STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2024AP954-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

HOLLY J. GRIMSLID,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY, BRANCH IV, THE HONORABLE SCOTT L. HORNE PRESIDING, TRIAL COURT CASE NO. 2023-CM-225

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE'S ARGUMENTS FAIL TO DIRECTLY ADDRESS MS. GRIMSLID'S CONTENTIONS AND ARE PREMISED UPON FALSE ASSUMPTIONS AND MISAPPREHENSIONS OF THE LAW.

The State leads its rebuttal argument with the proposition that "Ms. Grimslid provides no support that a 45-minute waiting to go to the bathroom is unreasonable." State's Response Brief, at p.5 [hereinafter "SRB"]. This argument is ludicrous for three reasons.

First, reference to the law of tort provides a good example of why the State's position is absurd. In tort, the doctrine of *res ipsa loquitur*—or the "thing speaks for itself"—is well established. The classic example taught in law school is that of the "mouse in the Coke bottle." That is, the first two elements of a cause of action for negligence—duty and breach—need not be independently proved because finding a "mouse in the Coke bottle" accomplishes that end, leaving only the elements of cause and harm to be established. This is what separates theories of "negligence" from "negligence *per se*."

The notion of "*res ipsa loquitur*" extends to Ms. Grimslid's argument in that she should not have to provide "proof" that it is unreasonable to make a person "hold it" for a ***minimum*** period of forty-five minutes. If there is a urinary urgency, *it is a urinary urgency*—that is it. Ms. Grimslid verbally expressed this urgency to the officer ***repeatedly and plaintively***, and what is unreasonable is not only that she was required to hold her bladder for that long, but also that her requests to use the bathroom were ***ignored*** as a punishment imposed by the officer in this case because, in his estimation, she was being lees than cooperative with him.

Second, there is something in the law of evidence of which the State is apparently unaware, namely "the common stock of knowledge" standard. More particularly, the "common stock of knowledge" rule provides that it is not necessary for a party to prove a matter if that matter is a part of the "common stock of knowledge." Nearly ninety years ago, the Wisconsin Supreme Court observed that a lay person is not required to have every fact proved by the admission of independent evidence or the use of expert testimony when the fact to be proved can be understood "in language customarily and usually used in common parlance, . . ."

See generally, *Christiansen v. Schenkenberg*, 204 Wis. 323, 329, 236 N.W. 109 (1931). This notion is reflected in the Rules of Evidence themselves. More specifically, Rule 902.01(2) permits courts to take judicial notice of adjudicative facts which are "generally known" or are capable of "accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.02(2)(a) & (b) (2023-2024). Put another way, an astrophysicist need not appear in court to testify that the sun will rise in the east and set in the west if the time of day is a relevant issue in a particular trial. This is a reflection of the fact that certain knowledge is simply so fundamental "everyone" knows it. Thus, it was not, nor *is* not, necessary to prove that it is significantly uncomfortable—if not painful—for a person who has to relieve themselves not to be permitted to do so for such an extended period of time.

Finally, what proof of the unreasonableness of the forty-five minute (***minimum*** forty-five minute period, that is) delay in allowing Ms. Grimslid to use the bathroom is expected? Should she have had a physician, anatomist, or other medical professional test the capacity of her bladder prior to the motion hearing in this case? Should she have had a nerve conduction study done to ascertain how quickly and strongly electrical impulses are sent from her bladder to her brain? Apart from these questions, even the circuit court recognized that this "was ***quite a lapse of time*** from when [Ms. Grimslid] had first asked to use the restroom" until she was ultimately removed from the officer's squad. R81 at 14:10-11; D-App. at 132.

The State relies on *State v. Vorburger*, 2002 WI 105, 255 Wis. 2d 537, 648 N.W.2d 829, for the proposition that it was not unreasonable for Officer Fah to make Ms. Grimslid wait as long as she did to use the bathroom. SRB at p.5. *Vorberger* is, however, extraordinarily distinguishable and uninstructive. First, the question of bathroom use was *not* central to the issue addressed by the *Vorburger* court which was examining a "consent to search" issue based upon the accused's argument that no reasonable suspicion existed to detain him and his girlfriend. *Id*. ¶ 27.

More importantly, however, as it relates to the *utterly tangential* issue that the defendant's ***girlfriend*** had to use the bathroom, the *Vorburger* court noted that Vorburger's girlfriend "asked to use the bathroom. . . . [The] officer . . . told [her] that . . . **she could use it**, so long as Officer Kosovac was present, **[whereupon she] chose not to use the bathroom**." *Id*. ¶ 18 (emphasis added). The actual complaint

in *Vorburger* was *not* that there was a *refusal to allow* a suspect to use the bathroom, but rather, that the bathroom use would not be *private*. *Id*. ¶ 62. This is clearly not the argument Ms. Grimslid presents to this Court because she was not even offered the opportunity to use the bathroom when requested—*i.e.*, bathroom privileges were withheld *entirely* from Ms. Grimslid when she asked—unlike the accused in *Vorburger* who was allowed bathroom access but elected not to take advantage of the same *of her own accord*.

The State's attention next turns to Ms. Grimslid's alleged uncooperativeness with the officer as an implied justification for denying her bathroom privileges. SRB at p.6. As far as Ms. Grimslid knows, alleged uncooperativeness is not a constitutionally sanctioned reason for permitting an officer to deny someone access to a restroom, and the State offers none. The justice system does not permit officers to engage in petty retributive behavior simply because they feel a defendant, who is in *their* custody and therefore for whom *they* are responsible, is not being as cooperative with them as they would like. Frankly, if this was the standard, it would not only be utterly unworkable, but would never be fairly applied because law enforcement officers are *individuals* which means they do not share the same level of tolerance. What one officer may consider an "uncooperative attitude" another officer may look upon more forgivingly, recognizing that the arrestee is in a difficult position, likely never having been in custody before.

The State also suggests that there was some urgency in the need for Officer Fah to complete the warrant application process which impliedly excuses his ignoring Ms. Grimslid's repeated requests to use the bathroom. SRB at p.6. This argument too is extremely flawed. First, it fails to acknowledge that allowing Ms. Grimslid to use the bathroom would have required no more than a *one* minute walk into the hospital at which they were already parked, a (perhaps) three minute use of the bathroom by Ms. Grimslid, and a one minute walk back out to the officer's squad, for a total of five minutes time. A delay of five minutes in this case would not have made any material difference in the dissipation of ethanol from Ms. Grimslid's blood.

Second, the State's claim overlooks the fact that Officer Fah could simply have continued with this warrant application unabated by asking for another officer to be dispatched to the scene to take Ms. Grimslid into the hospital to use the

bathroom. Officer Fah himself need not have expended any more effort, energy, or time than to make one call to his dispatcher.

Ms. Grimslid is uncertain as to whether the State's next argument is seriously or fallaciously made, but it proffers that a justification for not allowing Ms. Grimslid to use the bathroom until after the blood draw was to prevent the "destruction of evidence . . . ." SRB at p.6. The State's position, like its previous arguments, is absurd for two reasons specifically.

First, this is not a "drug possession" case where Ms. Grimslid could have potentially hidden the fruits or instrumentalities of a drug-related crime on her person which then could have been disposed of in a bathroom toilet. Moreover, Ms. Grimslid was *searched* prior to her custody and nothing was found on her person. Thus, even if this *had been* a drug-related offense, she had *nothing* on her person of which to dispose.

Second, there is *literally* nothing Ms. Grimslid could have done in the bathroom to destroy, or tamper with, the evidence that was in her bloodstream, *i.e.*, evidence of ethanol consumption, because it was *in her bloodstream*. It strains credulitity for the State to proffer that the "destruction of evidence" was a genuine concern in this case.

As for the State's effort to distinguish *Lopez v. City of Chicago*, 464 F.3d 711 (7th Cir. 2006), Ms. Grimslid concurs that it is not "on all fours" with her circumstances with the exception that there was a similar denial of bathroom use in *Lopez* as there was in this matter. SRB at pp. 6-7. Instead, Ms. Grimslid relied upon *Lopez* for the structure it provides when analyzing questions of the type Ms. Grimslid presents. Ms. Grimslid noted as much in her initial brief when she described the *Lopez* court's approach. *See* Appellant's Initial Brief, at pp. 10-11, 13.

The State posits that Officer Fah's denial of bathroom access to Ms. Grimslid was not vindictive. SRB at pp. 7-8. Assume, *arguendo*, that this is an accurate assertion. Even if it is, Ms. Grimslid still maintains that the weight of the remaining factors in this case conspire together to prove her point that it was constitutionally unreasonable not to allow her to use the restroom by delaying the same for as long as Officer Fah did. If the test of constitutional reasonableness turned solely on the

subjective intentions of law enforcement officers, it is likely no such challenges would ever survive because all a law enforcement officer would need to do to have their actions constitutionally excused is to testify that he or she was not acting vindictively. Fourth Amendment reasonableness would become an impossible standard to enforce.

Finally, the State's last volley addresses the remedy to be imposed in this matter. SRB at pp. 8-9. The State contends that there should not be suppression of the blood test result in this case because "Officer Fah was merely doing his due diligence when obtaining a search warrant for Ms. Grimslid's blood, **after Officer Fah took Ms. Grimslid's responses as a refusal**." SRB at p.8 (emphasis added). The emphasized language from the State's brief highlights the problem with the State's argument in that **the circuit court found that no unlawful refusal to submit to an implied consent test occurred in this case.** If there was no refusal, then the nexus between the officer's actions and the obtaining of a blood specimen—*regardless of the mechanism*—is unbroken, and some remedy must lie under the exclusionary rule.

CONCLUSION

It is Ms. Grimslid's position that Officer Fah's conduct was unreasonable under the Fourth Amendment because it was "deliberately indifferent" to her basic needs. Because Officer Fah unreasonably denied Ms. Grimslid access to the use of a restroom while she was in his custody, Ms. Grimslid respectfully requests that this Court reverse the decision of the circuit court denying her motion.

Dated this 10th day of October, 2024.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
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CERTIFICATION OF LENGTH

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 2,109 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 10th day of October, 2024.

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