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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. 2014AP000842 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID M. WAGNER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Sheboygan County Circuit Court,
The Honorable Terence T. Bourke, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

When a driver is ordered out of his car, told where to stand by two police officers, and one of the officers incorrectly informs the driver that the police already have permission to search the driver's vehicle, did the state meet it's burden to show that the driver's affirmative response to the officer's statement, "so you don't mind if I search you right" constitutes voluntary consent?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. § 752.31(2) and (3), and a request for publication is therefore prohibited by Wis. Stat. § 809.23(4)(b). Mr. Wagner anticipates that the issue will be fully presented in the briefs, but would welcome oral argument if the court would find it helpful to resolving the case.

STATEMENT OF THE CASE AND FACTS

The state charged the defendant-appellant, David M. Wagner, with possession of drug paraphernalia as a repeater (1). The defendant filed a motion, alleging that he did not voluntarily consent to the search of his person. The motion requested that the evidence found on him, a socket wrench containing residue that tested positive for THC, be suppressed. (9). The circuit court denied the motion following an evidentiary hearing. Subsequently, Mr. Wagner pled no contest to the single count as charged. (38:51). The court placed Mr. Wagner on probation for one year. (17).

Evidence at the suppression hearing included the testimony of the two police officers present at the traffic stop as well as a squad video.[1] (38; 13). City of Plymouth Police Officer Matthew Starker testified that at 4:23 p.m. on July 4, 2013, he saw a car with a tarp covering the rear-window and items hanging from the rear-view mirror. (38:4). As a result, he activated the lights on his squad car and the driver pulled over without delay. (38:7).

Officer Starker noticed the driver, the lone occupant of the vehicle, lean to the right, although he did not appear to reach into the back seat. (38:7). The driver was "kind of bouncing around" but the officer did not lose sight of Mr. Wagner's head or shoulders. (38:28). Officer Starker called for a second officer to respond, and approached the vehicle. An intern from the police department was also present alongside Officer Starker. (38:22). The driver provided a bank identification card that correctly identified him as David Wagner. (38:10).

Officer Starker knew the car was registered to Amy Prening, who the police department had made previous contacts with, some involving drugs. (38:5-6). Officer Starker pulled the car over near Amy's house. The area was residential and Officer Starker described it as "for the most part [a] low crime area." (38:25).

Officer Starker had also heard Mr. Wagner's name "come up several times in the MEG unit," a unit that investigates drug-related issues. (38:24). Officer Starker had

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[1] The parties agreed that for purposes of the suppression hearing, the relevant portion of the squad video was from one minute and 17 seconds into the video until the 14 minute and 40 second mark of the video, according to the time keeper on Windows Media Player. (38:21, 23).

not heard any discussion of weapons when Mr. Wagner's name came up. (38:24).

Officer Starker returned to his squad to check Mr. Wagner's information and confirmed that he had a valid driver's license. (38:11). Before doing so, he asked Officer DeMaa, who had now arrived, to stand near where Mr. Wagner was seated in the vehicle. (38:11). Officer Wagner advised Officer DeMaa of his earlier observations about Mr. Wagner's movement. (38:11). Officer DeMaa testified that he saw Mr. Wagner's "upper torso twisting and his arms moving." (38:32).

Officer DeMaa ordered Mr. Wagner to step out of his car and directed him to stand near the front of the car. Mr. Wagner complied and exited the vehicle. A cigarette can be seen in his mouth when he exits the car. (38:34). After preparing warnings in the squad, Officer Starker walked back toward where Officer DeMaa and Mr. Wagner were standing and ordered Mr. Wagner to instead move over to the sidewalk near the back of the car. (13: 9:00 min.). Both Officer Starker and DeMaa were in full uniform. (38:14). The intern, still present, was in plain clothes. (13).

Officer Starker then told Mr. Wagner, "You're all jittery and you're moving around in your car. O.K. With that, I have permission to search this car. I'm also gonna ask you what do you have on you that you shouldn't have?" (13: 9:17 min.). Mr. Wagner responded, "Nothing." (Id.). Officer Starker continued, "So, you don't mind if I search you, right." Mr. Wagner responded, "Go ahead." (Id.). At no time did Officer Starker advise Mr. Wagner that he did not have to submit to the search. (38:16).

Officer Starker searched Mr. Wagner. Officer Starker located cash, loose change, keys and an eight millimeter socket wrench on Mr. Wagner. (38:18). Officer Starker noticed the end of the wrench was a "dark, burnt, black color" and had a leaf-like substance on it. (38:18). Officer Starker used a "NarcoPouch" to confirm the substance on the wrench was THC. (38:18-19).

After the evidence was presented, the parties presented arguments to the court. The state argued that based on the totality of the circumstances, Mr. Wagner voluntarily consented to the search of his person. (38:38-43). Mr. Wagner's attorney disagreed, arguing that Mr. Wagner's response of "go ahead" was mere acquiescence and not voluntary consent. (38:43-45; App. 102-105).

The circuit court denied the defendant's suppression motion. It provided the following explanation for the ruling:

> …I'm going to deny the motion. But I'll go through my analysis starting with the furtive movements issue.
>
> I think that Officer Starker was correct in not doing an immediate search of Mr. Wagner after the stop. There may have been some furtive movements, but the *Johnson* case is clear that furtive movements alone don't – aren't enough. Well, I shouldn't say that. Given the circumstances.
>
> And one of the circumstances [the state] pointed out is that Mr. Wagner's been known to do drugs and Amy Prening has. But I don't think that's enough in and of itself. Prening and Mr. Wagner, neither one of them have a representation for violence or carrying weapons. And that's got to be factored in too. If you're in a dark, dangerous neighborhood and there are drugs involved,

that's another matter, but that's not what's going on here.

But after the stop the furtive movements continued. And Officer DeMaa's on the scene. And it got to the point where he asked Mr. Wagner to get out of the car. And I asked him about the cigarette because I saw the cigarette hanging from Mr. Wagner's mouth, and I thought perhaps what was going on is that Mr. Wagner was reaching for a cigarette or a light, and that's why he was making the movements that he did.

But I don't think an officer has to wait until a gun shows up before he can ask someone out of a car or before he does a search. You don't wait till it's too late. Had Mr. Wagner just kept his hands on the steering wheel during the stop I would have thought differently about the outcome of this motion.

You know, furtive movements in and of themselves are not enough generally speaking. But when they continue and Officer DeMaa was concerned enough to have Mr. Wagner step out of the car, it was at that point that Officer Starker asked for permission to do a search.

And I was concerned initially when I read the motion about Officer Starker's use of the word *right*. I'll get the quote from [the defense attorney's] motion. Officer Starker said, "So you don't mind if I search you, right?" And when I heard the recording, it was a pretty lame *right*. And I use the word lame in the sense that it wasn't very strong. In fact, I would not describe Officer Starker's demeanor as being forcible. I would describe it as being pretty laid back, and his testimony today was pretty laid back.

I think the use of the word right is a bad speech habit. A lot of people develop bad speech habits, and that's where it came from. Though I think as a pointer it can certainly be construed as a way of telling someone you

> don't have a choice. And I would never use that expression again.
>
> But when you look at it in black and white, it looks like the officer's saying you don't have a choice. That's what the word *right* means. But when you hear it, it just struck me as being a bad speech habit. And again, the officer's voice was not raised. It was not demanding. I didn't think it was forceful.
>
> So I believe that Mr. Wagner did voluntarily consent to that search. And for those reasons I'll deny the motion.

(38:46-49; App. 102-105).

Mr. Wagner appeals.

ARGUMENT

The State Did Not Meet Its Burden to Show Mr. Wagner Voluntarily Consented to the Search of His Person After he was Ordered Out of his Car, Told Where to Stand by Two Police Officers, and One of the Officers Incorrectly Informed Mr. Wagner That the Police Already Had the Authority to Search the Vehicle. Mr. Wagner's Affirmative Response to the Officer's Statement, "So You Don't Mind If I Search You Right" is Mere Acquiescence.

A police officer stopped Mr. Wagner's car in broad daylight for an equipment violation. After seeing Mr. Wagner move in the vehicle, but not losing sight of his head or shoulders, the officer told Mr. Wagner that he now had permission to search the vehicle. The officer made this assertion despite the Wisconsin Supreme Court's ruling in ***State v. Johnson***, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182, that an officer did not have a basis to search in very

similar circumstances. Mr. Wagner was ordered out of the car and was alone with three representatives from the police department. Immediately after being told that the officers already had permission to search the vehicle, an incorrect assertion, the officer stated "so you don't mind if we search you right." The circuit court acknowledged that this phrasing could be interpreted to mean that the listener does not have a choice. Nor did the police otherwise inform Mr. Wagner that he was allowed to decline to be searched.

Under these circumstances, the state cannot meet its burden to prove that Mr. Wagner freely and voluntarily consented to the search.

A. Legal standard and standard of review.

The lawfulness of searches and seizures is governed by the Fourth Amendment to the U.S. Constitution and Article 1, § 11 of the Wisconsin Constitution, which have been construed congruently. ***State v. Munroe***, 2001 WI App 104, ¶7, 244 Wis. 2d 1, 630 N.W.2d 233 (quoting ***State v. Phillips*** 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1989)). Generally, a law enforcement officer's search is not valid unless it is supported by a warrant. ***Munroe***, 244 Wis. 2d 1, ¶8. One exception to the warrant requirement is consent to the search by someone able to give consent. ***Id.***

However, the consent must be a "free, intelligent, unequivocal, and specific consent without any duress or coercion, actual or implied." ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993). When the state attempts to justify a warrantless search on the basis of

consent,[2] the state must prove by clear and convincing evidence that the consent was voluntary. ***Id.***

Mere acquiescence is not equivalent to consent. If consent is granted "only in acquiescence to an unlawful assertion of authority, the consent is invalid." ***State v. Bermudez***, 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998); ***Hadley v. Williams***, 368 F.3d 747 (7th Cir. 2004) (homeowner's consent vitiated by false claim that police had a warrant); ***United States v. Molt***, 589 F.2d 1247 (3d Cir. 1978) (defendant's consent not valid where agents innocently but falsely told defendant federal statute authorized them to inspect business records without a warrant).

In order to determine if consent is truly voluntary, courts look to the totality of the circumstances, considering both the events that led to consent as well as the characteristics of the defendant. ***Id.*** Specific factors courts have considered include: "whether any misrepresentation, deception or trickery was used to entice consent; whether the defendant was threatened or physically intimidated; the conditions at the time the request to search was made; the defendant's response to the agent's request; the defendant's general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents informed the individual

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[2] The state did not argue at the suppression hearing that the officer's search was the type of pat-down authorized by ***Terry v. Ohio***, 392 U.S. 1 (1968). Correctly so. First, the officer did not have specific and articulable facts to justify the pat-down. Second this is not simply a search of outer clothing. The search is not visible on screen, but the officer can be heard on the squad camera recording instructing Mr. Wagner to take his shoes off.

that consent to search could be withheld." ***Id.*** at 349. (citing ***State v. Phillips*** 218 Wis. 2d at 198-203).

Whether consent is voluntary is a question of constitutional fact. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998) (internal citations omitted). Questions of constitutional fact are mixed questions of fact and law. The circuit court's findings of evidentiary or historical fact will not be upset unless they are "contrary to the great weight and clear preponderance of the evidence." ***Id.*** However, appellate courts independently apply the constitutional principles to the facts the circuit court found in order to "determine whether the standard of voluntariness has been met." ***Id.***

B. Officer Starker incorrectly informed the defendant that he had authority to search his vehicle.

In this case, Officer Starker told Mr. Wagner that he was authorized to search Mr. Wagner's vehicle just before stating, "so you don't mind if I search you right." (13: 9:17 min.). Officer Wagner based his authority to search the vehicle on Mr. Wagner's movements, saying "you're all jittery and you're moving around in your car. O.K. With that, I have permission to search this car." (13: 9:17 min.). But neither the officer's reasoning nor the record in this case provided the police with lawful authority to search the vehicle.

In order to conduct a protective search of the vehicle the officer would have needed to have reasonable suspicion to believe that the person is dangerous and may have immediate access to a weapon. The well-established test for whether a protective search is justified is "whether a reasonably prudent [officer] in the circumstances would be warranted in the

belief that his safety or that of others was in danger." ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). An officer cannot rely on an "unparticularized suspicion or 'hunch,'" rather an officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." ***Id.*** at 27, 21.

In ***State v. Johnson***, the Wisconsin Supreme Court concluded that a driver's movements did not give officers reasonable suspicion to conduct a protective search of Johnson or his car. ***State v. Johnson***, 2007 WI 32, ¶36, 299 Wis. 2d 675, 729 N.W.2d 182. In that case, two officers stopped a car containing a passenger and a driver, when it failed to signal for a turn. ***Id.***, ¶2-3. It was dark, but street lights were on. ***Id.***, ¶3. Both officers noticed Johnson make a "furtive movement" and testified that his head and shoulders were either "pretty close" to disappearing from view or did, in fact, disappear from view. Both officers approached the vehicle. Neither officer asked Johnson to explain the movement he made. ***Id.***, ¶3-4.

In concluding that the circumstances in ***Johnson*** did not provide the officers with reasonable suspicion, the court noted that there are many reasons a person may make movements if the police pull them over. For instance, a driver may reach over to get his registration out of his glove compartment, readjust to get his wallet out of his back pocket, turn off the radio, or pick up trash in the car. ***Id.***, ¶43.

In this case, Mr. Wagner was asked to provide his identification, in the form of his driver's license. Officer Starker testified that he wasn't able to locate it immediately, and acknowledged that one can presume that he was continuing to look for it. (38:26). In addition, when Mr. Wagner was told to exit his vehicle he had a cigarette in

his mouth. As the court surmised itself at the suppression hearing, "I saw the cigarette hanging from Mr. Wagner's mouth, and I thought perhaps what was going on is that Mr. Wagner was reaching for a cigarette or a light, and that's why he was making the movements that he did." (38: 47; App. 103). Both of these reasons for making movements in the car are just the types of commonplace activities that the ***Johnson*** court was referring to when it expressed concern that if it allowed officers to conduct searches based on such movements, there would be no limit to when officers could conduct a protective search. ***Johnson***, 299 Wis. 2d 675, ¶43.

In addition, the ***Johnson*** court noted that the officers did not ask Mr. Johnson why he was leaning to the right, and that his explanation may have provided information about whether the search was reasonable. ***Id.***, ¶43 n.15. The present case again bears similarity to ***Johnson*** because the officers in this case did not ask Mr. Wagner why he was moving the way he was. His responses could have confirmed the circuit court's hypothesis that he was reaching for a cigarette or that he was continuing to look for his identification. Instead, the officers in this case simply asserted their authority to search.

That assertion was incorrect. The movements Mr. Wagner made do not rise to the level of reasonable suspicion. Nor do any additional facts present in this case, in addition to Mr. Wagner's movements, raise a reasonable suspicion that Mr. Wagner was armed or created a threat to the officers' safety. This is not a case like ***State v. Williams***, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, where officers had a specific tip that the subject of the search was engaging in criminal activity and the officers were in a vulnerable position, in addition to seeing Mr. Williams reach behind the passenger seat when their squad car pulled up to

the van Williams was in. ***Id.***, ¶53. Here, Mr. Wagner was pulled over for equipment violations in broad daylight and was outnumbered by the police.

The officer's assertion that he had permission to search the vehicle gives the impression that it would be futile for Mr. Wagner to disagree with the officer when he stated that Mr. Wagner wouldn't mind if he searched him. If consent is granted "only in acquiescence to an unlawful assertion of authority, the consent is invalid." ***State v. Bermudez***, 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998). In this case, the search of the car Mr. Wagner was driving is not directly being challenged. However, whether the officer had reasonable suspicion to search the car is relevant because the officer asserted he had permission to search immediately before seeking to search Mr. Wagner himself. This incorrect assertion of lawful authority, made immediately before the officer sought to search Mr. Wagner is a factor in the totality of the circumstances that weighs strongly against the voluntariness of the consent.

C. The totality of the circumstances demonstrate that Mr. Wagner did not voluntarily consent to the search of his person.

In addition to the officer's unlawful assertion of authority, several other factors demonstrate that Mr. Wagner did not voluntarily consent to the search of his person.

First, this court can look to the conditions at the time the request was made. At that point, the police had ordered Mr. Wagner out of the vehicle and were directing his movements. First, telling him to stand near the front of the car, then requiring him to move toward the sidewalk. The defendant then stood confronted with three representatives of the police department, two officers in full uniform and one

intern. The officers had issued commands, not asked questions. They were in control of his actions. It is in that context that the state has the burden of proving that Mr. Wagner freely and voluntarily agreed to the search of his person.

Next, the way the request to search was put to Mr. Wagner and his response also bear on whether his consent was voluntary. The circuit court noted that it had concerns about the officer's statement "so you don't mind if I search you right." (38:48; App. 104). The court noted that the statement can be construed to mean that "you don't have a choice." (Id.). That is exactly the problem. If the officer's statements to Mr. Wagner conveyed to him that he had no choice but to submit to the search, then his consent cannot be deemed voluntary. In addition, Mr. Wagner's response of "go ahead" is consistent with the notion that he did not have a choice. This is the type of response that indicates someone is succumbing to the inevitable, rather than someone who is making a free and knowing decision.

Ultimately, the circuit court decided that Mr. Wagner's consent was voluntary and emphasized the fact that the "officers voice was not raised" and his speech was not "forceful." (38:48-49; App. 104-105). However, simply because the statement was not made in a loud voice, the problem identified by the circuit court - that the listener would feel they had no choice - is not erased. In fact, the supreme court has recognized that in the context of voluntary consent, "coercion can be imposed by implicit as well as explicit means." ***State v. Phillips***, 218 Wis. 2d at 203.

Finally, the police officers did not inform Mr. Wagner that he did not have to consent to a search. Even though providing such information is not required of officers, this

fact weighs against a determination of voluntary consents. ***Id.*** Unlike in ***Phillips***, the court did not find that Mr. Wagner was somehow otherwise aware that he did not have to allow the officers to search him. ***Id.***

CONCLUSION

For the reasons set forth above, Mr. Wagner respectfully requests that the court reverse the judgment of conviction and remand with directions that Mr. Wagner's no contest plea is withdrawn and the evidence obtained following the officer's search of Mr. Wagner is suppressed.

Dated this 12th day of September, 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 3,673 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 12th day of September, 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 s. 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.

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