STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2024AP1976-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JEREMY A. SOBOTIK,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH V, THE HONORABLE PRESIDING J. ARTHUR MELVIN, III, TRIAL COURT CASE NO. 23-CT-160

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER MR. SOBOTIK'S RIGHT TO BE FREE FROM SELF-INCRIMINATION UNDER ARTICLE I, § 8 OF THE WISCONSIN CONSTITUTION AND *STATE v. KNAPP*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, WAS VIOLATED WHEN HE WAS INTERROGATED BY THE ARRESTING OFFICER IN THIS MATTER?

> Trial Court Answered: NO. The circuit court concluded that "this was an investigation into the odor that was emanating from the [Sobotik] vehicle," and further, since Mr. Sobotik was not under arrest at the time he was interrogated, no violation of his right to be free from self-incrimination occurred. R63 at 7:4 to 8:8; D-App. at 110-11.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question of law based upon a set of uncontroverted facts. The issue presented is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Sobotik will NOT REQUEST publication of this Court's decision as the common law authority at issue is well developed.

STATEMENT OF THE CASE

By criminal complaint filed on February 9, 2023, Mr. Sobotik was charged in Waukesha County with Operating a Motor Vehicle with a Restricted Controlled Substance in Blood—Third Offense, contrary to Wis. Stat. § 346.63(1)(am). R3.

After retaining counsel, Mr. Sobotik filed several pretrial motions including, *inter alia*, a motion to suppress based upon the arresting officer's interrogation of him in violation of Article I, § 8 of the Wisconsin Constitution and *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. R15.

A hearing on Mr. Sobotik's motion was held on September 25, 2023. R25. At the motion hearing, the State offered the testimony of a single witness, Officer Matthew Bublitz formerly of the Village of Pewaukee Police Department. R25 at pp. 5-38. During the hearing, the court received as Exhibit No.1 the body-camera video recording of Officer Bublitz's encounter with Mr. Sobotik. R25 at 9:11-22;

R51. At the conclusion of the hearing, the Court ordered the parties to submit supplemental briefs. R25 at 40:14 to 42:23.

As ordered, the parties submitted additional briefs. R29; R31. By oral decision delivered on January 3, 2024, the circuit court denied Mr. Sobotik's motion to suppress after finding that "this was an investigation into the odor that was emanating from the [Sobotik] vehicle," and further, since Mr. Sobotik was not under arrest at the time he was interrogated, no violation of his right to be free from self-incrimination occurred. R63 at 7:4 to 8:8; D-App. at 110-11.

After the adverse decision was issued by the circuit court, Mr. Sobotik entered a plea of no contest to the charge of Operating a Motor Vehicle with Restricted Controlled Substance in Blood—Third Offense on September 18, 2024, whereupon the lower court adjudicated him guilty and entered a judgment of conviction against him. R48; D-App. at 101-03.

It is from the adverse decision and judgment of the circuit court that Mr. Sobotik now appeals to this Court by Notice of Appeal filed on September 30, 2024. R52.

STATEMENT OF FACTS

On January 13, 2022, Mr. Sobotik was detained in the Village of Pewaukee, Waukesha County, by Officer Matthew Bublitz, formerly of the Pewaukee Village Police Department, for allegedly having been involved in a non-injury property-damage automobile accident. R3 at p.2. The encounter between the officer and Mr. Sobotik was captured on the officer's body-worn video camera. R51.

After making contact with Mr. Sobotik, Officer Bublitz observed that he had an odor of marijuana emanating from his person. R3 at p.2. When asked how recently he had smoked marijuana, Mr. Sobotik indicated that it had been "a couple of weeks." R3 at p.2. Officer Bublitz then conducted a search of Mr. Sobotik's pick-up truck and located a glass container in one of the pockets of a fishing jacket in the rear seat of the truck which appeared to contain a green leafy substance that the officer believed to be marijuana. R3 at p.2.

After locating what he believed was marijuana, Officer Bublitz reapproached Mr. Sobotik and showed him the glass container, asking "Is this yours?" R51 at Elapsed Time 19:33, *et seq*. Mr. Sobotik replied, "Yes." *Id*. Shortly thereafter, Officer Bublitz asked Mr. Sobotik, "So when's the last time you smoked?" *Id*. at

19:58, *et seq*. Mr. Sobotik responded that it was "about three or four hours ago." *Id*.

Officer Bublitz then had Mr. Sobotik submit to a battery of field sobriety tests. R3 at p.2. At the conclusion of the field sobriety tests, Officer Bublitz informed Mr. Sobotik that it was illegal in Wisconsin to drive with any restricted controlled substance in one's system. R51 at 33:24. Immediately thereafter, Officer Bublitz took Mr. Sobotik into formal custody for Operating a Motor Vehicle with a Restricted Controlled Substance. *Id.*; R3 at p.2.

The following facts, adduced from the testimony of Officer Bublitz, are of further relevance to Mr. Sobotik's appeal:

> The officer questioned Mr. Sobotik about smoking marijuana (R25 at 11:25 to 12:7);
>
> He based his interrogation of Mr. Sobotik on the fact that he "immediately noticed an odor of marijuana coming from him" (TR25 at 23:24 to 24:1; 24:8-11);
>
> The odor he observed was both of burnt marijuana when he spoke with Mr. Sobotik outside of his vehicle, and was of raw marijuana when he spoke with Mr. Sobotik at his vehicle (R25 at 29:2-24; 32:5-8);
>
> After discovering marijuana in Mr. Sobotik's vehicle, Officer Bublitz confronted Mr. Sobotik with a glass marijuana container he discovered during the search and questioned him about the timing of his marijuana use (R25 at 12:4-20; 31:22-24; 32:17-23);
>
> In addition to interrogating Mr. Sobotik about the timing of his marijuana use, Officer Bublitz also asked Mr. Sobotik how the marijuana got into his vehicle (R25 at 33:5-11); how frequently he smokes marijuana (R25 at 37:2-4); how much marijuana he smoked that day specifically (R25 at 37:5-6); whether the amount he smoked that day was a "normal" amount for him (R25 at 37:7-8); whether he "felt high at the moment" (R25 at 37:9-10); and how much time had elapsed between his marijuana use and the time he drove (R25 at 37:11-14);
>
> Given that he did not believe Mr. Sobotik regarding the statements he made about his marijuana consumption, Officer Bublitz further pressed Mr. Sobotik and told him that he "needed to be honest with [him]" (R25 at 33:8-11);
>
> After Officer Bublitz insisted that Mr. Sobotik "be honest," Mr. Sobotik admitted that the marijuana was his and that he ingested marijuana approximately four to five hours earlier (R25 at 33:12-23); and
>
> Officer Bublitz admitted that he was aware that Wisconsin's restricted controlled substance law did not require proof of impairment, but merely that marijuana was in Mr. Sobotik's system (R25 at 35:8-11).

STANDARD OF REVIEW

This appeal presents issues of constitutional law and fact to which this Court applies a two-step standard of review, first determining whether the circuit court's findings of historical fact were clearly erroneous and then independently applying the relevant constitutional principles to those facts. *State v. Dieter*, 2020 WI App 49, ¶ 1, 393 Wis. 2d 796, 948 N.W.2d 431.

ARGUMENT

I. MR. SOBOTIK WAS INTERROGATED IN VIOLATION OF HIS RIGHTS UNDER THE WISCONSIN CONSTITUTION WHEN THE ARRESTING OFFICER EXCEEDED THE SCOPE OF HIS AUTHORITY TO INTERROGATE HIM AFTER HIS INITIAL DETENTION.

A. Statement of the Law.

It is axiomatic that the operator of a motor vehicle stopped by law enforcement officers is detained for Fourth Amendment purposes. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569. These detentions, however, "are meant to be brief interactions with law enforcement officers, ..." *State v. Floyd*, 2017 WI 78, ¶ 21, 377 Wis. 2d 394, 898 N.W.2d 560, citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

During these "brief interactions," law enforcement officers are permitted to question the suspected driver. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). This questioning, however, is *not* unlimited with respect to its scope or duration. As the *Berkermer* Court described it, the questioning "means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Id.*

Wisconsin courts have similarly observed that permissible questioning of a person detained during a traffic stop must be "'reasonably related to the nature of the stop . . . .'" *State v. Gammons*, 2001 WI App 36, ¶ 18, 241 Wis. 2d 296, 625 N.W.2d 623, quoting *State v. Betow*, 226 Wis. 2d 90, 93-94, 593 N.W.2d 499 (Ct. App. 1999). There is no case disposed of in either the United States or Wisconsin Supreme Courts which hold that a traffic detention may be used as a law

enforcement tool to subject a suspect to a full-blown interrogation prior to taking the person into formal custody. The foregoing statement is especially true in Wisconsin given that the Wisconsin constitutional prohibition against self-incrimination is *not* co-extensive with the Federal Constitutional provision, but rather, extends beyond it.

Instructive on the issue of whether law enforcement officers may circumvent the requirement of providing *Miranda*[1] warnings to a suspect is *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. In *Knapp*, the Wisconsin Supreme Court examined whether a suspect's right to be free from self-incrimination under Article I, § 8 of the Wisconsin Constitution was co-extensive with the same right as that right is expressed under the Fifth Amendment to the United States Constitution, and further, whether the law enforcement practice of interrogating a suspect before *Miranda* warnings need to be given should be condoned without sanction.

In reaching its conclusion on the first question, the *Knapp* court examined at length the long and well-established rights of the states to interpret their constitutions independent of the protections afforded by the Federal Constitution. Based upon that history, the *Knapp* court stated that Wisconsin was not required to march in "lock step" with the federally established protections found in the U.S. Constitution, but rather would "'not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded.'" *Id.* at ¶ 59, quoting *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

On the second point, the *Knapp* court used strong language to impress upon law enforcement that it would not tolerate deliberate circumvention of the protections afforded by Article I, § 8 of the Wisconsin Constitution. The court unambiguously stated:

> We have recently shown **little tolerance** for those who violate the rule of law. In *State v. Reed*, 2005 WI 53, P36, 280 Wis. 2d 68, 695 N.W.2d 315, we depicted the Fifth Amendment as providing a shield that protects against compelled self-incrimination. By its very nature, the *Miranda* warnings secure the integrity of that shield--and to be sure, **that shield is made of substance, not tinsel**. *See Hoyer*, 180 Wis. at 413. Any shield that can be so easily pierced or cast aside by the very

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

> people we entrust to enforce the law fails to serve its own purpose, and is in effect no shield at all. Just as we will not tolerate criminal suspects to lie to the police under the guise of avoiding compelled self-incrimination, **we will not tolerate the police deliberately ignoring *Miranda's* rule as a means of obtaining inculpatory physical evidence. As we have frequently recognized in the past, what is sauce for the goose is also sauce for the gander.**

Knapp, 2005 WI 127, ¶ 72 (citations omitted in part; emphasis added).

Language such as "little tolerance," "that shield is . . . not tinsel," "not tolerate ignoring *Miranda*," and "what is sauce for the goose is also sauce for the gander," clearly, ardently, and categorically describe the *Knapp* court's intention, namely that the rights safeguarded by Article I, § 8 shall not be circumvented.

What is especially telling about the *Knapp* court's decision is the focus it placed not upon "formal custody," but rather upon the officer's *intentions*. More particularly, the facts underlying the *Knapp* decision are especially instructive in this case regarding what constitutes a "deliberate" circumvention of Article I, § 8 of the Wisconsin Constitution. In *Knapp*, a police detective was dispatched to Knapp's apartment *with an intention to arrest him* based upon an apprehension request made by Knapp's probation officer. *Knapp*, 2005 WI 127, ¶ 7. At the time the detective went to the Knapp apartment, Mr. Knapp was a suspect in the investigation of a homicide which had occurred in the early morning hours the day before. *Id*. ¶¶ 3-5. With knowledge of the foregoing, when the detective arrived at Mr. Knapp's apartment, he and Mr. Knapp went into Knapp's bedroom to permit him to put on some shoes. *Id*. Once in the bedroom, the detective questioned Knapp about the clothes he had been wearing the prior evening. *Id*. ¶ 8. When Knapp pointed to a pile of clothing on the floor, the detective seized them. *Id*.

After he was taken to the police station and further interrogated, a sweatshirt with a blood stain was found among the clothes the detective seized. *Id*. ¶ 9. Given the technology of the day, the blood stain evidence could not be directly linked to the victim of the homicide. *Id*. After a period of twelve years elapsed, DNA technology had sufficiently advanced that it could be determined that the blood on Knapp's sweatshirt belonged to that of the victim. *Id*. ¶¶ 11-12. Based upon the new analysis of the blood stain, Knapp was charged with the homicide. *Id*. ¶ 13.

After being charged, Knapp's counsel moved to suppress the sweatshirt

evidence. *Id*. During counsel's cross-examination of the detective who seized the sweatshirt, the detective admitted that he did not *Mirandize* Knapp because he wanted to "keep the lines of communication open" and did not want Knapp to exercise his *Miranda* rights. *Id*. ¶ 14.

On appeal, the State conceded that the sweatshirt was seized as part of an *intentional* violation of *Miranda*. *Id*. ¶ 20. In examining whether this deliberate violation of *Miranda* was sanctionable to the point of excluding more than just ill-gotten statements, but rather extended to the suppression of evidence under the exclusionary rule, the *Knapp* court took pains to note that the primary purpose underlying the exclusionary rule "is to deter future unlawful police conduct. . . ." *Id*. ¶ 22, citing *United States v. Calandra*, 414 U.S. 338, 347 (1974). The *Knapp* court then observed that if the illegality is exploited by the police, derivative evidence is also subject to suppression under the "fruit of the poisonous tree" doctrine. *Id*. ¶ 24, citing *Wong Sun v. United States*, 371 U.S. 471, 485-88, (1963); *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970).

Based upon the foregoing holding, the *Knapp* court found that the detective's initial conduct was "particularly repugnant"[2] and concluded:

> It is not too much to expect law enforcement to respect the law and refrain from **intentionally** violating it. When law enforcement is encouraged to **intentionally** take unwarranted investigatory shortcuts to obtain convictions, the judicial process is systemically corrupted. To guard against this danger, fair play requires the players to play by the rules, especially those players who enforce the rules.
>
> Here, it is undisputed that physical evidence was obtained as the direct result of an **intentional** *Miranda* violation. Therefore, applying our holding above, the physical evidence is inadmissible.
>
> In summary, we conclude that physical evidence obtained as a direct result of an **intentional** violation of *Miranda* is inadmissible under Article I, Section 8 of the Wisconsin Constitution. We will not allow those we entrust to enforce the law to **intentionally** subvert a suspect's constitutional rights. As it is undisputed that the physical evidence here was obtained as a direct result of an **intentional** violation of *Miranda*, it is inadmissible.

Id. ¶¶ 81-83 (emphasis added). Clearly, the foregoing holding establishes that a law enforcement officer's intentions, prior to questioning a suspect, are dispositive of whether Article I, § 8 has been violated.

[2] *Knapp*, 2005 WI 127, ¶ 75.

Similarly, in *Missouri v. Seibert*, 542 U.S. 600 (2004), the United States Supreme Court refused to condone a law enforcement tactic known as "question first, and warn later." *Id*. at 611-14; 616-17. Specifically, Seibert was a suspect in an arson case who was brought to the police station and asked several questions which were intended to lead to incriminating evidence. *Id*. at 604-06. After obtaining the answers they sought, law enforcement officers gave Seibert a twenty- to thirty-minute break and then *Mirandized* her and re-asked the questions they had originally put to her. *Id*. Seibert argued that this technique violated her Fifth Amendment rights, and while the Missouri court of appeals agreed, it also found that only the answers to the first series of questions should be suppressed, while the answers to the post-*Miranda* warning questions would remain admissible. *Id*. at 606. The Missouri Supreme Court disagreed, and suppressed ***all*** the statements, both those which came before the proper warning and those which came after. *Id*.

The *Seibert* Court ultimately agreed with the Missouri Supreme Court's approach and found distasteful the law enforcement tactic by which a suspect is questioned first, then *Mirandized* and requestioned. *Id*. at 616-17. The U.S. Supreme Court found the Missouri officer's tactic to be nothing more than an "end-run" around the Fifth Amendment which called into question the very voluntariness of the answers to the questions post-*Miranda*. *Id*. at 606-07. The Court held that "by any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id*. at 610.

B. Application of the Law to the Facts.

It is well settled that "interrogation" means direct questioning by the police, as well as any words or actions on the part of the police that the police should know are reasonably likely to elicit an *incriminating* response from the suspect. *United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001).

In examining the issue Mr. Sobotik puts before this Court, the first question which must be settled is this, namely: Were the questions asked by Officer Bublitz designed to elicit an incriminating response? Since Officer Bublitz allegedly

observed indicia of marijuana consumption—which ultimately prompted him to ask Mr. Sobotik to submit to field sobriety testing—the short answer must be "yes," but this case is not just about investigating an operating while impaired matter, it is about an officer having probable cause to arrest for a *restricted controlled substances violation*.

Officer Bublitz testified that he was aware that Wisconsin's restricted controlled substance law did not require proof of impairment, but merely that marijuana was in Mr. Sobotik's system at the time of driving. R25 at 35:8-11. Moreover, Officer Bublitz freely admitted that it was *after* discovering marijuana in Mr. Sobotik's vehicle, he confronted Mr. Sobotik with a glass marijuana container he discovered during the search and questioned him about the timing of his marijuana use. R25 at 12:4-20; 31:22-24; 32:17-23. In addition to interrogating Mr. Sobotik about the timing of his marijuana use, Officer Bublitz also asked Mr. Sobotik how the marijuana got into his vehicle (R25 at 33:5-11); how frequently he smokes marijuana (R25 at 37:2-4); how much marijuana he smoked that day specifically (R25 at 37:5-6); whether the amount he smoked that day was a "normal" amount for him (R25 at 37:7-8); whether he "felt high at the moment" (R25 at 37:9-10); how much time had elapsed between his marijuana use and the time he drove (R25 at 37:11-14). Notably, every one of these questions was put to Mr. Sobotik ***after*** Officer Bublitz: (1) smelled an odor of marijuana on Mr. Sobotik; (2) observed an odor of marijuana emanating from the Sobotik vehicle; and (3) found the glass container with marijuana in his vehicle. Since Officer Bublitz knew he did not need to establish impairment to arrest Mr. Sobotik once he found the marijuana in his vehicle and smelled it on his person, the entire interrogation which came thereafter was nothing more than the officer's deliberate effort to avoid *Mirandizing* Mr. Sobotik.

The point of the foregoing should be evident on its face. The very questions themselves had no reasonable relation to assisting Officer Bublitz in determining whether Mr. Sobotik should be arrested for a restricted controlled substances violation. Officer Bublitz not only had all the proof he needed to take Mr. Sobotik into custody prior to interrogating him, but additionally, had the knowledge that he required nothing more than what he already had within his possession and among his observations to effectuate that arrest *without* further questioning. If this Court permits the kind of interrogation in this case to stand unsanctioned, then it is

allowing the very practice of which the *Knapp* court warned to take place in every case, namely an "end-run" around the *Miranda* rule.

In a similar vein, this Court should also find that the line of questioning in this case violated the principle of "moderate questioning reasonably related to dispel or confirm an officer's suspicion" as described in the *Berkermer* and *Gammons* because it is of *no relevance whatsoever* to ask Mr. Sobotik how frequently he smokes marijuana and whether the amount he smoked that day was a "normal" amount for him. R25 at 37:2-8. In a prosecution for a strict liability offense such as operating with a restricted controlled substance in one's blood, these questions are irrelevant and add nothing to the "confirmation calculus" the officer needs to undertake to assess whether there has been a violation of the law.

It is clear that Officer Bublitz went well beyond what can be considered constitutionally reasonable in the instant case when he asked the litany of questions he did after formulating an intention to arrest Mr. Sobotik. It would be patently absurd to conclude that Mr. Sobotik was not going to be taken into formal custody once Officer Bublitz found the marijuana in his vehicle. It cannot reasonably be debated that a law enforcement officer is simply going to allow someone who smells of marijuana and is in possession of marijuana to simply "be on their way." It is eminently reasonable to conclude that Officer Bublitz knew he was going to arrest Mr. Sobotik and elected to "question first, warn later"—the very practice the *Berkemer* and *Knapp* courts found constitutionally offensive. Failing to curtail such law enforcement practices now only opens the door to future abuses.

CONCLUSION

Because Mr. Sobotik was extensively interrogated by the arresting officer in this matter after the officer had formulated an intention to arrest him for a restricted controlled substances violation, Mr. Sobotik's privilege against self-incrimination as guaranteed by Article I, § 8 of the Wisconsin Constitution was violated, and he therefore respectfully requests that this Court reverse the judgment of the circuit court and remand this case with directions to grant his motion.

Dated this 20th day of January, 2025.

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 3,913 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 20th day of January, 2025.

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