STATE OF WISCONSIN

COURT OF APPEALS

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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

The state begins the argument section of its brief by describing the facts and holding of ***State v. Stankus***, 220 Wis. 2d 232, 582, N.W.2d 468 (Ct. App. 1998) (State's Brief at 9-10). The state then argues that the facts of ***Stankus*** can be used to determine that Mr. Wagner voluntarily gave consent in this case. (State's Brief at 12).

However, the facts of ***Stankus***, which are not analogous to Mr. Wagner's case, hardly dictate the outcome here. In ***Stankus***, "[t]he sergeant asked Stankus two simple questions: Whether 'he had any guns, drugs or anything illegal in the vehicle,' and if he 'could go ahead and take a look through the vehicle.'" ***Id***. at 241.

A significant difference between ***Stankus*** and this case is that the officer asked Stankus these two questions without making any assertion that he already had authority to search either Stankus or his vehicle. In Mr. Wagner's case, on the other hand, the officer stated, "so you don't mind if I search you right" only after an officer had already ordered him out of his car, told him where to stand, and incorrectly informed him that the officers already had authority to search his vehicle.

As the state acknowledged, the determination of whether a citizen has voluntarily consented to a warrantless search depends on the totality of the circumstances, "including the events surrounding the consent." (State's Brief at 8). The circumstances surrounding the consent in this case do not involve two simple questions without an assertion that the officers have authority to search. Thus, the outcome in this case is not dictated by ***Stankus***.

Next, the state reviews additional factors it believes support the conclusion that the consent was voluntary. The state notes that officers did not use loud voices to issue commands. (State's Brief at 12). Although the officers did not raise their voices, shouting is not required for this court to conclude that Mr. Wagner's consent was involuntary. As the supreme court has recognized, in the context of voluntary consent, "coercion can be imposed by implicit as well as explicit means." ***State v. Phillips***, 218 Wis. 2d 180, 203, 577 N.W.2d 794 (1989).

The state also argues that this court should not consider that the police ordered Mr. Wagner out of the vehicle in its totality of the circumstances analysis because it was not illegal for the police to give such an order. (State's Brief at 12-13). The state provides authority for the proposition that officers are allowed to order drivers out of their vehicles, however, it provides no authority for the assertion that simply because an action is legal means it cannot be considered as part of the totality of the circumstances.

Next, the state again relies on ***Stankus*** to argue that there is no per se rule that the presence of two officers automatically creates a coercive environment. (State's Brief at 14). Wagner is not asking for a ruling that the presence of

two officers automatically makes consent involuntary. ***Stankus*** acknowledged that the number of officers is a factor in the totality of the circumstances. ***Stankus***, 220 Wis. 2d at 240. Here, the fact that Mr. Wagner was outnumbered by the officers and intern weighs against the conclusion that the consent was voluntary.

Next, the state attempts to distinguish this case from ***State v. Johnson***, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182. The distinction rests on the amount of movement that Johnson and Wagner made while in their vehicles. The state seems to argue that Johnson only moved once while waiting for the officer in his vehicle. While the ***Johnson*** opinion does use the word "movement" rather than "movements," the opinion also quotes an officer who testified that "Stillman advised Johnson due to his movements that we were going to search the vehicle." ***Id***., ¶ 3,5,7. So, it is not entirely clear that Johnson made only one movement.

In addition, that state asserts that Wagner would have had no reason to move in his seat after he provided the officer with his identification. (State's Brief at 17). However, Mr. Wagner provided a bank identification card, and even the officer acknowledged that he may have been continuing to look for his driver's license. (38:10, 26).

So, Mr. Wagner's movement does not necessarily distinguish the case from ***Johnson*** and does not provide the police with the authority to search his vehicle. Nor does the fact that the owner of the vehicle was known to the MEG Unit, mean that Mr. Wagner was suspected of a crime associated with weapons possession. He was pulled over for an equipment violation and Officer Starker testified that he was not aware of any violent history or any history of weapons associated with Mr. Wagner. (38:28).

As such, the officers did not have lawful authority to search Mr. Wagner's vehicle. When they asserted that they did immediately before the officer stated, "so you don't mind if I search you right," Mr. Wagner's response was not voluntary consent, but rather acquiescence. The state has not met its burden to show the consent was voluntary.

CONCLUSION

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

Dated this 12th day of January, 2015.

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 975 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 January, 2015.

Signed:

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