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 REPLY BRIEF

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

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ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANTS MOTION TO SUPPRESS EVIDENCE FOLLOWING WARRANTLESS SEARCH AND ARREST

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 is 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, or 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.

For the Court to determine whether police initially conducted a terry stop or a full blown arrest the Court must look to 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).

There is no question that Cherry was under arrest based on the circumstances stated in the record and in the Briefs of both the Defendant-Appellant and the State; albeit not a lawful arrest. A lawful arrest without a warrant occurs when the police witness the suspect committing a crime, a reliable informant provides information to the police regarding a felony that has been committed, and the time required to obtain a warrant would allow the suspect to either escape or destroy evidence, or the police have probable cause. United States .v Hoyos, 892 F.2d 1287 (1989). In its' brief on appeal the State first argues that probable cause was present and therefore arresting Cherry was lawful. Alternatively, it goes on to argue that there need not have been probable cause for arrest as Cherry was not under arrest but merely temporarily detained in a *Terry* Stop (State's br. at 13).

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 numerous armed tactical officers to approach the suspects in force from behind with weapons drawn, order the individuals 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 State agrees that for a *Terry* stop to be reasonable the "duration and intrusiveness must be reasonable under the circumstances" (State's br. at 4). What Cherry endured was far more than a minimally invasive search for weapons as is allowed by the law, prior to lawful arrest. Ratliff v. City of Chicago, 2012 US Dist. Lexis 170969 (2012). The police did pat Cherry down for weapons but only after forcing him to lay face-down on the gravel shoulder of a rural roadway ground while after being placed in handcuffs. Even though no weapons were recovered Cherry was escorted at gunpoint to the rear seat of a locked squad car where he was further detained. The State argues that Cherry was detained due to the totality of the circumstances (State's br. at 12), but offers in support of this conclusion only the color of his skin and his location at the time of the forcible stop as relied upon for the search.

United States v. Vargas outlined the difference between an arrest and a *Terry* stop and concluded that they are not identical. The State by way of its Brief uses circular reasoning to state that an arrest and a *Terry* stop are almost interchangeable, when in fact they greatly differ. The police's actions and suspicions were not reasonable and therefore there was no probable cause nor was the temporary seizure legal.

Under the most basic of black letter law, when a search is conducted which is not authorized by law all evidence recovered in the search is inadmissible under the exclusionary rule. This is clearly the circumstance presented in this case and is equally clearly shown in this record.

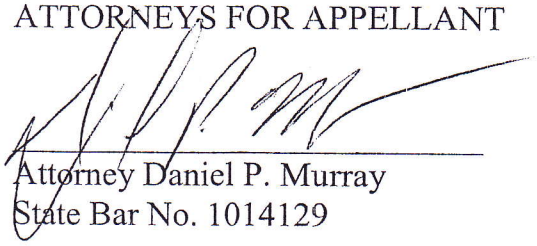
CONCLUSION

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 derived from the search suppressed and the case dismissed premised upon the illegal arrest.

Respectfully submitted:

Dated this 15th of January, 2013.

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 1432 words.

Dated this 15th day of January, 2013.

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CERTIFICATE OF COMPLIANCE WITH STAT. § (RULE) 809.19(12)

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

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This electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

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