Phelan. Wardens who receive additional law enforcement training and certification, maintain that training and certification should be allowed to use that training and certification for crimes committed in their presence. Therefore, this Court should affirm the Columbia County Circuit Court's decision in denying Phelan's Motion to Suppress.

Dated July 26, 2024

Respectfully submitted,

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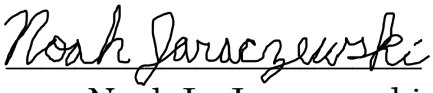

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CERTIFICATION

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 7740 words.