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STATE OF WISCONSIN
C O U R T O F A P P E A L S

DISTRICT II

Case No. 2013AP2803-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELISA ESTRADA,

Defendant-Appellant.

On a Notice of Appeal from a Judgment of Conviction and
Sentence Entered in the Racine County Circuit Court, the
Honorable Allan B. Torhorst Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Whether the police violated Ms. Estrada's Constitutional right to be free from unreasonable searches and seizures when they conducted a warrantless search of her vehicle.

The circuit court denied Ms. Estrada's motion to suppress the evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is not likely warranted because this appeal applies well-established law to the facts of the case. Although the briefs can adequately present the issue and legal authorities, oral argument is welcomed if this Court would find it helpful.

STATEMENT OF THE CASE AND FACTS

According to the criminal complaint, on May 7, 2012, at approximately 11:48 pm, Racine Police Officer Bodnar responded to a residence to speak to a victim of an armed robbery, Rachel D.¹ (1:2). She informed Officer Bodnar that she was with her lifelong friend, Elisa Estrada, in Ms. Estrada's car. (1:2). Ms. Estrada indicated they were driving to drop off her daughter, who was in the rear child seat, at an apartment on Rosalind Ave. (1:2). When Ms. Estrada stopped the car in the area of Rosalind and Hamlin Street, two men rushed the car. (1:2). One man approached the driver's side

¹ Counsel has redacted the name of the victim to protect her privacy.

and the other approached Rachel on the passenger side. The man on the passenger side pointed a black handgun at Rachel and demanded her purse. He was a darker-skinned black man wearing a black ski mask and a long-sleeved gray shirt or hoodie. (1:2). Rachel opened the door and gave him the purse, and he and the other man ran off in an unknown direction. (1:2).

Rachel told police that, after the robbery, Ms. Estrada was crying hysterically and needed a minute or two before she could drive away from the intersection. (1:2). They drove around for a bit, and then Ms. Estrada dropped Rachel off at home. Rachel told her mother what happened and police were contacted. (1:3).

Officer Bodnar broadcast a description of the robbery over his police radio. (1:3). At approximately 12:21 am, Officer Chad Anderson stopped a vehicle for an expired registration. (1:3). Officer Anderson approached the vehicle, and addressed the driver, who turned out to be Ms. Estrada. He suspected he had the other victim of the robbery as well as the assailants. (1:3). He waited for back-up and when it arrived, the passengers were removed and the vehicle was searched. (1:3). Police recovered a handgun, a gray hoodie on the floor behind the driver's seat, and Rachel's stolen belongings. (1:3).

Police believed that Ms. Estrada was complicit in the armed robbery. (1:4). In addition, Ms. Estrada was allegedly uncooperative during her arrest. (1:4). She was also on bond in pending misdemeanor cases. (1:4). The State charged her with armed robbery, as party to a crime, 6 counts of misdemeanor bail jumping, and resisting an officer. (1:1-2).

The defense filed a motion to suppress the evidence located in Ms. Estrada's car as fruit of an unlawful search.

(6). On September 24, 2013, the Racine County Circuit Court, the Honorable Allan B. Torhorst presiding, conducted a suppression hearing. (28).

Officer Theodore Bodnar testified that on May 7, 2012, at approximately 11:48 pm, he responded to a robbery complaint. (28:4; App. 104). He spoke with Rachel D. who related that she was robbed and after she arrived home, she told her mother what happened, and her mother called the police. (28:20, 26; App. 120, 126).

Officer Bodnar testified that Rachel related that the robbery had occurred at approximately 11:30 or 11:35. (28:4; App. 104). She told Officer Bodnar that the robbers were two men, on foot. (28:5, 9; App. 105, 109). The man who approached her side of the car was a black man with a gray hoodie and black ski mask. (28:5; App. 105). She did not see the other man and did not give a physical description of him. (28:9; App. 109). Rachel described Ms. Estrada's vehicle as a silver Chevy Impala. (28:6; App. 106).

Officer Bodnar testified that he conveyed the description of the suspect and the other victim, Ms. Estrada, over the police radio. (28:5-6; App. 105-06). The prosecutor asked Officer Bodnar if he thought it was suspicious that Ms. Estrada had not called the police to report the robbery, and he said "yes." (28:6; App. 106).

Meanwhile, at approximately 12:20 am, Officer Anderson was on patrol, randomly running license plates. (28:28; App. 128). He observed a Chevy Impala at a speedway gas station; he ran the Impala's license plate, and it came back suspended. (28:28; App. 128). As the car left the gas station, Officer Anderson activated his lights and the car pulled over. (28:28-29; App. 128-29).

At some point prior to the traffic stop, Officer Anderson had heard Officer Bodnar's radio communication about the robbery, including the description of the vehicle. (28:27-28; App. 127-28). He acknowledged that, in addition to running plates, he was "doing, you know, an area search for the suspects." (28:45; App. 145). He initially testified that the description Officer Bodnar had given of the suspects was *two* black men, one skinny and one wearing a gray sweatshirt. (28:31; App. 131). Later, it was clarified that one of the suspects wore a black ski mask and a gray sweatshirt, and he did not know anything about the other man, except he thought he remembered Officer Bodnar say he was also black. (28:41-42, 48; App. 141-42, 148). However, Officer Bodnar denied that he was given any physical description whatsoever of the second man. (28:9; App. 109).

Officer Anderson approached the vehicle and noted the driver, later determined to be Ms. Estrada, two adult black men, one in the front passenger seat and one in the back, and a one-year-old child. (28:29; App. 129). Officer Anderson did not notice anything odd or flag-raising about the men. (28:3; App. 136). He could not recall what they were wearing. (28:44; App. 144). The men did not appear agitated nor did their demeanor "stick out" to him. (28:56; App. 156). He did not see any weapons as he shined his flashlight through the car. (28:47; App. 147).

As Officer Anderson made contact with Ms. Estrada, she received a call from police dispatchers. (28:29; App. 129). Ms. Estrada told Officer Anderson that she was the victim of a robbery and the dispatcher wanted to speak with her about the incident. (28:30, 35; App. 130, 135). Officer Anderson took her phone and spoke to dispatch, but could not remember what dispatch told him: "At that point I couldn't tell you. Again I got the phone, I'm looking in the vehicle, my

other ear is kind of, you know, with the radios going at the same time, I couldn't tell you what Dispatch told me.” (28:45-46; App. 145-46). Officer Anderson noticed a gray sweatshirt on the floor behind the driver's seat, but did not see the hood part. (28: 31, 47, 53; App. 131, 147, 153).

Officer Anderson got off the phone, told Ms. Estrada he would be right back, and went back to his squad. (28:46; App. 146). He did not ask any questions. (28:46; App. 146). Officer Bodnar testified that Officer Anderson radioed that he was conducting a “high risk traffic stop” and asked for back up. (28:13; App. 113). Conversely, Officer Anderson testified that he did not ask for back up and the other officers came on their own. (28:48-49; App. 148-49).

Officer Bodnar responded to the scene of the traffic stop. (28:12; App. 112). When he arrived, at least 5 other squads were already present. (28:16; App. 116). Officers had their weapons drawn and were calling the individuals out of the car. (28:12; App. 112).

Officer Bodnar participated in the search of the vehicle, which yielded a gun and Rachel's belongings that she had reported stolen. (28:18-19; App. 118-19).² He described the vehicle as disorganized with paper and clothing on the floor. (28:24; App. 124).

² The complaint indicates that a search of one of the men yielded some cash (but not the amount reported stolen) and a cell phone cover that matched Rachel's description. However, the complaint first states that the gun was found in the car, suggesting that the search of the car either happened before the search of the individuals or simultaneously. (1:3). There was no further development of the sequence of the searches at the suppression hearing. The State has the burden of proof upon a motion to suppress fruits of an unreasonable search and seizure. *State v. Taylor*, 60 Wis.2d 506, 519, 210 N.W.2d 873 (1973).

Defense counsel questioned Officer Anderson about, “what occurred during that phone call that changed this from a traffic citation situation to a felony traffic stop?” (28:38; App. 138). Officer Anderson testified, “I think once the phone call came about, and again my ear is going a little by the other officers...You know, like behind the scene, you know, might be they’re our suspects.” (28:38; App. 138).

Counsel asked Officer Anderson what would have given the *other* officers the impression that he had the suspects, and he replied:

Officer Anderson: You’ll have to ask them, I don’t know. Again, I have two male suspects, you know. And as I said, I don’t know, you’ll have to ask—I believe you’ll have to ask those officers. That when I called out, you know, three occupants in the vehicle, you know, they started piecing things together. You have to ask them.

[Counsel]: Okay. So you don’t know where their suspicion came from or their hunch came from.

Officer Anderson: (shakes head.)

[Counsel]: All right.

Officer Anderson: No, sorry.

(28:51-52; App. 151-52).

Counsel again asked what the basis was for his suspicion and Officer Anderson replied, “between I remember one officer was saying, Chad you may have the

suspects; looking the vehicle [sic], seeing the male suspects, seeing the build, seeing the sweatshirt; and you know, when there's a gun involved you look in the whole circumstances and make sure that, number one, I'm safe." (28:52; App. 152).

Officer Anderson testified that he was the one giving orders at the scene, but did not give the order to search the car; he did not know who did. (28:54-55; App. 154-55). He could not recall which officer was the first to begin searching the car. (28:55; App. 155).

Officer Bodnar testified that he had two years of experience as a police officer, and Officer Anderson testified that he had 3-and-a-half years of experience. (28:6, 27; App. 106, 127).

At the close of evidence, the State argued that the officers were justified in searching the vehicle to determine if there was a weapon present based on the circumstances. (28:58). Collectively, defense counsel for Ms. Estrada and her codefendants argued that the search was based on a hunch and nothing in the record supported a finding of reasonable suspicion. (28:60-61, 63).

The court made the following factual findings:

- Officer Anderson was aware of the armed robbery incident from the radio communications, and he knew a gun was involved. (28:67, 69; App. 158-160).
- He was routinely and coincidentally running plates and discovered Ms. Estrada's car had a suspended registration and based on that, stopped the car. (28:67; App. 158).

- It was a short time but several miles from the location of the robbery. (28:68; App. 159).
- There were two males in the car. (28:68; App. 159).
- As Officer Anderson was talking to the driver, she received a call from police. (28:67; App. 158).
- Ms. Estrada handed the phone to Officer Anderson and Officer Anderson identified her as one of the victims of the robbery. (28:67; App. 158).
- At the same time, Officer Anderson was listening with his ear monitor to other officers, who were speculating about Ms. Estrada's involvement. The court acknowledged that the other officers were engaging in speculation. The court stated, "*the suggestion was that they were making guesses and hunches and things were going on, is a legitimate observation.*" (28:68; App. 159).
- Officer Anderson saw the piece of clothing. (28:68; App. 159).

The court denied the motion to suppress, concluding that Officer Anderson had reasonable suspicion to search Ms. Estrada's car. (28:66-72; App. 157-163).

Subsequently, Ms. Estrada entered a guilty plea to armed robbery as party to a crime. (31). The bail jumping and obstruction charges were dismissed, but read in. (31:2). The court sentenced Ms. Estrada to 10 years imprisonment, with 6 years initial confinement and 4 years extended supervision. (32:19).

Pursuant to Wis. Stat. §973.31(10), an order denying a motion to suppress evidence may be reviewed upon appeal

from a final judgment notwithstanding the fact that the defendant entered a guilty or no contest plea.

Ms. Estrada timely filed a Notice of Appeal (22), and this appeal follows.

ARGUMENT

I. The Circuit Court Erred by Denying Ms. Estrada's Motion to Suppress.

A. Standard of review and legal principles.

This Court applies a two-step standard when reviewing a ruling on a motion to suppress. *State v. Martin*, 2012 WI 96, ¶28, 343 Wis.2d 278, 816 N.W.2d 270. First, it upholds the circuit court's findings of fact, unless clearly erroneous; second, it independently reviews whether the facts meet the constitutional standard. *Id.*

The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. This Court, in construing Article I, § 11 of the Wisconsin Constitution, consistently follows the United States Supreme Court's interpretation of the Fourth Amendment. *State v. Betterley*, 191 Wis. 2d 407, 417, 529 N.W.2d 216 (1995).

Where an unlawful search or seizure occurs, the remedy is to suppress the evidence it produced. *State v. Washington*, 2005 WI App 123, ¶ 10, 284 Wis. 2d 456, 700 N.W.2d 305 (2005); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

In addition, the “fruit of the poisonous tree” doctrine requires exclusion of any tangible or intangible evidence obtained by exploitation of an illegal search. *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775 (citing *Wong Sun*).

Stopping an automobile and detaining its occupants is a “seizure,” which triggers fourth amendment protections. *State v. Goebel*, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). “A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed.” *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 (internal citations omitted).

However, officers may detain a person on a traffic stop *only* for as long as necessary to complete the investigation of the violation. See *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (emphasis added).

During a stop, an officer is authorized to conduct a search of the outer clothing of a person to determine whether the person is armed only if the officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1 (1968). Determining whether the officers had reasonable suspicion involves an objective analysis of the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 34 (1996).

An officer may extend the “frisk” (protective search) to the passenger compartment of a vehicle only if the officer has reasonable suspicion to believe the occupant is dangerous and may have immediate access to a weapon. *State v.*

Johnson, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182 (citing *Michigan v. Long*, 463 U.S. 1032 (1983)).

This does not mean that the police may conduct automobile searches whenever they conduct an investigative stop. *Long*, 463 U.S. at 1049. The sole justification for the search is the protection of the police officers and others nearby. *Id.*

In the instant case, Ms. Estrada does not challenge the legality of the stop. Testimony established that the vehicle's registration was suspended, and the court accepted this fact, which is not clearly erroneous. Nor does Ms. Estrada challenge any of the circuit court's other factual findings as clearly erroneous.

Therefore, the sole issue on appeal is whether the State adduced sufficient facts to establish that the police had reasonable suspicion for the protective search of Ms. Estrada's vehicle. *State v. Taylor*, 60 Wis.2d 506, 519, 210 N.W.2d 873 (1973) (the State has the burden of proof upon a motion to suppress fruits of an unreasonable search and seizure).

B. The police lacked reasonable suspicion to conduct a protective search of Ms. Estrada's vehicle, and therefore, the evidence obtained must be suppressed.

In this case, no justification existed for Officer Anderson to prolong the traffic stop beyond the time necessary to complete the investigation of the registration issue. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (officers may detain a person on a stop for a routine traffic violation only for as long as necessary to complete the investigation of the violation).

The prolonging of the stop—not to ask questions, but to wait for backup—and subsequent protective search of Ms. Estrada’s car were predicated on an unreasonable and unsupported hunch. *Terry*, 392 U.S. at 27 (A protective search must be based on more than an “inchoate and unparticularized suspicion or ‘hunch.’”).

There was no reasonable basis to suspect that Ms. Estrada’s passengers were the armed robbers. The police knew, from Rachel D., that she and Ms. Estrada were robbed by two men, one of whom was black and wearing a ski mask and gray hoodie. (28:5; App. 105). The police had no description of the second man, not even his skin color. (28:9; App. 109). The police knew that the assailants ran away, and that Rachel and Ms. Estrada were left in the car together. The police knew that Ms. Estrada was crying hysterically after the robbery. (1:2). Ms. Estrada drove around with Rachel for a short time and then dropped her off at home. (1:3).

When Officer Anderson stopped Ms. Estrada’s vehicle, he observed that Ms. Estrada was a white woman (17), and had two black men as her passengers. (28:29; App. 128-29). When Officer Anderson shined his flashlight through the car, he did not observe a weapon or anything else to indicate the occupants were dangerous. (28:47; App. 147). Neither man was wearing a ski mask or a gray hoodie. Both men had normal, innocuous demeanors. (28:36; App. 136). This is unlike in *State v. Matthews*, 2011 WI App 92, 334 Wis. 2d 455, 799 N.W.2d 911, where the police were justified in stopping a man who was walking at night wearing a ski mask and a hoodie with the hood up.

Officer Anderson learned that Ms. Estrada was the second victim of the robbery reported by Rachel. (28:30; App. 130). It is not suspicious that Ms. Estrada had not yet called the police to report the robbery. She was stopped by

Officer Anderson approximately 50 minutes after the robbery. (28:8; App. 108). There are a variety of reasons why a victim might hesitate to report a crime. A person might have had a bad experience with law enforcement in the past. Or, a person might be in shock or frightened. See *State v. Nielsen*, 2001 WI App 192, ¶50, 247 Wis. 2d 446, 634 N.W.2d 466 (closing statement was not improper where prosecutor opined that victim's delay in reporting a crime was "natural" because it simply "*appealed to the jurors to use their common experience and general knowledge of the average person's reaction to frightening events.*") (emphasis added).

Indeed, Rachel told police she only called 911 because her mother insisted, and she first drove around with Ms. Estrada without immediately calling the police. (28:20, 26; App. 120, 126). The fact that Ms. Estrada had not called the police in the 50 minutes after the robbery does not lead to a reasonable suspicion that she was complicit in the robbery.

It is not suspicious that there was a gray sweatshirt on the floor of the car. Officer Bodnar testified that Ms. Estrada's car was messy, with clothes and papers strewn about. (28:24; App. 124). The gray sweatshirt was merely one of many items of clothing in the car. Moreover, Officer Bodnar testified that the description he radioed out was of a gray *hoodie*, but Officer Anderson testified that he was only able to see that the gray item in Ms. Estrada's car was a sweatshirt. He indicated that he did *not* observe the hood part prior to the search. (28: 5, 31, 53; App. 105, 131, 153).

Officer Anderson was unable to specify what the officers were saying in his earpiece that made him suspicious. (28:38; App. 138). He denied calling for back-up and was unable to explain why the other officers assumed he had the suspects and came to the scene. (28:49, 51-52; App. 149, 151-

52). He denied providing the order to search the car. (28:55; App. 155).

It appears that Officer Anderson allowed the other officers, via the radio, to persuade him of a theory that had no basis in any of the observable facts or rational inferences from those facts. Even the circuit court acknowledged that the other officers were engaging in speculation. The court stated, “the suggestion was that they were making guesses and hunches and things were going on, *is a legitimate observation.*” (28:68; App. 168) (emphasis added).

The police acted on an inchoate and unparticularized hunch. It was a lucky hunch, perhaps, but a hunch nonetheless. Indeed, where the police act on *unlucky* hunches, their conduct does not result in a case and will not be subject to this Court’s review—and the unconstitutional search of the innocent individual will not come to light.

The purpose of the exclusionary rule is to deter the police from committing 4th Amendment violations. *State v. Dearborn*, 2010 WI 84, ¶35, 327 Wis. 2d 252, 786 N.W.2d 87.

The police violated Ms. Estrada’s right to be free from unreasonable searches under the Fourth Amendment of the United States Constitution and Article I, § 11 of the Wisconsin Constitution. The evidence obtained through this unlawful search, including the physical evidence and statements obtained pursuant to the passengers’ arrests, must be suppressed. *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775 (the “fruit of the poisonous tree” doctrine requires exclusion of tangible or intangible evidence obtained by exploitation of an illegal search).

CONCLUSION

The circuit court erred in denying Ms. Estrada's motion to suppress the evidence obtained via the unconstitutional search of Ms. Estrada's car. She respectfully requests that this Court reverse the circuit court and order the evidence from the car and any derivative evidence to be suppressed.

Dated this 10th day of March, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 of body text. The length of the brief is 3,798 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of March, 2014.

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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.

Dated this 10th day of March, 2014.

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