STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2014 AP 001053 - CR

TYRON POWELL,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE TIMOTHY G. DUGAN, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY ORDERED THE STATE COULD INTRODUCE IRRELEVANT EVIDENCE TO ATTACK POWELL'S CREDIBILITY.

The State argues that Powell's prior lack of testimony about police brutality at the second trial is relevant to impeach Powell because evidence that Powell did not testify about police brutality at the second trial would make whether Powell is now telling the truth about the allegation less probable. (State's brief at 5-6).

However, the State's conclusion is not correct. Powell's prior lack of testimony has no bearing on whether Powell is now telling the truth. The lack of testimony at the June 2012 jury trial is not a recent fabrication as the circuit concluded (87:62; Appellant's Brief App. 23) because the silence comes after the circuit court and the State became aware of Powell's prospective testimony at the January 2012 trial.

Powell's prior lack of testimony is not relevant to Powell's credibility because Powell's trial counsel, not Powell, chose whether to raise the issue of police brutality at the second trial. This decision is trial counsel's to make because Powell's trial counsel had the duty of determining trial strategy. SCR 20:1:2.

> "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."

SCR 20:1:2. ABA Comment [2]

The State argues that Powell's lack of testimony about police brutality at the second trial is relevant to Powell's credibility at the third trial if the issue arose because Powell's testimony at the second trial contradicts Powell's assertion

that the police made up the charges against Powell to conceal their mistreatment of Powell. (State's brief at 6-7).

However, Powell's testimony at the second trial provided an innocent explanation for the criminal charges he faced; first, he testified he never concealed the firearm he possessed; second, he testified he did not *knowingly* flee a traffic officer.

Powell's innocent explanation, which he testified to at both trials, is not inconsistent with Powell's assertion that he was a victim of police brutality after the stop; rather, the assertion of police brutality is consistent with Powell's testimony that he is not guilty of the charges.

The circuit court used this reasoning when it ordered a mistrial at the first trial.

> "Whether or not police conveyed that information and whether or not they covered it up. That's something that he's alleging is a defense. It's relevance is that the police officers in this case are completely fabricating everything. Because they beat him they are lying about all the charges. It's relevant."

(65:7).

Powell's testimony and Powell's assertion of police brutality are not inconsistent, and therefore, are not relevant for impeachment purposes. Powell's argument does not foreclose the State from impeaching Powell with any prior inconsistent statements.

The State argues that Powell's lack of testimony is relevant because the State must be permitted to challenge Powell's defense. (State's brief at 7). Yet, contrary to this argument the State gave notice to the circuit court and defense before the second trial that if Powell testified about police brutality, then the State was prepared to call a number of rebuttal witnesses. (71:2). This was the proper way for the State to challenge Powell's testimony about police brutality. The State could call rebuttal witnesses and present physical

evidence that contradicts Powell's testimony, which the State appeared prepared to do. Therefore the State was permitted to challenge Powell's defense regardless of the circuit court's ruling.

The State argues that Powell sought to usurp the province of the jury by not permitting the State to attack Powell's credibility. (State's brief at 7). Powell agrees with the State that the jury must determine the credibility of the witnesses. However, the jury's determination of his credibility should be based on evidence relevant to his credibility. Wis. Stat. § 904.01. The circuit court permitted the State to introduce evidence not relevant to Powell's credibility to attack Powell's credibility.

In this case, whether Powell testified previously about police brutality after the event had become known to all the parties' did not have a tendency to make the circumstances surrounding the event more or less probable or have any affect on Powell's credibility; rather, it would be confusing.

Finally, the State argues that the circuit court found the allegation of police mistreatment of Powell not substantiated. (State's brief at 5). However, the circuit court did not make a determination about whether the police mistreated Powell. (88:25). In addition, before the second trial the State possessed medical records of Powell from Columbia St. Mary's hospital. (70:2). Also, before the second trial the State acquired documents concerning the chain of custody of Powell's body after he was arrested. (68:2). Ultimately, the circuit court stated, "I haven't made a determination as to which party is credible." (88:25).

Because the circuit misapplied Wis. Stat. § 904.01 to the facts that Powell did not testify about police brutality at the second trial but sought to testify about police brutality at the third trial, the circuit court permitted the State to impermissibly attack Powell's credibility. Consequently the circuit court ruling was erroneous.

II. THE CIRCUIT COURT'S ERRONEOUS EVIDENTIARY RULING WAS NOT HARMLESS.

The State has the burden of proving that the circuit court's erroneous ruling was harmless and the State must meet this burden by proving that there was no reasonable possibility that the error contributed to Powell's conviction and the error had such slight effect as to be *de minimus*. State v. Dyess, 224 Wis. 2d 525, 542-543, 370 N.W. 2d 222 (1985).

Where the circuit courts error affects rights of constitutional dimension or where the verdict is only weakly supported by the record this Court's confidence in the reliability of the proceeding may be undermined more easily than where the error was peripheral or the verdict strongly supported by evidence untainted by error. Dyess, 224 Wis. 2d at 545.

First, the State argues that the circuit court's ruling is harmless because Powell never admitted evidence of police brutality at the third trial; therefore, because the evidence was not admitted there is no possibility that the circuit court's ruling could have contributed to Powell's conviction.

The State's argument requires Powell to have admitted evidence of police brutality at the third trial so that the State could then impermissibly impeach Powell and *then* Powell could show that the error was not harmless.

However, Powell need not venture down that rabbit hole to prevail now because the jury's determination of the witnesses' credibility was vital. This is because the crux of the evidence was the testimony of police officers versus the testimony of Powell. The jury was burdened with determining whose version of events to believe. The jury in the second trial was not able to come to a conclusion about who to believe and was deadlocked.

The circuit court's error went to the issue of the Powell's credibility, which each party agrees was vital. (87:7).

In addition, the circuit court's error was not peripheral because the verdict was only supported by whose version of events the jury believed: the police officers' or Powell's.

Second, the State argues that the circuit court's ruling was harmless because it did not invade Powell's attorney-client privilege since the privilege was not affected by the ruling. (State's brief at 8). However, this is not true because had Powell raised the issue of police brutality at the third trial, then the State would then have asked Powell whether Powell raised the issue at the second trial; the State would argue that Powell's answer showed he was lying about the events taking place.

In order to counter this Powell would be forced to waive his attorney-client privilege and call his prior attorney to testify because only Powell's attorney could *truly* answer the question of why the issue was not raised at the second trial after it was brought to everyone's attention.

In both of the State's arguments the State concludes that because the evidence Powell complains of was never entered into evidence, there could be no error. However, the State misses the point because the very nature of the circuit court's erroneous order impermissibly undermined Powell's defense and undermines this Court's confidence in the verdict.

Therefore, because the circuit court's pretrial order was erroneous and not harmless this Court should reverse the judgments and order a new trial.

III. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT'S POSTCONVICTION MOTION FOR A MACHNER HEARING.

The State argues that officers had reasonable suspicion to stop Powell; therefore, Powell would not have been successful in suppressing evidence and the postconviction motion seeking a Machner hearing was properly denied.

Powell agrees with the State that, "corroboration by police of innocent details of an anonymous tip may under the totality of the circumstances give rise to reasonable suspicion to make a stop." State v. Richardson, 56 Wis. 2d 128, 142, 456 N.W.2d 830 (1990)

However, an accurate description of a subject's readily observable location and appearance, like the anonymous tip in Powell's case, is reliable in the limited sense that it will help the police correctly identify the person whom the tipster means to accuse; however, such a tip, does not show that the tipster has knowledge of concealed criminal activity. Florida v. J.L., 529 U.S. 266, 272 (2000).

In Powell's case, as in J.L., the anonymous tip lacked indicia of reliability related to knowledge of concealed criminal activity and does not justify the officers' stop. The tipster in Powell's case had no knowledge of concealed criminal activity since she did not complain of any criminal activity to the officers.

The State argues that the manner in which the officers effectuated the stop does not change the analysis and the State cites to Pounds as support. (State's Brief at 13).

In Pounds the court held that troopers were reasonable for stopping Pounds at gunpoint based on the illegal sawed off shotgun in plane view in side the car Pounds exited. State v. Pounds, 176 Wis. 2d 315, 322, 500 N.W.2d 373 (Ct. App. 1993). However, the court also held that the techniques the officers used gave rise to a custodial situation requiring Miranda protections for Pounds. Pounds, 176 Wis. 2d at 322. The protections delineated in Miranda come into play as soon as a suspects' freedom is curtailed "to the degree associated

with formal arrest." Pounds, 176 Wis. 2d at 321 (citing Berkemer v. McCarty, 468 U.S. 420, 440 (1984)).

Here, as in Pounds, the show of force by the officers' curtailed Powell's freedom to the degree associated with formal arrest. As a result the officers sought to unlawfully arrest Powell.

Powell did not abandon his firearm during flight as the State argues. (State's Brief at 16). Rather, Powell submitted to the officer's show of authority by unarming himself and stopping his vehicle; therefore, Powell was seized when he unarmed himself. State v. Young, 294 Wis. 2d 1, 717 N.W.2d 729 (2006).

Based on the foregoing, the officers' did not have reasonable suspicion or probable cause to stop Powell; thus, the officers unlawfully stopped Powell and the evidence obtained as a result of the unlawful stop would have been suppressed had a suppression motion been filed. As a result, Powell's trial counsel was ineffective for not filing a suppression motion because the motion would have been successful and this Court should order a Machner hearing.

IV. THE CIRCUIT COURT PREJUDICED POWELL WHEN THE CIRCUIT ERRONEOUSLY ADMITTED TESTIMONY PERTAINING TO THE TYPE AND YEAR OF MR. POWELL'S PRIOR CRIMINAL CONVICTIONS.

The State argues that the circuit court properly exercised its discretion related to this issue at the final pretrial. (State's Brief at 19). However, at the final pretrial the circuit court determined how many criminal convictions Powell had for testimonial purposes. (87:7-9). The circuit court never weighed whether the probative value of the evidence the State

sought to admit was substantially outweighed by its prejudicial affect.

The State argues that once Powell opened the door, then fair play dictated that the State be able to go into specific facts regarding Powell's prior convictions. However, the analysis that dictates whether the State should be permitted to elicit specific facts regarding Powell's prior convictions is whether the probative value of the evidence is substantially outweighed by the evidence's prejudicial affect. The circuit court did not conduct this analysis.

If the circuit court had conducted this analysis, then the circuit court would have found that the prejudicial affect of the evidence did substantially outweigh its probative value. This is because the specific details about Powell's prior convictions are especially prejudicial given that the prior convictions were the same charges Powell faced at trial.

In addition, Powell's additional testimony of never being convicted of a felony did not tip the scale towards the defense. The jury heard that Powell had three prior criminal convictions, which is not insignificant, as the State argues. (State's Brief at 20).

The circuit court's error is not harmless because as previously argued the crux of the evidence at trial was the testimony of police officers versus the testimony of Powell. As such, Powell's credibility was a vital issue for the jury to determine. Because the jury heard specific details about Powell's prior convictions, which improperly prejudiced Powell's credibility, this Court's confidence in the verdict is undermined.

Because the circuit court erred when it did not properly exercise its discretion in permitting the State to elicit testimony about Powell's prior convictions and the circuit court's error was not harmless, Powell requests this Court to reverse the judgments and order a new trial.

CONCLUSION

The circuit court erred in denying Powell's postconviction motion for a Machner hearing and a new trial.

Based on the reasons set forth within this brief Defendant-Appellant, Tyron J. Powell, respectfully requests the Court to reverse judgments and order a new trial or, in the alternate, to order a Machner hearing.

Dated this 17th day of November, 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 2314 words.

Dated this 17th day of November, 2014.

Signed:

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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 17th day of November, 2014.

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