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

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REPLACEMENT REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

As argued in Phelan's original reply brief, the ultimate question in this case is whether Phelan was unlawfully detained in violation of his constitutional right to be free from an unreasonable seizure. (Reply Br. at 1). Specifically, all parties agree that Wis. Stat. §§ 29.921(1) & (5) set forth Warden Volenberg's statutorily granted authority to arrest or detain Phelan.

I. Warden Volenberg lacked authority to detain, investigate and arrest Phelan for OWI.

In its replacement brief, the state makes one basic argument in support of the circuit court's order denying Phelan's motion to suppress. The state argues that Warden Volenberg had authority to arrest Phelan and to subject him to field sobriety testing and a preliminary breath test because there was probable cause to believe Phelan committed a crime in the warden's presence. (*See* State's Replacement Br. at 5-6, 12-23). At the heart of the dispute at this point is whether Wis. Stat. § 29.921(5) means what it says or whether DNR wardens, who receive law enforcement training, have full law enforcement authority.

The state's position, ultimately, is that a certified DNR warden is not limited by the text of Wis. Stat. § 29.921(5) because a DNR warden may arrest any person where probable cause exists to believe the person committed a crime in the presence of the warden. There are two main problems with the state's

position. First, the text of the statute does not include the phrase "probable cause" nor does it substantively set forth a probable cause standard. Second, the state's statutory interpretation, which reads words into the statute, is flawed on its face and unreasonably ignores the scope and context within which a certified warden is authorized to arrest an individual for non-DNR related activity.

As argued in Phelan's original reply brief, Wis. Stat. § 29.921(5) does not set forth a probable cause standard. (*See* Reply Br. at 5-9). Instead, the text parallels language used to justify a citizen's arrest. While full-fledged law enforcement officers generally have the authority to effectuate warrantless arrests based on probable cause, a certified DNR warden may only (1) "assist another law enforcement agency…including making an arrest at the request of the 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." Wis. Stat. § 29.921(5).

The authority to "arrest a person who has committed a crime in the presence of the warden" is simply not the same as the general law enforcement authority to arrest a person where probable cause objectively exists to believe the person has committed a crime. As argued in reply to the state's initial response, which argued that Warden Volenberg effectuated a citizen's arrest, Wis. Stat. § 29.921(5) does appear to set forth statutory authority for a certified DNR warden to effectuate a citizen's arrest if

the warden actually witnesses a crime being committed. (Reply Br. at 6-9). Citizens, like certified DNR wardens, do not possess general law enforcement authority. However, both citizens and certified DNR wardens may arrest a person that commits a crime in their presence. *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.").

Moreover, weaved into the state's probable cause to arrest argument is a bold and unsupported assertion that the OWI investigation Warden Volenberg conducted, including subjecting Phelan to questioning, field sobriety testing and a preliminary breath test, was merely "tasks attendant to an arrest." (*See* State's Replacement Br. at 16-18). The state cites no authority for this general proposition and nothing that overrides Wis. Stat. § 29.921(5)'s clear and specific limits to a certified DNR warden's investigative authority. The statutory text must mean what it plainly says: certified DNR wardens have limited authority to arrest and no authority to conduct OWI investigations.

Because Warden Volenberg did not witness Phelan commit a crime in his presence, he had no authority to investigate or arrest Phelan for OWI. Instead, Warden Volenberg *suspected* that Phelan might have been operating his vehicle unlawfully and conducted an unconstitutional OWI investigation. What Warden Volenberg could have and should have

done, as soon as his suspicion into Phelan extended beyond a simple littering violation, is to contact and seek support from local law enforcement concerning any OWI investigation. Such interplay between certified wardens and general law enforcement agencies is explicitly contemplated by Wis. Stat. § 29.921(5). Just as certified DNR wardens are statutorily authorized to effectuate an arrest *at the request* of law enforcement or pursuant to a *felony* arrest warrant, certified DNR wardens must rely on law enforcement to pursue general law enforcement investigations. Wis. Stat. § 29.921(5) ("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).").

In this case, Warden Volenberg testified about Phelan's suspicious driving prior to the stop. Warden Volenberg could have, at that point, reached out to local law enforcement for backup concerning his littering suspect who may have become an operating while intoxicated suspect. Had Warden Volenberg followed such a procedure he would have both acted within his statutory authority and involved general law enforcement to conduct the OWI investigation that Wis. Stat. § 29.921(5) explicitly barred him from conducting. That is not what happened here. Instead, Warden Volenberg unlawfully seized Phelan and conducted an unauthorized OWI investigation. As a result, Phelan was unconstitutionally seized and the evidence obtained as a result of Warden Volenberg's investigation must be suppressed.

II. Phelan did not forfeit his statutory argument concerning Wis. Stat. § 29.921(5).

Secondarily, the state argues that Phelan forfeited the argument that Wis. Stat. § 29.921(5) does not set forth a probable cause to arrest standard. (*See* State's Replacement Br. at 21-23). The state is incorrect. Phelan argued both in the trial court and in his brief-in-chief that Warden Volenberg lacked the statutory authority to detain, arrest, or investigate Phelan for OWI. (*See* Phelan's Brief-in-Chief at 8, 10-19). In response, the state filed a brief arguing that Warden Volenberg conducted a lawful citizen's arrest of Phelan, even if he acted outside of his statutory authority. (State's Response Br. at 20-22).

Phelan's argument that Warden Volenberg lacked specific statutory authority to detain, arrest, or investigate him for OWI is entirely consistent and subsumed within the argument that Wis. Stat. § 29.921(5) means what it says and does not set forth a general authority for certified DNW wardens to effectuate arrests based on objective probable cause.

To the extent that this Court believes Phelan *did* forfeit this specific argument by not raising it as clearly or as explicitly prior to his reply brief, Phelan would respectfully ask the court to nevertheless address the argument now. As this Court is aware, forfeiture is a rule of judicial administration and a reviewing court may disregard forfeiture and address the merits of an unpreserved issue in an appropriate case. *See State ex rel. Universal Processing Servs. of*

Wis., LLC v. Cir. Ct. Milwaukee Cty., 2017 WI 26, ¶53, 374 Wis. 2d 26, 892 N.W.2d 267. Moreover, the forfeiture rule gives parties and the courts notice and a fair opportunity to address the issue. *See State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.

Here, Phelan clearly did not engage in "sandbagging" the state, the circuit court, or this Court. Phelan has consistently argued that Warden Volenberg acted outside of his authority, as granted by Wis. Stat. § 29.921(5), in detaining, investigating, and arresting Phelan for OWI. The specific argument the state now argues that Phelan forfeited was made in direct reply to the state's own citizen's arrest argument supporting Warden's actions.

Thereafter, this Court, upon a review of the initial briefs, concluded that the case should be decided by a three-judge panel and provided the attorney general with an opportunity to participate in briefing. As a result, the state has now had a more than fair opportunity to respond to all of Phelan's substantive arguments. And, to the extent this Court converted this case to be decided by a three-judge panel as opposed to by a single judge, it would appear this Court recognizes the substantive import of the issues presented in this case. And, a decision that does not address the full scope of Wis. Stat. § 29.921(5), as applied to the facts of this case, would be contrary to the goals of the forfeiture doctrine and would result in a disruption of judicial process and an extreme lack of efficiency. *See State v. Ndina*, 315 Wis. 2d 653, ¶30.

Therefore, forfeiture does not apply to this case and even if this Court determines that it might, Phelan respectfully asks this court to reach the full merits of this case in order to address the scope of a certified DNR warden's authority to detain, investigate, and arrest an individual suspected to have operated a vehicle while impaired.

CONCLUSION

For the reasons argued above, as argued in his brief-in-chief, and his original reply brief, John R. 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 Phelan's judgment of conviction.

Dated this 3rd day of April, 2025.

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 1,557 words.

Dated this 3rd day of April, 2025.

Signed:
Electronically signed by
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