COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2107-CR **Cir. Ct. No. 2013CT418**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEAN M. BLATTERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Reversed and cause remanded*.

¶1 KLOPPENBURG, J.[1] Dean Blatterman appeals a judgment of conviction for operating a motor vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a). Blatterman argues that the circuit court erred in denying his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

motion to suppress evidence of intoxication because, he asserts, the police subjected him to a "de facto" arrest that was unsupported by probable cause when they transported him outside the vicinity of the original stop. I conclude that Blatterman was transported outside the vicinity of the stop, and I therefore reverse.

BACKGROUND

¶2 The evidence offered at the suppression hearing consisted solely of the testimony from Dane County Sheriff's Deputy James Nisius, who stopped Blatterman's vehicle. Nisius testified as follows.

¶3 Nisius was on duty at approximately 8:47 a.m. on March 19, 2013, when he was dispatched to a house in response to a call that an individual (later identified as Blatterman) "was putting gas in [a] house … through a stove or a fireplace." The caller stated that she "thought [Blatterman] was trying to blow up the house or light the house on fire by pulling gas or monoxide into the house." The caller was Blatterman's wife.

¶4 While Nisius was en route to the house, dispatch informed him that Blatterman "was leaving the house in a white minivan." Dispatch also informed Nisius that Blatterman "was possibly intoxicated" and was "driving a white minivan with the license plate ANNA92." Shortly thereafter, a vehicle matching that description passed by Nisius's squad car. Nisius followed the vehicle.

¶5 Nisius testified that he did not immediately stop the vehicle because dispatch had informed him "that this person … historically had mentioned suicide

by cop."[2] In addition, Nisius testified that he "stayed quite a distance behind" the vehicle for his safety because "dispatch had mentioned that … the person may have attempted to ignite [his] house on fire," and that the person may be intoxicated. Nisius testified that he waited to initiate the stop until backup officers arrived because he "figure[ed] that [the officers were] going to do a high-risk stop on this vehicle given the circumstances."[3]

¶6 When the backup officers arrived, Nisius stopped Blatterman's vehicle by engaging his squad car's red and blue lights. Blatterman pulled over. Nisius opened his door, drew his "duty weapon," pointed it at Blatterman's vehicle, and told Blatterman "to stick his hands up out the window." Nisius testified that Blatterman "opened up the door right away and started walking back with his hands in the air." Nisius noticed that Blatterman "had something in his hand."[4]

¶7 Nisius told Blatterman to "turn away" and "stop walking," because, as Nisius testified, it is not "procedure to have someone get out of a car and walk back on a high-risk stop." Blatterman "kept walking right towards" the officers. One of the backup officers "transitioned from his duty weapon to a Taser" and told Blatterman that he would be "tased" if he did not stop walking. At that point, Blatterman was approximately six to eight feet in front of the bumper of Nisius's

[2] BLACK'S LAW DICTIONARY 1571 (9th ed. 2009) contains the following definition of the colloquial phrase "suicide-by-cop": "A form of suicide in which the suicidal person intentionally engages in life-threatening behavior to induce a police officer to shoot the person."

[3] Nisius explained that a high-risk stop involves "stopping a vehicle in a safe manner when there's somebody in the vehicle that may … present a harm to himself or others or the officers involved."

[4] Nisius later learned that the object was a cell phone.

vehicle. One of the backup officers told Blatterman to "get down" and "turn away." Blatterman knelt down, but did not turn away. The backup officers "put [Blatterman] to the ground." Blatterman was placed in handcuffs.

¶8 Nisius searched Blatterman for weapons. Nisius then asked Blatterman, "[A]re you okay? What's wrong?" Blatterman said that his chest hurt. The officers called emergency medical services (EMS).

¶9 When Nisius "got up close" to Blatterman, he detected an odor of intoxicants. Nisius also noticed that Blatterman's eyes were watery. Nisius testified that he believed Blatterman may have been operating while intoxicated because of Blatterman's "strange behavior [of] not responding to [the] officers[,] … the odor of intoxicants[,] … the watery eyes[,]" and the fact that the person who called dispatch said that Blatterman was intoxicated. Nisius did not ask Blatterman to perform field sobriety tests at the scene of the stop.

¶10 While waiting for EMS to arrive, Nisius placed Blatterman in the back of his squad car. Nisius testified that he did so because "[i]t was freezing outside" and Blatterman was wearing a short-sleeved shirt.

¶11 Blatterman refused medical treatment from EMS. Nisius testified that he believed Blatterman "should get checked out at the hospital" because there was "potentially an issue with carbon monoxide poisoning[,] … [Blatterman] was potentially suicidal, and he also claimed that his chest hurt."

¶12 Before leaving the scene of the stop, Nisius reviewed Blatterman's driver's record, which revealed that Blatterman had three prior operating while intoxicated convictions.

¶13 Nisius transported Blatterman to a hospital that was approximately ten miles away. Nisius testified that he informed hospital staff that he had transported Blatterman to the hospital for three reasons: (1) because Blatterman may have had carbon monoxide poisoning; (2) because Blatterman was potentially suicidal; and (3) because Blatterman stated that his chest hurt. Nisius also informed hospital staff that there was "potentially a need for a phlebotomist to do a legal blood draw."

¶14 Blatterman was transferred to an exam room. A nurse checked Blatterman's vitals and monoxide levels, which were "within normal parameters." Hospital staff then questioned Blatterman about whether he was suicidal. Blatterman indicated that he was not suicidal. Blatterman was handcuffed during the examinations.

¶15 After the examinations were completed, Nisius "unhandcuffed" Blatterman and had him perform field sobriety tests. A sample of Blatterman's blood was drawn, which indicated that Blatterman had a blood alcohol level of .118. Blatterman was charged with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration.

¶16 Blatterman filed a motion to suppress, arguing that he was arrested without probable cause and seeking suppression "of all evidence gathered subsequent to the illegal 'arrest.'" The circuit court denied the motion, and Blatterman appeals.

STANDARD OF REVIEW

¶17 When reviewing the denial of a motion to suppress evidence, we uphold the circuit court's findings of fact unless they are clearly erroneous. ***State***

v. Pinkard, 2010 WI 81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592. However, the application of constitutional principles to the facts is a question of law that we review de novo. ***Id.***

DISCUSSION

¶18 On appeal, Blatterman does not challenge the initial stop of his vehicle, which he characterizes as an "investigative detention." Instead, Blatterman argues that he was "subjected" to a "'de facto arrest' without probable cause" when Nisius extended the detention and transported Blatterman to the hospital, because the hospital was outside the vicinity of the original stop. The State argues that the detention was not transformed into an arrest when Nisius moved Blatterman to the hospital because the hospital was within the vicinity of the stop. Alternatively, the State argues that even if the stop was transformed into an arrest, Nisius had probable cause to arrest Blatterman before Nisius moved Blatterman to the hospital.

¶19 The Fourth Amendment protects against unreasonable searches and seizures. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by … law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions ....'" ***Delaware v. Prouse***, 440 U.S. 648, 653-54 (1979) (quoted sources and footnotes omitted). Accordingly, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ***Id.***

¶20 The Wisconsin Supreme Court has recognized two types of seizures that fall within the proscriptions of the Fourth Amendment—arrests and

investigative stops. ***State v. Young***, 2006 WI 98, ¶¶20, 22, 294 Wis. 2d 1, 717 N.W.2d 729.

¶21 One type of seizure, an arrest, "is a more permanent detention that typically leads to 'a trip to the station house and prosecution for crime.'" ***Id.***, ¶22 (quoting ***Terry v. Ohio***, 392 U.S. 1, 16 (1968)). For an arrest to be constitutional, it must be supported by probable cause that a crime has been committed. ***Young***, 294 Wis. 2d 1, ¶22. Probable cause requires that an officer "have sufficient knowledge at the time of the arrest to 'lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.'" ***Id.*** (quoted source omitted).

¶22 Another type of seizure, an investigative stop (also known as a ***Terry*** stop) is a less permanent detention that typically involves temporary questioning of an individual. ***Young***, 294 Wis. 2d 1, ¶20. An investigative stop "allows police officers to briefly 'detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.'" ***Id.*** (quoted source omitted). For an investigative stop to be constitutional, it must be supported by reasonable suspicion. ***Id.*** Reasonable suspicion requires that an officer "possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." ***Id.***, ¶21. A mere hunch that criminal activity may be occurring is insufficient. ***Id.*** "However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop." ***State v. Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305.

¶23 As the Supreme Court has explained, the predicate underlying permitting investigative stops "on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the

suspect." ***Florida v. Royer***, 460 U.S. 491, 500 (1983). While the permissible scope of such an intrusion will vary based on the facts and circumstances of each case, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." ***Id.*** In addition, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." ***Id.*** The State bears the burden of demonstrating that the seizure it seeks to justify on the basis of reasonable suspicion was "sufficiently limited in scope and duration to satisfy the conditions" of an investigative stop. ***Id.***

¶24 One circumstance under which a seizure may exceed the permissible scope of an investigative stop is where the officer transports the suspect outside the vicinity of the stop. ***State v. Quartana***, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). In ***Quartana***, this court interpreted WIS. STAT. § 968.24, Wisconsin's codification of the ***Terry*** stop, which provides:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

WIS. STAT. § 968.24; ***Quartana***, 213 Wis. 2d at 445-46. Specifically at issue in ***Quartana*** was the last sentence of § 968.24, requiring that the detention and temporary questioning "be conducted in the vicinity where the person was stopped." WIS. STAT. § 968.24; ***Quartana***, 213 Wis. 2d at 446. We interpreted that sentence to mean that "the law permits the police, if they have reasonable

grounds for doing so, to move a suspect in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest." ***Id.***

¶25 In addition, we set forth a two-factor test to determine whether an investigative stop has been converted into an arrest due to the movement of the suspect during the stop. ***Id.*** Under the two-factor test, we examine: (1) whether the suspect was moved within the "vicinity"; and (2) whether the purpose in moving the suspect within the vicinity was reasonable. ***Id.*** We defined "vicinity" to mean "'a surrounding area or district'" or "'locality.'" ***Id.*** (quoted source omitted). Under the facts of that case, we concluded that transporting a suspect one mile from his home to the scene of an accident fell within the definition of "vicinity." ***Id.*** at 446-47.

¶26 In this appeal, Deputy Nisius transported Blatterman from the scene of the stop to a hospital ten miles away. The State contends that the hospital was within the vicinity of the stop. The State's argument fails for two reasons. First, the State does not support the argument with citation to any controlling legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Second, unpublished cases interpreting ***Quartana***, while not controlling legal authority, contradict the State's argument. *See* ***State v. Burton***, No. 2009AP180, unpublished slip op. ¶¶14-15 (WI App Sept. 23, 2009) (concluding that transportation of the defendant from the scene of the stop to a hospital eight miles away was not within the vicinity); ***State v. Doyle***, No. 2010AP2466-CR, unpublished slip op. ¶13 (WI App Sept. 22, 2011) (concluding that transportation of the defendant from the scene of the stop to a police station approximately three to four miles was within the vicinity, but acknowledging "that three to four miles is at the outer limits of the definition of 'vicinity.'"). The State fails to identify controlling legal authority that would allow for those "outer limits" to be extended

to ten miles. I therefore conclude that Blatterman was not moved within the vicinity when Nisius transported him to the hospital.

¶27 Because I conclude that Blatterman was not moved within the vicinity when Nisius transported him to the hospital, I do not reach the second factor of ***Quartana's*** two-part test, which asks whether the purpose in moving the suspect within the vicinity was reasonable. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

¶28 The State contends that even if Blatterman had been under arrest when he was transported to the hospital, "[b]y the time police moved Blatterman to the hospital," they "had sufficient information to constitute probable cause for an arrest." According to the State, the following factors formed the basis for a probable cause determination: (1) police knew that Blatterman had three prior operating while intoxicated convictions, "and therefore, [Blatterman] would have a maximum legal blood alcohol of .02"; (2) police had received information from dispatch that Blatterman was "possibly intoxicated"; (3) "Blatterman behaved strangely and was not responsive to commands" when police stopped him; and (4) "Deputy Nisius detected an odor of intoxicants coming from Blatterman and observed that ... Blatterman had watery eyes."

¶29 The State likens this situation to cases that involved an accident or erratic driving, and which took place around bar time, but none of those facts are present here. The State's argument regarding probable cause based on the .02 limit consists of general statements that are not supported by citation to any legal authority at all. In the absence of further legal support, I find the State's argument undeveloped, and I consider it no further. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶30 While I conclude that Blatterman's Fourth Amendment rights were violated when the officer transported him to the hospital, I recognize that the officers who executed the stop of Blatterman's vehicle were faced with an extraordinarily difficult task. They had been informed that Blatterman had attempted to "blow up" his house, that he may have been intoxicated, that he had mentioned suicide-by-cop. Under these circumstances, the officers were balancing a multitude of concerns: concern for the safety of the public; concern for their own safety; concern that a crime may have been or was being committed; and, importantly, concern for Blatterman's mental and physical health.

¶31 The circumstances involved in the stop in this case exemplify the "complex and multiple tasks" that police officers perform on a daily basis. *See ABA Standards for Criminal Justice*: *Urban Police Function*, § 1-1.1(a) (2d ed. 1980). These tasks include apprehending persons committing criminal offenses, preventing criminal and delinquent behavior, resolving conflict, and assisting citizens in need of help such as those who are mentally ill, suffering from alcoholism, or addicted to drugs. ***Id.*** On top of the difficulties presented by the varied tasks police officers perform, "police officers are [also] often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." ***Graham v. Connor***, 490 U.S. 386, 397 (1989); *see also* ***County of Sacramento v. Lewis***, 523 U.S. 833, 853 (1998) (police officers must make decisions "'in haste, under pressure, and frequently without the luxury of a second chance'") (quoted source omitted).

¶32 In recognition of the fact that police officers must often act to protect public safety or to assist individuals who are mentally ill, the courts and the legislature have developed exceptions and procedures that apply when police officers act outside of their traditional role as enforcers of the law. For example,

Wisconsin courts have recognized an exception to the requirement that seizures be supported by reasonable suspicion or probable cause where the officer is acting as a "community caretaker." *See* ***State v. Kramer***, 2009 WI 14, ¶16, 315 Wis. 2d 414, 759 N.W.2d 598; ***State v. Maddix***, 2013 WI App 64, ¶¶13-14, 348 Wis. 2d 179, 831 N.W.2d 778. And Wisconsin's Emergency Detention statute, codified at WIS. STAT. § 51.15, authorizes police officers to take an individual into custody if they have "cause to believe that individual is mentally ill" and if that individual has demonstrated "[a] substantial probability of harm to himself or herself" or "[a] substantial probability of physical harm to other persons." *See* WIS. STAT. § 51.15(1)(ar)1.-2.

¶33 Nevertheless, in this case, the State has not shown a path through the panoply of these and other legal doctrines surrounding the Fourth Amendment, so as to find that the transport of Blatterman to the hospital, after he refused medical care, comports with the Fourth Amendment. Because Blatterman was not moved within the vicinity when Deputy Nisius transported him to the hospital, I conclude that the stop in this case exceeded the scope of an investigative detention. And because the State has not shown that Nisius had probable cause to arrest Blatterman when he transported him to the hospital, the extension of the stop violated Blatterman's Fourth Amendment rights.

CONCLUSION

¶34 For the reasons set forth above, I reverse the circuit court's judgment.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.