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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Ultimately, this case is about whether John R. Phelan was unlawfully detained in violation of his constitutional rights to be free from an unreasonable seizure. *See State v. Griffith*, 2000 WI 72, ¶25, 236 Wis. 2d 48, 613 N.W.2d 72 (citing U.S. Const. amend. IV and Wis. Const. art. I, § 11). Specifically, Mr. Phelan argues that his detention became unlawful at the point during the seizure that Warden Volenberg went beyond the scope of his authority granted by the relevant statutes: Wis. Stat. §§ 29.921(1) & (5). *See State v. Floyd*, 2017 WI 78, ¶21-22, 377 Wis. 2d 394, 898 N.W.2d 560. Simply put, the relevant statutes authorize DNR wardens to conduct investigations and make arrests under limited circumstances. Because Warden Volenberg acted outside of his statutory authority, and because the facts in the record do not support a citizen's arrest, this Court should reverse the circuit court's order denying Mr. Phelan's motion to suppress.

In response, the state seeks to expand the clear limits set forth in the plain statutory text, mistakenly asserts that Mr. Phelan committed a crime in the presence of Warden Volenberg, and argues that suppression is not warranted because Warden Volenberg, even if he acted outside of his statutory authority, eventually called in law enforcement to take over his investigation. This Court should reject the state's attempts to whitewash a DNR warden's unauthorized OWI investigation.

First, Mr. Phelan's position was simple and clear in his brief-in-chief. Mr. Phelan did not argue that Warden Volenberg's initial pursuit and stop of Mr. Phelan was unlawful. Instead, Mr. Phelan argued that once Warden Volenberg determined that Mr. Phelan had not littered on DNR-controlled lands, his continued detention and Warden Volenberg's continued investigation into an OWI was unauthorized and unreasonable.

After a lengthy lead-in, the state ultimately agrees with Mr. Phelan that Warden Volenberg's authority is limited, but that because "a crime was committed in the presence of the warden," the subsequent OWI investigation and Mr. Phelan's continued detention was reasonable and lawful. The error in the state's argument is two-fold. First, and most importantly, the relevant statute is clear: "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)." Wis. Stat. § 29.921(5). Second, Warden Volenberg did not witness Mr. Phelan commit any crime. Instead, Warden Volenberg determined that Mr. Phelan had not littered, and then unlawfully conducted an OWI investigation.

The authority to arrest is different from the authority to investigate. Under Wis. Stat. § 29.921(5), Warden Volenberg was authorized to (1) "assist another law enforcement agency," (2) arrest a person pursuant to an arrest warrant concerning the commission of a felony," or (3) "arrest a person who has

committed a crime in the presence of the warden." Only the third option is relevant to Mr. Phelan's case.

Had the legislature intended to authorize DNR wardens to *investigate* crimes that fall outside of the DNR's area of expertise it could have clearly done so. *See* Wis. Stat. § 968.07(1)(d) (authorizing a law enforcement officer to arrest a person when "[t]here are reasonable grounds to believe that the person is committing or has committed a crime."). Instead, the legislature enacted a statutory scheme that clearly authorizes DNR wardens to assist law enforcement with regard to general law enforcement. *See* Wis. Stat. § 29.921(5). Authority to arrest a person who commits a crime in the presence of a DNR warden is not the same as authority to investigate whether a crime has been committed. Here, Warden Volenberg was authorized to investigate whether Mr. Phelan had littered on DNR-controlled lands. Warden Volenberg was not authorized to conduct an OWI investigation after his littering investigation ended.

Moreover, the relevant statute, Wis. Stat. § 29.921(5), does not use the common and well-understood language of probable cause. The statute does not authorize DNR wardens to arrest an individual the warden reasonably believes probably committed a crime. *Contra State v. Moore*, 2023 WI 50, ¶12, 408 Wis. 2d 16, 991 N.W.2d 412. Instead, within the limited circumstances set forth in Wis. Stat. § 29.921(5), the legislature authorized DNR wardens to effectuate an arrest when they witness an individual commit a crime in the presence of the

warden. Whether law enforcement may have suspected Mr. Phelan committed a crime is not the question.

Second, the state's reliance on the "citizen's arrest" doctrine is misplaced and actually supports the conclusion that Warden Volenberg's OWI investigation was unauthorized and resulted in an unreasonable seizure of Mr. Phelan. Whether Warden Volenberg effectuated a lawful citizen's arrest merely begs the question about whether the warden actually witnessed Mr. Phelan commit a crime and does not resolve the dispute over whether the warden's subsequent OWI investigation constituted a lawful seizure of Mr. Phelan. In fact, it would appear that Wis. Stat. § 29.921(5)'s authority for wardens to arrest a person "who has committed a crime in the presence of the warden" is the same basic standard for a citizen's arrest.

A "citizen's arrest," as defined in the caselaw, allows an off-duty officer or citizen to "arrest a perpetrator without a warrant when the citizen witnesses the crime being committed." *See State v. Slawek*, 114 Wis. 2d 332, 335, 338 N.W.2d 120 (Ct. App. 1983) (noting that the Wisconsin Supreme Court had previously held that a "citizen who witnesses a homicide can lawfully arrest the perpetrator without a warrant."). This is essentially the same standard set forth in § 29.921(5). Thus, the state's citizen's arrest argument is merely a non-statutory version of the statute upon which Mr. Phelan relies.

Further, the main "citizen's arrest" case cited by the state, *City of Waukesha v. Gorz*, 166 Wis. 2d 243, 479 N.W.2d 221 (Ct. App. 1991), does not support Warden Volenberg's authority to conduct an OWI investigation. Unlike the situation in *Gorz*, Warden Volenberg did not merely stop Mr. Phelan and call in law enforcement to arrest Mr. Phelan. *See Gorz*, 166 Wis. 2d at 245. Instead, Warden Volenberg concluded his littering investigation and then pursued an OWI investigation. While a citizen may have some very limited authority to effectuate an arrest if a crime is committed in the citizen's presence, no such authority exists for citizens, whether they be private, off-duty law enforcement, or a DNR warden acting beyond their statutorily granted authority, to seize a citizen and generally investigate crime. *See State v. Slawek*, 114 Wis. 2d at 336.

Here, Warden Volenberg completed his DNR-related investigation when he determined Mr. Phelan had not littered. Thereafter, no authority, statutory or otherwise, permitted the warden to detain Mr. Phelan in order to conduct an OWI investigation.

Third, the state argues that even if Warden Volenberg unlawfully detained Mr. Phelan and unlawfully conducted an OWI investigation, suppression is not appropriate. In so arguing, the state argues that Warden Volenberg's actions "met the objective of Wis. Stat. § 29.921(5) by contacting the Sheriff's office." (State's Br. at 22). The state's argument flies in the fact of the plan statutory text: "A warden may not conduct investigations for violations

of state law except as authorized…" Wis. Stat. § 29.921(5).

The "objective" of the applicable statutes is to limit the authority of DNR wardens. The plain text of the statutes grants wardens the authority to investigate DNR-related matters and, under limited circumstances, to effectuate arrests. The problem here is that Warden Volenberg conducted an OWI investigation. The fact that the warden called in the sheriff's office after he conducted an unauthorized OWI investigation and unlawfully detained Mr. Phelan is why suppression is necessary.

Because of Warden Volenberg's actions, evidence was obtained in violation of Mr. Phelan's constitutional right to be free from an unreasonable seizure. A clear statute limited the warden's authority to conduct an OWI investigation. Logic and common sense dictate that the evidence obtained after Mr. Phelan's unlawful detention must be suppressed. The legislature specifically limited the investigatory power of DNR wardens. Likewise, the legislature authorized DNR wardens to arrest individuals in very limited circumstances. If DNR wardens can ignore clear statutory limits, investigate general law enforcement matters, and unlawfully seize citizens without fear of legal consequences, then the limitations established by the legislature would be meaningless. Suppression is appropriate because Mr. Phelan's constitutional right to be free from an unreasonable seizure was violated.

CONCLUSION

For the reasons argued above and as previously argued in his brief-in-chief, Mr. Phelan respectfully requests that this Court reverse the circuit court's decision and order denying his motion to suppress and remand with directions to vacate Mr. Phelan's judgment of conviction.

Dated this 14th day of October, 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 1,424 words.

Dated this 14th day of October, 2024.

Signed:
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