



Fond du Lac County

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February 7, 2019

District Attorney's Summary of the December 23, 2018 Death of Christopher L. Cary

This report is written pursuant to Wisconsin Statute §175.47(5)(a) and death of Christopher L. Cary on Sunday December 23, 2018 in the City of Fond du Lac, Wisconsin. The death of anyone is tragic and becomes even more profound when the death occurs in circumstances involving law enforcement officers. The emotional impact on the family of Mr. Cary and the officers will last well beyond the writing of this report. I offer my condolences to the family and friends of Mr. Cary as well as my sympathies to the officers and their families.

The City of Sheboygan Police Department began an investigation into the death of Mr. Cary on December 23, 2018 and provided final copies of their investigation into Mr. Cary's death to the Fond du Lac County District Attorney on January 16, 2019.

I have based my review upon the Sheboygan Police Department's investigation including; squad video/audio, autopsy findings, toxicology results, recorded interviews, police reports, witness statements and photos. I have concluded that the law enforcement officers acted appropriately and that Christopher L. Cary was responsible for his death. Based upon that finding there is absolutely no basis for any prosecution. The evidence and facts indicate that Mr. Cary died of "acute cocaine toxicity" by voluntarily ingesting cocaine in an apparent effort to avoid law enforcement officers from detecting the cocaine during a traffic stop of the vehicle Mr. Cary was operating.

Timeline of Events

On December 23, 2018 City of Fond du Lac Police Officer Sandra O'Donnell performed a traffic stop of a vehicle being operated by Christopher L. Cary at approximately 21:31 near the intersection of North Main Street and Division Street. Officer O'Donnell noted the vehicle's front license plate was missing. Officer O'Donnell made contact with Mr. Cary at 21:32:06 and further noted Mr. Cary had no proof of insurance and was not wearing his seatbelt. Officer O'Donnell observed the front license plate resting on the floor of the front passenger seat area.

Officer O'Donnell returned to her squad car at 21:33:40. Officer O'Donnell performed a criminal history check of Mr. Cary at 9:34:45 which indicated a possible open criminal case and an extensive criminal history. Officer O'Donnell performed a further records check of Wisconsin Circuit Court

Access¹ on her MDC at 21:36 which indicated Mr. Cary had an open criminal case, Fond du Lac County Case No. 2018CF000041 which included felony cocaine charges. Officer O'Donnell requested that dispatch confirmed that Mr. Cary had an open criminal case. Officer O'Donnell also noted Mr. Cary was moving around a lot in the vehicle and at 21:43 City of Fond du Lac Police Officer Trenton Smith was dispatched to back up Officer O'Donnell and Officer Smith arrived at 21:48. Dispatch confirmed, at 21:46, that Mr. Cary had an open criminal case as noted in Wisconsin Circuit Court Access. At 21:46 Fond du Lac County Sheriff's Deputy Justin Weisbecker and K9 Koda were dispatched to the scene and Deputy Weisbecker arrived at 21:57.

Officer O'Donnell approached Mr. Cary's vehicle at 21:59 and requested that Mr. Cary exit the vehicle to explain the citations to him. Mr. Cary exited his vehicle at 22:00 and met with Officers O'Donnell and Smith on the east sidewalk, just outside view of the dashboard squad camera. The conversation between officers and Mr. Cary continued to be audible during this time. At this time Deputy Weisbecker and K9 Koda began a sniff of the vehicle and K9 Koda alerted on the vehicle. A search of Mr. Cary was performed between 22:02 and 22:04. During this search \$626 was located on his person. Officers also noted that Mr. Cary's zipper to the crotch region of his pants was open. During the search of Mr. Cary, Nicole Schaub arrived to the scene and positioned herself on the east sidewalk.

Deputy Weisbecker and Officer O'Donnell performed a search of the vehicle being driven by Mr. Cary at 22:06. During this search Officer O'Donnell located ripped open sandwich baggies in the driver's door storage area and loose laying pieces of a white rock like substance, consistent with the appearance of crack cocaine, on the driver's seat. The white rock like substance was submitted to the Wisconsin Crime Lab for further testing. On January 15, 2019 the State of Wisconsin Crime Lab issued a report indicating the presence of cocaine base in the items Officer O'Donnell located on driver's seat with a total weight of approximately 0.353 grams.

Officer O'Donnell became suspicious that Mr. Cary concealed crack cocaine in his pants based on those observations and his zipper being open when he originally exited the vehicle. Officer O'Donnell returned to Mr. Cary and he was placed in handcuffs at 22:07. Officer Smith then performed a more thorough search of Mr. Cary based on Officer O'Donnell's request. No contraband or drugs were located during this search. This search was performed in front of a squad camera and Mr. Cary is visible and not showing any apparent signs of distress as he converses with officers.

Mr. Cary is then placed in the rear of a squad car at 22:09 and the officer then seatbelts Mr. Cary into the squad car. Officer Smith began to monitor Mr. Cary by closing the door to the backseat area of the squad car and then positioning himself in the driver's seat of the squad car at 22:10. The rear squad camera video shows Mr. Cary open his mouth and make noises with his mouth. Mr. Cary was also sticking his tongue out at times and continuing to make noises with his mouth.

Officer O'Donnell and Deputy Weisbecker returned to searching Mr. Cary's vehicle and Officer Smith remained in the front seat of the squad car with Mr. Cary to observe him. Between 22:10 and 22:11 Mr. Cary is seen continuing to make movements with his mouth and is heard making comments disagreeing about his arrest and swearing. At 22:11:40 Mr. Cary is observed taking what appeared to be a deep

¹ The online records showed an open felony case, Mr. Cary's address, and the charges pending against Mr. Cary.

breath and then blew air out of his mouth. At 22:11:48 Mr. Cary then sticks his tongue out and at 22:11:52 Mr. Cary begins rapid foot movements and his body is observed bouncing up and down.

Officer Smith asked Mr. Cary if he was alright at 22:11:57 and Mr. Cary responded "Help me, help me" in a slurred voice with his tongue out. Officer Smith responded at 22:11:58 asking Mr. Cary, "what's going on?" Mr. Cary responds from 22:11:59 through 22:12:12 "I don't know, I don't know" and then Mr. Cary repeatedly screamed "Help me!" and is seen rapidly moving in his seat. Officer Smith exits the squad car at 22:12:05 and requests dispatch send an ambulance to his location.

Officer Smith continues to monitor Mr. Cary during this time at 22:12:15 opens the rear squad car door and Mr. Cary continues rapid leg movements, appears to be convulsing and screaming "help me!" Mr. Cary's eyes began to flutter during this time and appear to be looking around. Officer Smith released Mr. Cary's seatbelt at 22:12:53 and Officer O'Donnell asked Mr. Cary if he swallowed crack at 22:13 and Mr. Cary was non-responsive to the question. Mr. Cary's body then transitions to twitching while making snoring type sounds. During this time Mr. Cary appears to be breathing with an open air way. Officer Smith continues to monitor Mr. Cary from 22:12:05 through 22:19:04. Emergency medical service from the ambulance arrived and took command of Mr. Cary at 22:19:04. EMS members evaluated Mr. Cary in the back of the squad car and at 22:22:36 Mr. Cary was removed from the squad car and placed on the EMS cot at 22:24:07 and moved into the ambulance. The ambulance departed the scene at 22:42:47 and arrived to St. Agnes Hospital at approximately 22:46:53.

Witness Statements

Sheboygan investigators interviewed Ms. Schaub and learned she is the registered owner of the vehicle that Mr. Cary was operating and that Ms. Schaub and Mr. Cary have at least one child together. Schaub stated that Mr. Cary called her at approximately 21:50 when Mr. Cary observed a second squad car arrive at the scene of the traffic stop. Schaub stated that Mr. Cary sounded normal but perhaps a little nervous. Cary told Schaub that she should come pick up the vehicle to avoid it being impounded as Mr. Cary believed he may have warrants and could be going to jail.

Ms. Schaub stated she arrived on the scene of the traffic stop and observed Mr. Cary being searched and he was not handcuffed and appeared to be fine. Schaub then observed two officers search the vehicle and locate residue and baggies. Schaub then witnessed Mr. Cary being handcuffed and placed in the rear of one of the squad cars with an officer then getting into the driver's seat of the same squad car Mr. Cary had just been placed in. Schaub stated she believed within 5 minutes of Mr. Cary being placed in the squad car the officer got out and was calling for an ambulance. Ms. Schaub then made a frantic 911 call.

Autopsy Findings

Mr. Cary was pronounced dead at 23:24 in the Emergency Room of St. Agnes Hospital on December 23, 2018. An autopsy was performed by Fond du Lac Medical Examiner Adam Covach on December 24, 2018. Dr. Covach's autopsy protocol report was completed on January 9, 2019 and ruled Mr. Cary's cause of death as "acute cocaine toxicity." Toxicology results from NMS Labs showed significant concentrations of cocaine in Mr. Cary's blood and gastric fluid. Investigators noted that during the autopsy white chunk like rocks were located in Mr. Cary's stomach contents, which appeared consistent

with the appearance of cocaine. Dr. Covach's autopsy protocol reports no evidence of traumatic injury or violence which is consistent with witness statements.

Blood Results	Cocaine	11,000 ng/mL
Gastric Results	Cocaine	12,000,000 ng/mL

The January 9, 2019 report from NMS Labs indicates that the average blood cocaine concentrations in 37 cocaine related fatalities was 4,600 ng/ml. (range 40-31,000 ng/mL).

Timeline Summary

From the time of the traffic stop until Mr. Cary was turned over to EMS he was in contact with the police for approximately 53 minutes from 21:31 until 22:24.

Mr. Cary remains in his vehicle for approximately 28 minutes from 21:31 until 21:59.

Mr. Cary then remains outside of his vehicle for approximately 10 minutes from 21:59 until 22:09 when he is placed in the rear of Officer O'Donnell's squad car.

Mr. Cary remains in the squad car for approximately 15 minutes from 22:09 until 22:24 when he is moved into the ambulance.

Mr. Cary first began exhibiting signs of possible distress at 22:11:52 and Officer Smith asks Mr. Cary if he is alright at 22:11:57, 5 seconds after the possible distress is first observed on squad camera.

Mr. Cary screams for help at approximately 22:11:59 and Officer Smith begins exiting his squad and calls for an ambulance at 22:12:05, 6 to 8 seconds after Mr. Cary is screaming for help.

Mr. Cary remains in the squad car and is monitored by officers for approximately 7 minutes from 22:12 through 22:19:05 when EMS crews arrive. EMS evaluates Mr. Cary for approximately 3 minutes, from 22:19 through 22:22:36, at which point Mr. Cary is moved to the ambulance at 22:24:07.

EMS crews perform life saving measures on Mr. Cary in the ambulance at the scene for approximately 18 minutes and at 22:42:47 Mr. Cary is transported to St. Agnes Hospital arriving at approximately 22:46:53.

Legal Principles

Officer O'Donnell's traffic stop of the vehicle driven by Mr. Cary was lawful based on the vehicle not having a front license plate attached. Officer O'Donnell approached the vehicle and learned of three additional traffic violations; no license on person, no proof of insurance and Mr. Cary wasn't wearing his seatbelt. Officer O'Donnell did not contemplate a citation or warning for no license on person. Officer O'Donnell advised Mr. Cary of license plate issue and received an address from Mr. Cary as to where he lived. Officer O'Donnell attempted to verify the identity and address of Mr. Cary through in-house records. Mr. Cary provided the address of 150 E Merrill, which is different than the address Mr. Cary had listed with the court in Fond du Lac County Case No. 2018CF000041.

Officer O'Donnell verified Mr. Cary's identity through in-house records but Officer O'Donnell was unable to verify the address based on in-house records. Officer O'Donnell appears to have contemplated a potential criminal charge for obstruction an officer pursuant to Wisconsin Statue §946.41(1), a class A misdemeanor², along with a traffic citation for no proof of insurance. Officer O'Donnell decided to issue warnings for the vehicle not having a front license plate and Mr. Cary not wearing his seatbelt. Officer O'Donnell also could have issued a citation for Mr. Cary not having his license on his person.

Officer O'Donnell discusses a possible charge of obstructing an officer with Officer Smith at approximately 21:48 when he arrived on scene. Ultimately Officer Smith shares his opinion that it would require the possible false address to make Officer O'Donnell's duties more difficult.

Officer O'Donnell and Smith do not discuss felony bail jumping³ at any time during the traffic stop, however, the address Mr. Cary listed on his court case file for 2018CF000041 on March 1, 2018 was listed as 546 Forest Avenue. Mr. Cary's previous address had been listed as 54 East Rees Street, which is different than the address listed on Mr. Cary's court file for 2018CF000041. This discrepancy indicates that Mr. Cary either lied about his address to the officers or may have failed to update the court within 48 hours of an address change. The bail bond form signed by the defendant in 2018CF000041 requires that the defendant "shall give written notice to the Clerk of this Court within 48 hours of any change of address..."

The Wisconsin Supreme Court addresses the issue of a dog sniff and the extension of a traffic stop in *State v. Arias* 311 Wis.2d 358; 752 N.W.2d 748 (2008). In *Arias* the Court held a dog sniff is not a search of vehicle and that 78 second intrusion of Arias' liberty was reasonable based "on a balance between public interest and the individual's right to personal security free from arbitrary interference by law officers" in citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330 (1977). The court reasoned that there was a 78 second delay in Arias from the time from the end of the stop for a traffic violation and the dog sniff. The court determined this delay to be reasonable despite the reason for the traffic stop to have concluded.

Analysis

Officer O'Donnell performed a traffic stop of a vehicle being driven by Mr. Cary at 21:31 and observed the driver to be the sole occupant in the vehicle. Officer O'Donnell verbally identified the driver as Christopher Cary as he informed Officer O'Donnell that he didn't have his wallet or driver's license with him. Mr. Cary stated he didn't know if the vehicle had insurance and was unable to provide Officer O'Donnell with proof of insurance. Mr. Cary also indicated the vehicle belonged to Nicole Schaub.

² Wisconsin Jury Instruction 1766 identifies four elements to obstructing:

- A) The defendant obstructed an officer which means the conduct prevents or makes more difficult the performance of the officers duties.
- B) The officer was acting in an official capacity
- C) The officer was acting with lawful authority
- D) The defendant knew the officer was acting in an official capacity and knew his conduct would obstruct the officer

³ Felony bail jumping pursuant to Wisconsin Statue §946.49 and Jury Instruction 1795 requires the following:

- A) The defendant was charged with a felony
- B) The defendant was released from custody on bond
- C) The defendant intentionally failed to comply with the terms of the bond

Officer O'Donnell noted in an interview with Sheboygan detectives that Mr. Cary appeared nervous, his hands were shaking and he avoided eye contact with Officer O'Donnell.

Officer O'Donnell reported Mr. Cary's actions as being suspicious based upon his movements within the vehicle. Officer O'Donnell ran an in-house records check and was able to verify his identity based on the in-house records. The records check reflected a narcotics history for Mr. Cary and Officer O'Donnell requested a K9 respond to her location. Officer O'Donnell also requested dispatch run a check of any open cases for Mr. Cary. Dispatch responded at 21:46 that Mr. Cary had an open felony drug case, 2018CF000041, with charges of manufacture/delivery cocaine, possess with intent to deliver cocaine, maintaining a drug trafficking place, possession of drug paraphernalia, and possession of narcotic drugs⁴. Officer O'Donnell then requested a second squad respond to back her up and Officer Smith arrived on scene at 21:48.

Officer O'Donnell stated she observed Officer Smith arriving on scene and driving past Mr. Cary's vehicle at which point Mr. Cary started turning his body around and looking in the mirror, which Officer O'Donnell believed to be nervous behavior being exhibited by Mr. Cary. Officer O'Donnell briefed Officer Smith upon his arrival. Officer O'Donnell then printed the citation while Officer Smith monitored Mr. Cary.

Nicole Schaub informed Sheboygan investigators that Mr. Cary was on the phone with her when Officer Smith arrived to the scene at 21:48. Mr. Cary told Ms. Schaub that when the second squad car arrived he believed he would be arrested.

Audio from Officer O'Donnell's squad and lapel microphones reflects that Officer Smith arrived on scene at 21:48. The officers began discussing Mr. Cary's address and whether or not he obstructed in possibly providing Officer O'Donnell an incorrect address. Mr. Cary provided Officer O'Donnell an address of 150 East Merrell and City of Fond du Lac Police in house records reflected a different address and Mr. Cary's address listed with the court in 2018CF000041 was 546 Forest Avenue. The bail bond form required Mr. Cary to update any address changes within 48 hours. The most recent address Mr. Cary provided to the court was 546 Forest Avenue. The officers would have had probable cause to arrest Mr. Cary for Felony Jumping or possibly obstructing an officer based upon the address provided by Mr. Cary not matching the address Mr. Cary provided the court in 2018CF000041.

Officer Smith ultimately recommended to Officer O'Donnell that this circumstance didn't appear to fit an obstructing charge. Officer O'Donnell appears to agree and began working on a citation for no proof of insurance and warning which would be given to Mr. Cary.

Officer O'Donnell informed Sheboygan investigators that she forgot to issue the warnings which caused her to reprint the citation along with two warnings. Sheboygan investigators noted that there were two copies of the citation collected as evidence. Officer O'Donnell then explained around the time of her printing the citations Deputy Weisbecker and his K9 Koda arrived on scene at 21:57. Deputy Weisbecker requested Officer O'Donnell have Mr. Cary exit the vehicle so that Deputy Weisbecker could have K9 Koda perform a sniff of the vehicle.

⁴ 2018CF000041 was dismissed on January 25, 2019 based upon the death of Mr. Cary.

Applying the decision in the *Arias* case, the officers did not extend the traffic stop because Officer O'Donnell had not completed the original reason for encounter with Mr. Cary, the traffic violation and warnings. Prior to approaching Mr. Cary's vehicle Officer O'Donnell was tasked with identifying who Mr. Cary was, what his correct address was, if he was authorized to drive the vehicle, and whether Mr. Cary obstructed an officer by providing a false address. Had Mr. Cary remained calm, had his driver's license on him, proof of insurance, and provided the correct address the encounter with officers would have been reduced in time. Mr. Cary's traffic violations, lack of driver's license, and providing an address that didn't match court or in-house records required Officer O'Donnell to perform additional investigation beyond the initial reason for the traffic stop.

Once Officer O'Donnell completed the citation and warnings she reproached Mr. Cary's vehicle at 21:59 and requested he exit the vehicle so that Officer O'Donnell didn't have to discuss the citation and warnings while standing close to moving vehicles while also allowing Deputy Weisbecker to have K9 Koda perform a sniff of the vehicle. Mr. Cary is observed exiting his vehicle at this time, which is 11 minutes after Officer Smith arrived. Officers noted the zipper to the crotch region of Mr. Cary's pants was unzipped.

Based on witness statements and the physical evidence it is believed that Mr. Cary began removing cocaine that had been concealed in the crotch region of his pants and placing the unpackaged cocaine in his mouth during these 11 minutes. It is unknown if Mr. Cary began swallowing the cocaine at this time but is likely Mr. Cary's body began absorbing the unpackaged cocaine once it was placed in his mouth.

During the 10 minutes Mr. Cary is outside of his vehicle, on the east sidewalk outside the view of the squad camera, he is heard conversing with officers and exhibiting no verbal signs of distress. Interviews with the officers indicate they observed no signs of medical distress being exhibited by Mr. Cary during this time.

Officer O'Donnell and Deputy Weisbecker began searching the vehicle at 22:06 and Officer O'Donnell observed cocaine on the front driver seat where Mr. Cary had been seated along with torn plastic baggies. Plastic baggies are commonly used to transport cocaine and other narcotics. Based on Mr. Cary's zipper being unzipped, the dog sniff indications on the vehicle, and the cocaine being located in the vehicle, Mr. Cary was placed in handcuffs. A further search of Mr. Cary was performed because officers believed it was possible additional cocaine may be on Mr. Cary's person. No additional cocaine was located during the search Officer Smith performed at 22:07, which was performed in front of the squad camera. Mr. Cary is observed on the squad camera to be conversing with officers and never indicates that he is experiencing a medical issue or that he ingested cocaine.

Once Mr. Cary is placed in the squad car at 22:09 he is being monitored by police officers at all times until EMS arrives and begin assessing Mr. Cary's medical situation. Mr. Cary is making noises with his mouth and sticking his tongue out in the back of the squad car but it is not until 22:11:52 that Mr. Cary's behavior escalates with rapid movements and begins to yell "Help me!" Officer Smith responds appropriately within 6 to 10 seconds of these signs of distress and requests dispatch send an ambulance. Officers inquire to Mr. Cary if he ingested something, including cocaine, but Mr. Cary doesn't provide officers with any reason for his medical distress.

Based on the rapid movements of Mr. Cary the safest place for him was to remain in the squad car to protect himself from any head or other injuries. The officers were able to verify that Mr. Cary was breathing and there was no apparent obstruction to his air way. There was no evidence of a heroin overdose or that the use of Narcan could be helpful. Narcan is generally used when someone is unconscious due to the effects of opioids. Mr. Cary remained conscious and there was no evidence of heroin or opioid use.

The actions of the officers are further supported by the arrival of the EMS crews and the approximate 3 minutes of time EMS spent evaluating Mr. Cary in the squad car. EMS crews removed Mr. Cary once a medical cot was available to transport him to the ambulance.

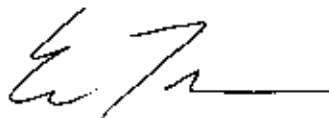
Conclusion

The audio and video evidence, CAD reports, witness statements from Ms. Schaub, the involved officers and EMS crews, along with Dr. Covach's autopsy findings, the toxicology report and crime lab report were the primary sources in assisting with factual conclusions made in this report. The *Arais* case along with the jury instructions for obstructing an officer and felony bail jumping assisted in the legal analysis.

I have determined that Officer O'Donnell performed a lawful traffic stop based on the vehicle not having a front license plate. The initial encounter with Mr. Cary yielded three additional violations, one which was not considered by Officer O'Donnell. Mr. Cary's address not matching up with in-house records and the address Mr. Cary provided the court in 2018CF000041 gave officers probable cause of obstructing an officer or felony bail jumping under the collective knowledge doctrine. The continued investigation by Officer O'Donnell through the dog sniff performed by K9 Koda was reasonable under the totality of circumstances and in no way led to the death of Mr. Cary. Mr. Cary was ultimately arrested and officers had probable cause to arrest Mr. Cary for possession of cocaine, possession of drug paraphernalia, obstructing an officer, and felony bail jumping. The death of Mr. Cary occurred through his voluntary ingestion of cocaine during a lawful traffic stop and arrest. Mr. Cary died from "acute cocaine toxicity" on December 23, 2018 related to his ingestion of the cocaine.

Mr. Cary never mentioned to police officers or medical professionals that he ingested cocaine or any other substance. Officers acted appropriately in monitoring Mr. Cary during the entire traffic stop and the time Mr. Cary spent in the rear of the squad car. Officer Smith acted professionally and swiftly in calling for an ambulance within seconds of it becoming apparent Mr. Cary could be experiencing a medical emergency. Officers then continued monitoring Mr. Cary to ensure he was breathing and had an open airway until EMS crews arrived, at which point Mr. Cary's medical care was turned over to the medical professionals on scene. There is no basis for any criminal charges based on these findings.

Respectfully,



Eric J. Toney
District Attorney