STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2014AP1430- CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTWAN D. HOPSON,

Defendant-Appellant.

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ON REVIEW OF JUDGEMENT OF CONVICTION ENTERED JUNE 14, 2013, HON. TERENCE T. BOURKE, PRESIDING.

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUE PRESENTED

Mr. Hopson filed a motion to suppress cocaine evidence based on a fourth amendment violation because police conducted a search of his person when he was detained but not under arrest. Should the evidence have been suppressed?

The trial Court answered: No. The trial court declined to suppress, ruling that it was an appropriate *Terry* frisk, although an officer searched inside his pockets and attempted to reach inside his sock.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Hopson would welcome oral argument if the Court believes it would be beneficial, but he is not requesting it, because the arguments of both sides can be presented sufficiently through written briefs.

This matter requires application of established legal principles to undisputed facts; therefore, publication is not requested.

## STANDARD OF REVIEW

Whether facts fulfill a particular legal standard is a question of law. *See*, e.g., Nottelson v. ILHR Department, 94 Wis.2d 106 (1980), 287 N.W.2d 763. In this case, the Court is called upon to determine whether the facts of the search of Mr. Hopson amount to a 4th amendment violation and should therefore have been suppressed – a question of law.

Legal questions are the province of the appellate courts and are subject to *de novo* review. Gilbert v. Medical Examining Bd., 119 Wis. 2d. 168, 194, 349 N.W.2d 68, 79-80 (1984).

## PROCEDURAL POSTURE AND FACTS

On April 8, 2011, in Sheboygan County Case No. 11-CF-163, Mr. Hopson was charged in a criminal complaint with Count 1, Possession of Cocaine (2nd and Subsequent), Repeater; Count 2, Resisting an Officer, Repeater; Count 3, Felony Bail Jumping, Repeater; Count 4, Misdemeanor Bail

Jumping, Repeater; and Count 5, Misdemeanor Bail Jumping. (R. 1, App. 1.)

In support of the charges, the complaint included a narrative section in which it was alleged that on April 7, 2011, Mr. Hopson was a passenger in a vehicle that was the subject of a traffic stop in Sheboygan. (R. 1, pp. 3-4, App. 1, pp. 3-4.) During the stop, an K-9 unit was called and advised that the dog had indicated on the vehicle. R. 1, p. 4, App. 1, p. 4.) Officers searched the vehicle and observed marijuana shake located on the passenger side of the floor, as well as the pocket behind the passenger seat. Id.

After the search of the vehicle, Mr. Hopson's person was searched. (Tr. 12/2/11, p. 29., App. 4, p. 4) Officer Trisha Saeger searched Mr. Hopson's pockets and stuck her finger into his sock (Tr. 12/2/11, pp. 29-30., App. 4, pp. 4-5.) Officer Saeger agreed that this was a search. (Tr. 12/2/11, p. 30., App. 4, p. 5.) When asked directly and clearly whether Mr. Hopson was "under arrest" at the time of the search, Officer Saeger did not answer that he was under arrest. She answered evasively, "There's probable cause to arrest [him] for the drugs in the vehicle. [He was] not free to go." Id.

During the search, Mr. Hopson ran away from officers. (R. 1, p. 4, App. 1, p. 4.) Officer Yang observed him in a fenced off area behind 1212 Clair Avenue, Sheboygan, crouched down, and the K-9 unit was brought to that area and officers observed a plastic baggie containing alleged cocaine. Id.

Mr. Hopson was charged with the offenses listed in the complaint, on April 8, 2011. On July 28, 2011, Mr. Hopson's then-attorney, Patricia Adelman, filed a Motion to Suppress Fruits of Illegal Detention (and Frisk) and Illegal Arrest. (R. 33.) The title of this is misleading and does not reflect the argument made and ruled upon at the subsequent motion hearing where the argument and ruling focused on whether or not the search (not frisk) of Mr. Hopson was unlawful; this argument will be developed in the argument section.

A motion hearing was begun on November 9, 2011, and continued and concluded on December 2, 2011. The State argued that the motion should be denied, explaining that "They had probable cause to arrest him for obstructing an officer and for the marijuana that was found in the vehicle. For these reasons all of the officers' actions were appropriate, and we ask that the motion be denied." (Tr. 12/2/11, p. 37. App. 4, p. 6.)

The trial court ruled that the extension of the stop was not unreasonable, which is not now being disputed. The trial court also ruled that the amount of marijuana shake in the vehicle would not have provided probable cause, but when taken in conjunction with the K-9 officer indicating on the vehicle, did provide "reasonable suspicion of criminal activity which then gets into a *Terry* stop," for which the court ruled there was a basis. (Tr. 12/2/11, p. 42., App. 4, p. 7.) The court further reasoned that "Given the totality of the circumstances, there is probable cause for the detention – or reasonable suspicion to justify the arrest." (Tr. 12/2/11, p. 43, App. 4, p. 8.) The court therefore denied the motion. Id.

On June 4 and June 5, 2013, a jury trial was held, in which Mr. Hopson was found guilty on counts 1 and 2 (possession of cocaine and resisting an officer); on June 14, 2013, as part of a plea agreement, he pled no contest to count 3 (felony bail jumping), and counts 4 and 5 (misdemeanor bail jumping) were dismissed but read in. (R. 175-179, App. 2.)

## ARGUMENT

**The search that police performed on Mr. Hopson was a violation of his 4th amendment rights. It cannot be excused under *Terry* although there was reasonable suspicion for an investigative stop and frisk under *Terry* this was not a simple stop and frisk; as was conceded by the searching officer, it was a true search.**

### A. Mr. Hopson was not under arrest, so the search cannot be valid as a search incident to arrest.

Warrantless searches are per se unreasonable unless the State establishes that one of the few specific exceptions to the warrant requirement justifies the search. State v. Pallone, 2000 WI 77, ¶ 29, 236 Wis. 2d. 162, 613 N.W.2d 568. One established exception is for a search "incident to a lawful arrest." Id., ¶ 32. For this exception to apply, there must be an arrest in fact. Id., ¶ 32.

This court has held that when there was probable cause for arrest but there was not an actual arrest, there could be no search incident to arrest. State v. Marten-Hoye, 2008 WI App 19, 746 N.W.2d 498. In Marten-Hoye, the undisputed facts set forth that a police officer approached Marten-Hoye outside at nighttime to ensure that she was not violating the curfew ordinance. After determining that she was not subject to the curfew based on her age, the officer told Marten-Hoye that she was free to leave. Marten-Hoye walked away and began shouting obscenities and waving her hands around, drawing the attention of ten to fifteen people. The officer re-approached Marten-Hoye and told her she was under arrest for disorderly conduct, placed her in handcuffs, and told her that she would receive a city ordinance violation and then be released if she continued to be cooperative. The officer then searched Marten-Hoye and found contraband, for which she was ultimately convicted. On appeal, this Court held that the search was constitutionally impermissible. Id., ¶ 7. This Court reasoned that given the totality of the circumstances, a reasonable person in Marten-Hoye's position would not have believed he or she was "in custody." Id., ¶ 28. Those circumstances included the fact that Marten-Hoye was told that she would be issued a citation and then be free to go, that she was not placed in a squad car, and that the entire interaction was in public. Id., ¶ 27. Significantly, this did not amount to an arrest even though Marten-Hoye was in fact told she was under arrest and put in handcuffs.

Similarly, in Mr. Hopson's case, the totality of the circumstances would also not lead a reasonable person to believe that he or she was under arrest. Mr. Hopson was a passenger in a vehicle that was pulled over in a traffic stop. (Tr. 11/9/11, p. 6., App. 3, p. 1) The traffic stop was the result of a suspended license plate. Id., at 7. Mr. Hopson was asked to step out of the vehicle, and he and the driver were brought to the curb. Id., at 15. Officers Saeger and Schnabel then searched the vehicle and found marijuana shake, which is small pieces of marijuana flakes. Id., at 17-18. Officer Yang did a pat-down of Mr. Hopson on the sidewalk and found nothing but a toothbrush. (Tr. 12/2/11, p. 6., App. 4, p. 1) After the pat-down, Officer Yang stayed with Mr. Hopson on the sidewalk while Officer Schnabel did some paperwork relating to a citation for the driver, then Officer Saeger arrived with a K-9 and began walking it around the car. Id., at 6-7. Officer Yang and Mr. Hopson were first standing on the sidewalk and then Mr. Hopson asked if they could side down, and he sat down on a ledge. Id., at 12. He was not in handcuffs and had not been told he was under arrest.

Officer Yang distinguished between a search and a pat down; he stated, "So I was patting [Mr. Hopson] down for weapon [sic]. I did not search [him]." As Officer Yang and Mr. Hopson were waiting on the sidewalk, the vehicle was being searched; the marijuana shake was found, and Officer Saeger approached Mr. Hopson "to search [him]." Id. at 29.

Given the totality of the circumstances, a reasonable person in Mr. Hopson's position would not have believed he was under arrest. He was not in hand cuffs, he had not been told he was under arrest; he was simply standing or sitting around on a sidewalk waiting for the car to be searched. Nothing intervened between that circumstance and the search. Significantly, Officer Saeger herself, when given the opportunity to testify that Mr. Hopson was under arrest, did not say that. Instead, to the question, "Was [Mr. Hopson] under arrest?" Officer Saeger responded, "There's probable cause to arrest [him] for the drugs in the vehicle. [He was] not free to go." (Tr. 12/2/11, p. 30., App. 4, p. 5.) In other words, he was not under arrest.

Since he was not under arrest, just as the defendant in Marten-Hoye, there cannot be a search incident to arrest. Just

as in Marten-Hoye, there may have arguably been probable cause to arrest, but without an arrest in fact, the probable cause to arrest does not give officers the authority to do a full search.

### B. The search went beyond what is allowable as a *Terry* search; therefore it cannot be upheld as an allowable stop and frisk.

The trial court at Mr. Hopson's suppression motion hearing ruled that the search was lawful as a *Terry* search. (Tr. 12/2/14, p. 42.) However, as previously discussed, Officer Saeger agreed that Mr. Hopson was "searched," and that she had looked in his pockets and stuck his finger in his sock. Id., at 29-30. This is inarguably beyond the scope of a *Terry* stop or search. Because this search was unlawful, all derivative evidence must be suppressed as fruit of the poisonous tree under Wong Sun v. United States, 371 U.S. 471 (1963).

The cocaine seized in this case was confiscated after Mr. Hopson ran from the unlawful search and was later apprehended in a field, where the baggie of cocaine was found nearby. (R. 1, p. 3, App. 1, p.3.) Had the officer not performed an unlawful search, the evidence would not have been discovered or attributed to Mr. Hopson. Thus, the evidence is inadmissible under Wong Sun.

## CONCLUSION

Mr. Hopson was searched illegally when Officer Saeger searched his pockets and socks without a warrant and when Mr. Hopson was not under arrest. As a result of this illegal search, Mr. Hopson ran away from the scene and was apprehended near a baggie of cocaine. Had the officer not performed an illegal search, the evidence would not have been discovered. It should therefore have been suppressed and not used at trial. Mr. Hopson therefore asks this Court to

reverse the conviction and order a new trial in which the evidence would be excluded. If the government is able to obtain convictions by breaking the law, contempt for the law is bred. The goal of convicting criminals cannot be seen to commend the commission of crimes by the government in that pursuit.

Respectfully submitted this _____day of September, 2014.

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Angela D. Henderson
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## CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2082 words.

_____

Angela D. Henderson

## ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Angela D. Henderson

## CERTIFICATION AS TO APPENDICES

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 so reproduced to preserve.

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Angela D. Henderson

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