

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2014AP842 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

David M. Wagner,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

**Appealed from a Judgment of Conviction Entered in the Circuit
Court of Sheboygan County, Wisconsin,
The Honorable Judge Terence Bourke Presiding
Trial Court Case No. 2013 CM 628**

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STATEMENT OF THE ISSUE

- I. **Did the State meet its burden to prove that Wagner voluntarily consented to a search of his person when officers did not threaten, intimidate, or display any show of force; officers did not use any misrepresentation, deception or trickery to entice Wagner into consenting to the search; and Wagner's personal characteristics demonstrate that he was a mature adult, with prior law enforcement experience?**

Trial Court Answered: **Yes.**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State would not have an objection to oral argument but believes the issues raised on appeal will be fully developed in the briefs submitted to the Court. The State does not believe that publication is necessary because the issues involves applying well-settled rules of law to a reoccurring fact situation.

STATEMENT OF THE CASE

On July 4, 2013, at about 4:23 pm, Plymouth Police Officer Matthew Starker conducted a traffic stop on a vehicle registered to Amy Prening on South Street in the City of Plymouth, Sheboygan County, Wisconsin. (R. 38 at 4:10-5:22.) Officer Starker initiated the traffic stop because there were a number of items hanging from the

rearview mirror and there was a dark-colored tarp covering the rear window of the vehicle. (*Id.* at 5:7-14.) The operator pulled the vehicle over one house south from the registered owner's (Amy Prening) address. (*Id.* at 6:21-22.) The sole occupant and driver were identified as David Wagner through a bank card with Wagner's name on it. (*Id.* at 10:6-25.)

Both Prening and Wagner were previously known to the Plymouth Police Department and the Multi-jurisdiction Enforcement Group (MEG Unit, also known as the "Drug Unit") for their involvement with drugs in Sheboygan County. (*Id.* at 5:23-6:14; 24:6-16.) The knowledge of Prening's drug involvement extends to her vehicle and home. (*Id.* at 7:14-17.)

After pulling the car over, Officer Starker observed that Wagner's movement inside the vehicle "didn't appear to be in a normal fashion." (*Id.* at 6:19-25.) Officer Starker explained that Wagner made "several movements...seemed very jittery...[and] would lean to his right." (*Id.* at 7:20-25.) Officer Starker further described that it "appeared he was reaching over to the passenger side area of the vehicle...he just appeared to be kind of bouncing around in the vehicle." (*Id.* at 8:4-6.) During this movement, Officer Starker could not see Wagner's hands. (*Id.* at 8:12-13.)

Officer Starker explained that in his more than a dozen years of experience and after thousands of traffic stops, Wagner's movements inside the vehicle raised enough concerns for officer safety that he radioed for an

additional officer to assist. (*Id.* at 4:7-9; 7:23-25; 9:25-10:2.) Officer Starker explained that he was concerned there may be a weapon and there may be illegal drugs in the vehicle. (*Id.* at 8:18-22.) Officer Starker explained that Wagner's movement occurred around his back and waistband area. (*Id.* at 9:3-24.)

Upon approaching the vehicle, Officer Starker informed Wagner of the reason for the stop and told him that if he had a valid license he would be free to go. (*Id.* at 11:3-9.) Wagner could not produce any sort of documentation that would confirm his identity. (R. 13 at 4:30 mins.) Officer Starker observed Wagner putting his hands in his pockets while in the vehicle and advised Wagner not to do that any further. (R. 38 at 25:17-23.) Officer Starker explained that he was concerned that Wagner had access to weapons including knives. (*Id.* at 26:1-4.) Officer Starker then returned to his squad car to verify the identity of Wagner, which had only been orally provided up to this point. (R. 13 at 4:58 mins.)

Officer DeMaa, the backup officer, arrived on scene and was informed about the concerning movement that Officer Starker observed. (*Id.* at 11:20-24.) While Officer Starker was running the driving status of Wagner on the officer's computer, Officer DeMaa observed Wagner as he sat in the car. (*Id.* at 12:6-10; 31:21-24.) At one point, Wagner stuck his hand out the window, providing some form of identification. (R. 13 at 5:35 mins.) Officer DeMaa obtained this identification and provided it to Officer Starker. (*Id.*) Officer Starker

ultimately explained that he was able to identify Wagner despite Wagner's appearance changing over time. (*Id.* at 10:12-16.)

Officer DeMaa observed that Wagner continued "making movements behind his back and under his seat." (*Id.* at 31:24-25.) Officer DeMaa could not observe what Wagner was doing but it appeared that Wagner was "attempting to retrieve something or place something there." (*Id.* at 32:1-3.) Officer DeMaa asked Wagner to step out of the vehicle based on the movements observed by Officer Starker and himself because Officer DeMaa believed it would be safer for everyone. (*Id.* at 32:4-6; 32:24-33:3.) Officer DeMaa explained that Wagner "could have been reaching for a gun...trying to hide something...there's numerous amount[s] of officer's safety issues when a person's moving around in a vehicle." (*Id.* at 33:6-10.) Officer DeMaa and Officer Starker were both concerned that they could not see Wagner's hands. (*Id.* at 8:12-17; 25:21-26:4; 33:11-18.) Officer DeMaa explained that "[h]ands are dangerous." (*Id.* at 33:17.)

Officer Starker re-approached Wagner and asked Wagner for consent to search his person. (*Id.* at 12:19-24.) Officer Starker stated "I just asked if you mind if I - - to a consent search of his person." (*Id.* at 13:10-11.) Wagner said "yes." (*Id.* at 13:15.) This resulted in a "quick pat-down" where the officer asked Wagner if "he had any sharp objects" that could poke him. (*Id.* at 17:21-23.) Wagner said no. (*Id.*)

Officer Starker located an 8 mm socket, typically found used with a socket wrench. (*Id.* at 17:25-18:7.) This socket had burnt ends, and a leaf-like substance inside. (*Id.* at 18:8-11.) Officer Starker recognized this to be a pipe used to smoke THC. (*Id.* at 18:13.) Wagner admitted that he used it for smoking marijuana, and Officer Starker's field test confirmed the presence of THC. (*Id.* at 18:15-17; 19:14-20:3.)

Officer Starker's request for consent occurred on the sidewalk. (*Id.* 12:16-24.) Even though both Officer Starker and Officer DeMaa were wearing police uniforms, neither displayed their handguns, tasers, handcuffs, or any other item that an officer may use to exercise a level of force. (*Id.* at 13:22-15:3.) Neither officer made any threats, used any loud commands, nor used any tactics that resulted in misrepresentation or deception. (*Id.* at 16:18-17:18.)

Wagner was described as being roughly 28 years old with several previous law enforcement contacts. (*Id.* at 17:1-9.) Wagner was described as being cooperative and truthful, understanding all questions asked and responding appropriately. (*Id.* at 15:4-16:25.) While Wagner had some slurred speech, he did pass field sobriety tests. (*Id.* at 15:12-16:9.)

Officer Starker believed that he had authority to search because of the furtive movement that occurred during the beginning of the traffic stop which continued during Officer DeMaa's contact. (*Id.* at 27:17-29:10.) Officer Starker explained that he would have released

Wagner from the scene if he had a valid license, but that changed in light of Officer DeMaa's observations. (*Id.* at 29:1-10.)

These facts led to Wagner being charged with possession of drug paraphernalia as a habitual criminal, contrary to Wis. Stat. § 961.573(1) and § 939.62(1)(a). (R. 1.) Wagner filed a motion challenging the consent search, but not the legality of the initial detention. Wagner argued that the consent was involuntary, pursuant to *State v. Johnson*, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182. (R. 9.)

On September 18, 2013, the motion was heard before the Honorable Judge Terence T. Bourke in Sheboygan County. (R. 38.) Officers Starker and DeMaa testified. (*Id.*) A squad video from Officer Starker's squad car was played and entered into evidence as the sole exhibit. (R. 13.) The video captured the officer contact with Wagner and the consent to search. (*Id.*)

The State argued that the consent was knowingly, intelligently and voluntarily given and that the officers had enough concerns for safety that they could conduct a search. (R. 38 at 35:10-20.)

Judge Bourke denied Wagner's motion. (*Id.* at 46:17.) He explained that Wagner voluntarily consented to the search. (*Id.* at 49:2-4.) Judge Bourke expressed some initial concern when he read the phrase used by Officer Starker, "So you don't mind if I search you, right?" (*Id.* at 48:5-49:1.) However, the video demonstrated that Officer Starker's speech was not demanding and the use

of the word “right” was not forceful. (*Id.*) The officer’s demeanor and tone did not suggest that Wagner did not have a choice. (*Id.*) Rather, the officer had a laid back demeanor and exercised some bad speech habits. (*Id.*)

The court also examined the “furtive movements” issue. (*Id.* at 46:17-48:4.) Judge Bourke explained that Officer Starker was correct in not doing an immediate search of Wagner based on the limited furtive movements pursuant to *Johnson*. (*Id.* at 46:20-25.) But, Judge Bourke explained “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.” (*Id.* at 47:18-21.) The furtive movement analysis ended with the court explaining “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 permission to do a search.” (*Id.* at 47:24-48:4.)

After the court’s ruling, Wagner entered a no contest plea to the charge and was placed on probation. (R. 17.) This appeal followed

ARGUMENT

- I. Wagner’s consent was voluntarily given when the officers did not threaten, intimidate, or display any show of force; officers did not use any misrepresentation, deception or trickery to entice Wagner into consenting to the search; and Wagner’s personal characteristics demonstrate that he was a mature adult, with prior law enforcement experience.**

Upon appellate review, a trial court's findings of fact will be upheld after a denial of a suppression motion unless they are clearly erroneous. *State v. Stankus*, 220 Wis. 2d 232, 238, 582 N.W.2d 468, 471 (Ct. App. 1998). Applying these facts to constitutional principles is a question of law that is reviewed de novo. *Id.*

The State bears the burden to show by clear and convincing evidence the consent for the search is voluntary. *Id.* at 237-38. Voluntariness must be determined by the totality of the circumstances including the events surrounding the consent and the characteristics of the defendant. *State v. Bermudez*, 221 Wis. 2d 338, 348, 585 N.W.2d 628, 633 (Ct. App. 1998).

Voluntariness has been described as an elusive standard that reflects balancing competing values. *Stankus*, 220 Wis. 2d at 238. On one hand, police need to be able to seek the cooperation of individuals by asking questions to preserve our safety and security. *Id.* “[S]tealth and strategy are necessary” law enforcement tools. *Id.* Restricting effective law enforcement only serves to lessen security. *Id.* On the other hand, citizens have a liberty interest in being free from law enforcement unreasonably prying into their personal affairs. *Id.*

“So an officer has a right to ask for consent to search and the individual has a right to say no.” *Id.* at 239. Coercion occurs when the right to say no is compromised by an official show of authority. *Id.* “Consent must be received, not extracted.” *Id.* “If consent is granted only in acquiescence to an unlawful assertion of authority, the

consent is invalid.” *Bermudez*, 221 Wis. 2d at 348 (citing *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 20 L.Ed2d 797 (1968)).

Relevant factors in the voluntariness analysis which have been outlined by the Wisconsin Supreme Court include:

whether any misrepresentation, deception or trickery was used to entice the defendant to give 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 agents’ request; the defendant general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents informed the individual that consent to search could be withheld.

Bermudez, 221 Wis. 2d at 349 (citing *State v. Phillips*, 218 Wis. 2d 180, 198-203, 577 N.W.2d 794, 802-04 (1998)). No single factor controls. *Id.* Ultimately, the State’s burden is to show the voluntariness of the consent search, not “informed consent.” *Id.* at 351.

In *Stankus*, officers pulled over Stankus for an equipment violation. *Stankus*, 220 Wis. 2d at 235. The sergeant approached the vehicle wearing his police uniform. *Id.* Stankus provided his license to the sergeant and the sergeant checked the license to determine whether the license was valid and whether there were any outstanding warrants. *Id.*

The sergeant and the chief then re-approached the vehicle. *Id.* at 236. The sergeant observed that the interior of the vehicle was significantly cluttered with various debris, which he considered was an indication the car may contain illegal drugs. *Id.* at 235-36. The

sergeant asked Stankus if “he had any guns, drugs, or anything illegal in the vehicle.” *Id.* at 236. Stankus replied “no” and the sergeant asked if he “could go ahead and take a look through the vehicle.” *Id.* Stankus replied, “Sure. Go ahead.” *Id.*

Stankus and a passenger were asked to step out of the vehicle and stand on the curb near the car. *Id.* Stankus stated as he exited “[y]ou can even look in the trunk.” *Id.* Under the driver’s seat of the car a large clear plastic baggie containing a white powdery substance was found. *Id.* This later turned out to be flour. *Id.* at 237. Inside the trunk were brass knuckles and a sawed-off shotgun. *Id.*

This Court found the consent voluntarily given by Stankus for a number of reasons. *Id.* at 244. The mere fact that two officers approached Stankus during the request for consent did not create a coercive atmosphere. *Id.* at 241. The officers did not have their weapons drawn and did not make any promises or threats or use deception. *Id.* The officer did not raise their voices and did not subject Stankus to repeated intimidating questionings. *Id.* Even though the officer asked if he could “go ahead and take a look” there was nothing in the tone or phrasing that conveyed a message compliance was mandatory. *Id.*

The Court of Appeals in *Stankus* also noted that Stankus said he was nervous and scared and was never informed of his right to refuse consent. *Id.* at 243. The Court explained that the law does not require the police to

inform him of his right to refuse consent. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 246-47, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). This Court also explained that Stankus was a mature and educated adult was capable of a knowing consent. *Id.* at 244.

In *Johnson*, the Wisconsin Supreme Court found that Johnson had merely acquiesced to the officer's search; thus, not providing voluntary consent. *Johnson*, 2007 WI 32 ¶ 19. Two officers, who were riding together, pulled Johnson over for failing to signal for a turn. *Id.* ¶ 2. As Johnson pulled over, the officers observed Johnson and another person in the vehicle. *Id.* ¶ 3. Johnson was observed leaning forward, apparently reaching under his seat. *Id.* One officer testified that it was a "strong furtive movement bending down as if he was reaching ... underneath the seat." *Id.* The officers explained that based on their training and experience this movement was consistent with an attempt to conceal contraband or weapons. *Id.*

The officers approached the car together and had Johnson step out of the vehicle because of the furtive movement that was observed upon the initial stop. *Id.* ¶¶ 4-5. Once Johnson was out of the vehicle, an officer advised him that they were going to do a pat down for weapons for officers' safety. *Id.* ¶ 6. During the pat-down, Johnson "acted like he fell down." *Id.* An officer escorted Johnson to the curb. *Id.* Then the officers asked Johnson if there was anything illegal in the car. *Id.* ¶ 7. The officers then "advised Mr. Johnson due to his

movements that we were going to search the vehicle.” *Id.* Johnson replied “I don’t have a problem with that.” *Id.* The officers testified that they would have searched the vehicle with or without consent. *Id.*

In the vehicle, under Johnson’s seat, a baggie of marijuana was found. *Id.* ¶ 8. Subsequently, a search of Johnson’s person was conducted because Johnson refused to remove his hand from his pocket. *Id.* In his pocket were several grams of cocaine. *Id.*

The Supreme Court found this to be mere acquiescence rather than voluntary consent because the officers’ testified that did not ask for consent to search and the officers’ testified that they were going to search regardless. *Id.* ¶ 19. The court found that the officer’s comment “we were going to search” is a command rather than a question. *Id.*

The facts in the case before the Court, like the facts of *Stankus*, support a finding that consent was voluntary.

First, the officers did not threaten, intimidate, or display any show of force to Wagner. The officers did not display their handguns, tasers, handcuffs, or any other item that an officer may use to exercise a level of force. (R. 38 at 13:22-15:3.) The officers did not make any threats nor use any loud commands. (*Id.* at 16:18-17:18.) Even though Officer Starker initiated a traffic stop using his emergency lights, this authority was lawfully executed and was not challenged by the defense. (*Id.* at 4:23-5:2.) Moreover, Officer DeMaa’s request to have Wagner step out from the vehicle should not factor into

any display of force. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 333, 54 L.Ed.2d 331 (1977) (establishing a per se rule that an officer may order a person out of his or her vehicle during a valid traffic stop). Here, like *Stankus*, the conduct of the officers weighs in favor of voluntary consent.

Second, Wagner's personal characteristics further demonstrate a finding of voluntariness. Wagner was described as being roughly 28 years old by Officer Starker. (R. 38 at 17:7-9.) Wagner had significant prior law enforcement contacts as evidenced by the testimony of Officer Starker and Wagner's habitual criminality status. (*Id.* at 17:1-9; R. 17.) Although there was no information about his education background, Wagner was described as being cooperative and truthful, he appeared to understand all questions asked, and he provided appropriate responses. (R. 38 at 15:4-16:25.) Wagner's speech was slurred somewhat, but nothing that rose to the level of justifying an impaired driving arrest. (*Id.* at 15:12-16:9.) These personal characteristics lead to a finding consistent with *Stankus*; that Wagner was a mature and experienced adult who was capable of a knowing consent.

Third, even though the officers did not inform Wagner that he did not have to consent, (*Id.* at 16:9-12), this factor does not weigh heavily on the analysis. After all, "[t]he state's burden in a consent search is to show voluntariness, which is different from informed consent." *Bermudez*, 221 Wis. 2d at 351 (quoting *State v. Xiong*,

178 Wis. 2d 525, 532, 504 N.W.2d 428, 430 (Ct. App. 1993)).

Fourth, contrary to Wagner's assertion, the presence of two officers and one intern on the scene of the traffic stop does not create any sort of coercive environment. The Court in *Stankus* explicitly rejected the argument that two officers created a coercive environment. *Stankus*, 220 Wis. 2d at 241. Even though in this case there was also an intern wearing plain clothes, it is difficult to fathom how this slight distinction from *Stankus* would tip the scales to a contrary conclusion. (See R. 38 at 22:12-20.)

Fifth, Officer Starker did not use any misrepresentation, deception or trickery to entice Wagner into consenting to the search. Officer Starker asked "So, you don't mind if I search you, right?" (R. 13 at 9:24 min.) Wagner replied "Go ahead." (*Id.*) This dialogue is in a question and answer format, which is analogous to the phrasing in *Stankus*, and contrary to the phrasing in *Johnson*. As such, the phrase by Officer Starker can only be characterized as a question, not a command.

Indeed, Judge Bourke appropriately characterized Officer Starker's voice as "not raised," "not demanding" and not "forceful." (R. 38 at 48:25-49:1.) Judge Bourke even described Officer Starker's demeanor, both in court and during the traffic stop, as "pretty laid back." (*Id.* at 11-14.) These are significant findings of fact consistent with Officer Starker not using any sort of deception or trickery.

This was not a search that was performed after an assertion of unlawful authority or a misrepresentation. The following dialogue between Officer Starker and Wagner is taken from the recording:

OFFICER STARKER: David, actually come back here towards me. Come here once. Alright. I don't want your hands going in your pockets anymore. (R. 13 at 8:59-9:10 mins.)

DAVID WAGNER: Ok. (*Id.* at 9:10 mins.)

OFFICER STARKER: When I pulled in behind you, you are all jittery and moving around in your car okay? (*Id.* at 9:11-9:14 mins.)

DAVID WAGNER: Ok. (*Id.* at 9:14 mins.)

OFFICER STARKER: So... wi... with that, I have permission to search this car. I am also going to ask you what do you have on you that you shouldn't have? (*Id.* at 9:14-9:24 mins.)

DAVID WAGNER: Nothing. (*Id.* at 9:24 mins.)

OFFICER STARKER: So you don't mind if I search you right? (*Id.* at 9:25-9:26 mins.)

DAVID WAGNER: Go ahead. (*Id.* at 9:26 mins.)

Officers had lawful authority to search the vehicle and Wagner's person in light of the continuous furtive movements. Officers may conduct a protective search of a person and the passenger compartment of the vehicle during a traffic stop when an officer reasonably suspects the person is dangerous and may have immediate access to a weapon. *Johnson*, 2007 WI 32, ¶¶ 21-25. Unlike the facts in *Johnson* where the suspect made only one leaning-forward gesture (*Id.* ¶ 3), Wagner moved

continuously throughout the interior of the vehicle during the traffic stop. His movements were consistent with a person reaching to an area where weapons may be concealed. This is a situation where both officers suspected Wagner may be reaching for or has access to a weapon.

The continued furtive movements of Wagner are further distinguishable from the facts of *Johnson* because the movements continued despite Wagner having produced a piece of identification.

Officer Starker explained to Officer DeMaa that Wagner was “really moving around” when he first pulled him over and asked him to stand up close to the vehicle. (R. 13 at 6:10 mins; R. 38 at 11:20-22.) On the video it can further be observed that Wagner moves around the interior presumably in an attempt to locate identification or driver’s license for himself as Officer Starker asked Wagner if he “has anything that has his name written on it.” (R. 13 at 4:30 mins.) A few seconds later, after the officer returned to his squad, Wagner then holds his hand out the window with his identification. (*Id.* at 5:35 mins.)

After the production of identification, Officer DeMaa observed Wagner make “movements behind his back and under his seat, whether it be attempting to retrieve something or place something there.” (R. 38 at 31:25-32:2.) Officer DeMaa described Wagner’s “upper torso twisting and his arms moving.” (*Id.* at 32:15.) Officer DeMaa described that Wagner could have been reaching for a gun or hiding something. (*Id.* at 33:4-8.) The

actions of Wagner were further concerning because Officer DeMaa could not see Wagner's hands and that is dangerous. (*Id.* at 33:14-18.) In light of the continued movement by Wagner, Officer DeMaa requested Wagner to step from the vehicle while Officer Starker was still checking on Wagner's driving status. (R. 13 at 8:46 mins.)

In *Johnson*, the court was concerned about the innocent explanations for the initial movement like obtaining a driver's license from a wallet or other similar actions. *Johnson*, 2007 WI 32 ¶ 43. Here, Wagner produces some identification after the initial observation of furtive movement. Producing identification alleviates any further need for Wagner to be moving around in his vehicle. Yet Wagner's movements continued to the point where Officer DeMaa's concerns for safety caused him to ask Wagner to step out of the vehicle.

In *Johnson*, there was only one movement that occurred at the onset of the traffic stop. *Johnson*, 2007 WI 32 ¶ 3. Thus, the *Johnson* court's concerns for innocent explanations are simply inapplicable here since Wagner's movement continued throughout the traffic stop, including after Wagner's identification was presented. Moreover, "an officer is not required to rule out the possibility of innocent behavior." *State v. Colstad*, 2003 WI App 25 ¶ 8, 260 Wis. 2d 406, 414, 659 N.W.2d 394, 398 (*citing State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)).

An additional factor that must be considered is that law enforcement has had significant drug contacts with Amy Prening (her person, vehicle and house) and Wagner (who was driving Prening's car). This was a traffic stop where officers "suspected drug activity, a crime known law enforcement to be associated with weapons possession." *Johnson*, 2007 WI 32 ¶ 29. Officer Starker testified that Wagner has prior drug contacts with the MEG Unit (a unit in Sheboygan County solely designed to investigate drug dealers). (R. 33 at 24:6-16.) Further, Officer Starker testified that Wagner was driving a vehicle belonging to Amy Prening and pulled over in front of Amy Prening's home. (*Id.* at 5:15-22; 6:19-7:13.) Prening is another person known from the MEG Unit for drug contacts. (*Id.* at 5:23-6:14; 7:14-17.) Certainly the additional safety concerns that arise from suspected drug activity, coupled with the continued furtive movements supports the conclusion that Wagner may have access to weapons; at least to the level of reasonable suspicion.

Officers Starker and DeMaa were both able to point to specific and articulable facts supporting reasonable suspicion that Wagner was armed and dangerousness. As such, Officer Starker's assertion that he had authority to search the vehicle was appropriate, truthful, and not a misrepresentation. After all, Judge Bourke correctly pointed out that "you don't wait till it's too late." (*Id.* at 47:18-21.)

Further the statement by Officer Starker is distinguishable from the command in *Johnson* because Officer Starker's statement was that he could search *the vehicle*. Officer Starker then asked Wagner the question of whether Wagner would consent to search of *his person*. On the other hand, in *Johnson*, the officers said they were going to search the vehicle based on the furtive movement, which resulted in a search of the vehicle and the discovery of drugs. *Johnson*, 2007 WI 32 ¶ 18. Thus, the statement by Officer Starker is not the same type of assertion that was made by the officers in *Johnson* in light of the particular location to be searched and where the search was ultimately performed.

It is also worth emphasizing that during Officer Starker's question, Officer Starker and Wagner are not standing next to the vehicle either. This spacing further supports the distinction of searching the vehicle versus asking to search Wagner's person.

The facts present here, as distinguished from *Johnson*, demonstrate that the officer did not use any misrepresentation, deception or trickery in obtaining the consent.

The totality of the circumstances demonstrates that the Honorable Judge Bourke correctly concluded that the State met its burden to prove that Wagner voluntarily consented to a search of his person, which then revealed the existence of the marijuana pipe.

CONCLUSION

The trial court correctly held that the State proved Wagner voluntarily consented to search of his person based on the totality of the circumstances. Therefore, this Court should deny Wagner's appeal and affirm the Honorable Judge Bourke.

Dated this _____ day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I certify that this Brief conforms to the rules contained in Wis. Stats. § 809.19(8), regarding form and length. It uses proportional serif font with 13 point body text, 11 point text for quotes and footnotes, leading above the minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is **4,491** words.

I also 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 electronic copy of this Brief is identical to the paper copy of the Brief which has been filed with the Wisconsin Court of Appeals.

Dated this _____ day of December, 2014.

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