STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN

Plaintiff-Respondent,

vs. Case No.: 2012AP001137 CR

EUGENE L. CHERRY,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

APPEALED FROM WASHINGTON COUNTY
CIRCUIT COURT, BRANCH 3
TRIAL COURT CASE NO. 2010CF000463
HONORABLE TODD K. MARTENS PRESIDING

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STATEMENT OF ISSUE

I. **DID THE TRIAL COURT ERR IN DENYING DEFENDANT-APPELLANTS MOTION TO SUPPRESS EVIDENCE DISCOVERED FOLLOWING WARRANTLESS ARREST AND SEARCH?**

The Trial Court answered: No.

The Respondent would answer: No.

Appellant states: Yes.

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant, Eugene L. Cherry, does not request oral argument in this appeal. The issue on this appeal is clear, and may be fully addressed through briefs of the parties.

STATEMENT ON PUBLICATION

Defendant-Appellant, Eugene L. Cherry, does not request publication of this decision in that the issue presented does not create new issues of law or involve areas of appellant procedure.

STATEMENT ON THE CASE

This appeal stems from the Judgment of Conviction in favor of the plaintiff, State of Wisconsin, and against the defendant, Eugene L. Cherry entered on the 5th day of October, 2011 and adjudging the Defendant-Appellant, Eugene L. Cherry guilty of one count of burglary, contrary to sec. 943.10.10(1m)(a) Wis. Stats and one count of Criminal Damage to Property, contrary to Wis. Stats. sec. 943.01(1). (Record on Appeal 69 and 70-1 to 70-3). It is based on the Trial Court's decision and Order denying Defendant-Appellant's Motion to Suppress Evidence Derived from Unlawful Stop, Unlawful Arrest, Unlawful Detention and Unlawful Search filed on March 25, 2011 and heard by the Court on May 5, 2011 (Record on Appeal 22-1 to 22-3). For purposes of this appeal, Defendant-Appellant, Eugene L. Cherry, will hereinafter be referred to as "Cherry" and Plaintiff-Respondent, State of Wisconsin, will hereinafter be referred to as "State".

STATEMENT OF FACTS

On November 30, 2010, the State caused to be filed a criminal complaint charging Cherry with one (1) count of burglary of a building or dwelling, as party to a crime and one count of criminal damage to property, also as a party to a crime. (Record on Appeal 1-1 to 1-7). Cherry appeared for the Initial Appearance on the same date that the complaint was filed. The Court found probable cause on the complaint and set bail in the amount of $2,500.00 cash, which Cherry was unable to post (Record on Appeal at 5-1). The matter was continued for a Preliminary Hearing.

The hearing on Defendant-Appellant's Motion to Suppress Evidence Derived from Unlawful Stop, Unlawful Arrest, Unlawful Detention and Unlawful Search was held on May 5, 2011. Washington County Deputy Sheriff Ronald

Rewerts testified that he received information from an eyewitness that there was a suspicious vehicle in their neighbor's driveway and some suspicious persons on the scene (Record on Appeal at 26-6). Deputy Sheriff Rewerts testified that when he arrived at the location he spoke with a female occupant of tan automobile who indicated that she had been accompanied to the location by two black males who were no longer in evidence (Record on Appeal at 26-7). Deputy Sheriff Rewarts observed that the residence appeared to have been broken into, basing this conclusion on physical damage to the door frame and the actual mechanism of the door (Record on Appeal at 26-9). Once the homeowner was located and informed of the suspected burglary to his residence, he informed police that he had firearms located in an unlocked gun case in the basement of the residence (Record on Appeal at 26-10). At this point, Deputy Sheriff Rewarts testified that a call to dispatch by a civilian witness came through to report two "suspicious males", a black man and a Hispanic man, had been observed walking in the vicinity of Wildlife Road (Record on Appeal 26-17 to 26-18).

Following Deputy Sheriff Rewarts' testimony Detective James Wolf took the stand (Record on Appeal at 26-18). Detective Wolf testified that police were unsure if the burglary suspects were inside the residence or if they had fled out the back of the house (Record on Appeal at 26-21). Detective Wolf then informed the Court that officers then received another call from an eyewitness who spotted two males walking in the vicinity of Wildlife Drive(Record on Appeal at 26-26). He stated the two individuals were described only as a "black man and a Hispanic man" (Id). He stated of his personal knowledge that the area in which they were reported to have been observed was about a mile from the crime scene (Record on Appeal at 26-27). At that point, Detective Wolf headed toward Wildlife Drive along with other officers, where two men were spotted walking along Wildlife Drive (Id).

According to Detective Wolf, Lieutenant Theusch and Sergeant Cummings from the Hartford Police Department had

accompanied him in a separate vehicle to Wildlife Drive (Record on Appeal at 26-30). Upon seeing the two males the fully uniformed and armed officers got out of their cars, all pointing their weapons at the two individuals. Lieutenant Theusch ordered the suspects to stop and get on the ground (Id). Both of the men complied with the officers' orders. Detective Wolf then approached Cherry on the ground, placed him in handcuffs and patted him down for weapons. No weapons were found. Cherry was then placed in the back seat of a squad car (Record on Appeal 26-30 to 26-31). The same was done with the other suspect by Sergeant Cummings (Record on Appeal 26-30 to 26-31). It was only at this point that officers contacted Detective Abbott, who had remained at the scene of the suspected burglary, to receive additional information, including, ironically, a detailed description of the two men that had accompanied the female that had been found on the scene. (Record on Appeal at 26-31).

The description provided by Detective Abbott to detective Wolff was that of a 35 year old male, five foot six, around 150 pounds, black male wearing black jacket and black pants and another individual who was a six foot, 200 pound black male, wearing a black jacket and black jogging pants. (Record on Appeal at 26-31). Based on this description Detective Wolff concluded police had arrested the correct individuals (Record on Appeal at 26-32). While on the witness stand, Detective Wolff was questioned about the fact that the original description indicated only that it was a black male and a Hispanic male involved in the suspected burglary. He opined that Cherry was a light skinned black male and therefore assumed a witness could confuse him with being Hispanic. (Record on Appeal at 26-40).

Detective Wolff also testified that both Cherry's and the codefendant's pants appeared wet and muddied when the officers ordered them to get on the ground (Record on Appeal at 26-28). Detective Wolf was questioned about the demographics of Washington County and whether that played a role in their stopping and arresting of Cherry and his black codefendant (Record on Appeal at 26-36). He, at least

implicitly, acknowledged it did. (Record on Appeal 26-28 to 26-29)

Once the description from Detective Abbot was received by Detective Wolff on the scene of the arrest, Cherry and his codefendant were taken to the Sherriff's Department in West Bend where Detective Wolf attempted to interview them and they were searched (Record on Appeal at 26-32). Detective Wolff interviewed and searched the codefendant while Sergeant Boudry was interviewing and had searched Cherry (Record on Appeal at 26-33). Cherry was found to have a large amount of coins on him, including half dollars and some foreign coins; he also had a "cubic zirconia-type stone" and a band like a ring on him (Id).

At the conclusion of testimony, the State argued that Cherry had not been arrested until after verification of the full description of the suspects had been received from Detective Abbott. However, pursuant to the testimony of the State's own sworn officers/witnesses, receipt of that description did not occur until after Cherry had been stopped at gunpoint, ordered face-down to the ground in the gravel siding of a rural country road, and handcuffed and placed in the squad car (Record on Appeal 26-45 to 26-46). The State also alleged that the initial identifier of the two suspects, consisting solely (and inaccurately) of their race, combined with the possibility of weapons being stolen to constituted probable cause for the arrest of Cherry (Record on Appeal at 26-46).

The defense responded that the arrest occurred much earlier and that there was no evidence at the time to indicate that either Cherry or his counterpart were responsible for the burglary or any of the damage caused at the residence with the suspected break in (Record on Appeal at 26-47). Cherry and his codefendant had cooperated with the police and complied with all requests from the officers (Record on Appeal at 26-34). The defense asked for suppression of the evidence recovered at the police station due to the fact that it had come from an illegal arrest and therefore illegal search (Record on Appeal at 26-48).

The Trial Court, Honorable Todd K. Martens, presiding

orally denied the suppression of evidence recovered after arrest and search following the presentation of testimony and evidence and the arguments of counsel (Record on Appeal 26-52 to 26-62).

Cherry subsequently filed a Notice of Appeal and it is from the Court's denial of that Motion that this appeal is being taken.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS EVIDENCE DISCOVERED FOLLOWING WARRANTLESS ARREST AND SEARCH.

When a search is conducted without a warrant and not incident to a lawful arrest, all evidence recovered in the search shall be inadmissible under the exclusionary rule. The exclusionary rule was derived from the Fourth Amendment and adopted by Wisconsin in Hoyer v. State, 193 N.W. 89 (1928). The rule states that any evidence collected in violation of an individual's constitutional rights are inadmissible. When an illegal action is used to recover the evidence, it is deemed "fruit of the poisonous tree" unless the discovery was inevitable and not dependant on the search itself. Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920).

A search of a person may occur, and evidence may be seized, when the search is made incident to a lawful arrest, with consent, pursuant to a valid search warrant, within the authority and scope of a lawful inspection, pursuant to a search during an authorized temporary questioning, and as otherwise authorized by law. (Wis. Stat. sec. 968.10) Temporary questioning occurs when an officer has stopped a person and reasonably suspects he or she may in danger of physical injury and they may search for weapons or anything capable of being used as a weapon. (Wis. Stat. sec. 968.25) However, the scope of a search of that nature cannot extend past checking the suspect for weapons and once it is discovered that the individual is not armed the police may not search further.

When police conclude that an individual may have committed a crime or may be about to commit a crime, and there is probable cause that they are armed and dangerous,

they may conduct what has come to be denominated a "Terry Stop" under the United States Supreme Court case of Terry v. Ohio, 392 U.S. 1 (1968). Terry stops allow the police to stop the individual and pat them down to ensure that they do not present a danger to the officers or to the public. It is abundantly clear that this is not what occurred in this circumstance, even if it could be credibly argued that officers possessed sufficient information to formulate a reasonable and articulable basis for such a stop. A Terry stop does not allow armed officers to approach the suspects from behind with weapons drawn, order the individual to the ground and proceed to handcuff them and place them into police cars. A Terry Stop also would not permit police to forcibly handle the suspect, search their person for anything beyond weapons, or arrest the individual without probable cause. Terry v. Ohio, 392 U.S. 1 (1968).

The Mendenhall test sets forth the standard which is used by the Court to determine whether an individual is under arrest. That test states:

> (A person is under arrest) "(o)nly if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave" Michigan v. Chesternut, 486 U.S. 567 (1988)

For the Court to determine whether police initially conducted a terry stop or a full blown arrest the Court must look at the following factors:

> "the amount of force used by police, the need for force, the extent to which an individual's freedom of movement was restrained, and in particular, such factors as the number of agents involved, whether the target of the stop was suspected of being armed, the duration of the stop, and the physical treatment of the suspect and whether or not handcuffs were used" U.S. v. Vargas, 369 F.3d 98, 101 (2004).

The standard for an arrest to occur without a warrant requires one of the following factors to be present: the

police must witness the suspect committing a crime, a reliable informant must provide information to the police regarding a felony that has been committed, the time taken to obtain a warrant would allow the suspect to either escape or destroy evidence, or the police must have probable cause. Probable cause exists when "the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime". United States v. Hoyos, 892 F.2d 1287, 1392 (1989)

For a person to believe that a suspect has committed a crime without evidence or eyewitness testimony identifying the suspect, the suspected individual should fit the description of a "suspicious person" United States v. Packer, 15 F.3d 654 (1994). The Court ruled that a phone call to the police describing a "suspicious person" (without any other details or description given) does not generate reasonable suspicion to warrant a stop and consequently an arrest. Gentry v. Sevier, 597 F.3d 838 (2010). When the defendant cooperates with the police and is not caught in the act of something suspicious and does not attempt to flee when the police approach them there leads to less of a cause for reasonable suspicion.

Cherry was merely walking down the road when stopped at gunpoint by numerous armed police. He fully complied with the police's orders. Upon pat down by officers, no weapons of any sort or type were discovered. He was not, simply put, engaging in any suspicious activity at the time of the stop by the police and he did not respond in a suspicious manner when stopped.

Applying the rationale which the trial Court used in denying his motion by finding probable cause to arrest and search Cherry in this case, any black men (or Hispanic men) discovered within a walking radius of the suspected burglarized home in Washington County can and should have been arrested. The utter lack of suspicious activity or

identifying attributes other than the color of their skin leads to the irrefutable conclusion that the warrantless arrest and subsequent search were not legal.

The moment Cherry was ordered at gunpoint by several armed SWAT officers to lay face-down on the gravel shoulder of a rural Washington County roadway, it was rendered patently unreasonable for any person to believe that he was free to leave. There is no way to interpret these actions as anything other than a detention and an arrest. This arrest occurred at a time that the only information that was in the possession of the officers was that of the suspects' race (albeit slightly wrong) and before the officers called for any further description. It occurred without a warrant and without probable cause based upon the fact that he was engaging in no suspicious behavior at the time of the arrest and was identified by his race alone. The search incident to arrest at the police station must also be found to be illegal as it was not accomplished following a lawful arrest. Anything recovered during the search must be suppressed as it was discovered incident to an unlawful arrest.

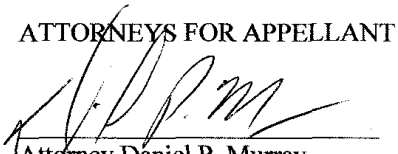
CONCLUSION

The Trial Court erred in denying Cherry's Motion to Suppress Evidence Derived from Unlawful Stop, Unlawful Arrest, Unlawful Detention and Unlawful Search filed on March 25, 2011. Because the Trial Court committed reversible error in this instance, Cherry is entitled to have the evidence suppressed and a retrial.

Respectfully submitted:

Dated this 3rd day of October, 2012.

ATTORNEYS FOR APPELLANT



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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 3258 words.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with S. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the Circuit Court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the Circuit Court's reasoning regarding those issues.

I further certify that if this appeal is taken from a Circuit Court Order or Judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that the paper brief is identical to the electronically filed brief.

Dated this 3rd day of October, 2012.

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