STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CASE NO. 2014AP1589-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ZOLTAN M. PETER,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF WALWORTH COUNTY, THE HONORABLE DAVID M. REDDY, PRESIDING

# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## STATEMENT OF THE ISSUE

**I. Did the trial court err when it found the plastic bag containing what appeared to be a controlled substance was lawfully seized?**

The trial court determined the bag containing suspected marijuana was in plain view and lawfully seized.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument should not be required as the issues can be adequately addressed by the parties through briefs. There is no request for publication as the issues presented relate solely to application of existing law to the facts of record.

## STATEMENT OF THE CASE

On May 25, 2012, Zoltan Peter was charged with Operating a Motor While Under the Influence of an Intoxicant as a 2nd offense in violation of Wisconsin Statutes § 346.63(1)(a) and Operating a Motor Vehicle With a Detectable Amount of a Controlled Substance in his Blood in violation of Wisconsin Statutes § 346.63(1)(am). (R1:1). A motion to suppress evidence, including suspected marijuana discovered inside Mr. Peter's vehicle, was filed on November 11, 2012. (R9:1). An evidentiary hearing on the suppression motion was heard by the Honorable David M. Reddy on December 12, 2012. At the conclusion of that hearing, the court found that the vehicle was searched and the suspected marijuana was discovered pursuant to the plain view doctrine. (R44:48; App. 148).

Based upon the court's ruling, the State was permitted to introduce the discovery of the suspected controlled substance in Mr. Peter's vehicle at a jury trial. It was introduce as evidence at trial through the testimony of Officer Aaron Hackett. (R47:77). At the conclusion of the jury trial held October 3, 2013, Mr. Peter was found "Not Guilty" of operating a motor vehicle while under the influence (R24:1); however, he was found "Guilty" of operating a motor vehicle with a restricted controlled substance (R25:1). A Judgment of Conviction was entered based upon the jury's verdict. (R29:1).

Mr. Peter now appeals the circuit court's decision denying suppression of the evidence, specifically the suspected controlled substance, discovered in his vehicle.

## STATEMENT OF THE FACTS

The relevant facts are not in dispute. On September 29, 2011 at 7:19 p.m., Officer Aaron Hackett of the Village of East Troy Police Department received a dispatch call regarding a vehicle hitting a tree. (R44:4-5; App. 104-105). When Officer Hackett arrived at the scene, he observed the Defendant-Appellant, Mr. Zoltan Peter, as the driver in the single-car accident. (R44:6; App. 106). Officer Hackett spoke with Mr. Peter before emergency personnel responded. (*Id*.). During this time, Officer Hackett observed no indication of intoxication of Mr. Peter. (R44:21-22; App. 121-122). Once emergency personnel arrived and

attended to Mr. Peter, Officer Hackett moved out of their way but continued to observe other areas of the vehicle. (R44:8; App. 108). It was at this point Officer Hackett observed a 12-pack of Miller Lite beer in the vehicle's rear passenger floor. (R44:16; App. 116). Officer Hackett then opened the rear passenger door and picked up the 12-pack of beer to determine whether it was opened. (*Id*.). Upon noticing it was unopened, he set it back down. Once he set the unopened 12-pack down, Officer Hackett then observed portions of plastic bags sticking out from the pouch (referred to by the parties as a "compartment" of "flap") on the back of the front passenger seat. (*Id.*). Officer Hackett indicated that initially, he could only see plastic bag, but once he utilized a flashlight and looked into the compartment that he observed a green leafy substance inside the plastic bag he suspected may be marijuana. (R44:38; App. 138). In addition to using a flashlight, Officer Hackett indicated he had to open the pouch before the green leafy substance was visible. (R44:40; App. 140). At no point did Mr. Peter consent to Officer Hackett's entry into and search of his vehicle.

## ARGUMENT

### I. The Suspected Controlled Substance Was Not Lawfully Seized As It Was Not In Plain View And The Physical Manipulation By Officer Hackett To Observe It Constituted A Search Without Probable Cause.

A. Standard of Review

Any question as to finding of facts by the circuit court should be upheld unless they are clearly erroneous. *State v. Gross*, 2011 WI 104, ¶ 9, Wis.2d 72, 79, 806 N.W.2d 918, 921 (2011). The circuit court's conclusions of law are reviewed de novo. *State v. Harris*, 206 Wis.2d 243, 557 N.W.2d 245, 248 (1996).

B. The Plain View Doctrine cannot be applied in this case as the incriminating character of the evidence was not immediately apparent and was only observed through additional search.

As a starting point of analysis, Mr. Peter has the right to be secure in his person, house, papers, and effects against unreasonable searches and seizures pursuant to both the Fourth Amendment of the United States Constitution and Article I, § 11 of the Wisconsin Constitution. With no warrant issued, a valid exception provided by case law must exist to justify a search inside and seizure of items from Mr. Peter's vehicle.

The State argues that the warrant exception known as the plain view doctrine supports Officer Hackett's observation and seizure of the suspected marijuana. (R44:47-48; App. 147-48; R10:4). The three prerequisites for plain view to apply are stated in *State v. Guy*, 172 Wis.2d 86, 101-102, 492 N.W.2d 311, 317 (1992):

> (1) the evidence must be in plain view; (2) the officer must have a prior justification for being in the position from which [he or] she discovers the evidence in "plain view"; (3) and the evidence seized "in itself or in itself with the facts known to the officer at the time of the seizure [must provide] probable cause to believe the is a connection between the evidence and criminal activity." (quoting *State v. Washington*, 134 Wis.2d 108, 121, 396 N.W.2d 156, 161 (1986)).

These elements correspond with those expressed in the federal application of plain view. *See Horton v. California*, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 2308 (1990). The Supreme Court in *Horton* stated that in addition to being in plain view, the incriminating character of the evidence "must be immediately apparent." *Horton* at 136, 110 S.Ct. 2308. The Court in *Horton* relied in part on its earlier decision in *Arizona v. Hicks* in which it held that in order to invoke plain view, police are required to show probable cause to believe the item was evidence or contraband. *Arizona v. Hicks*, 480 U.S. 321, 326, 107 S.Ct. 1149, 1153 (1987).

In the present case, the issue is with the third element – that the incriminating character of what Officer Hackett observed was immediately apparent. From his position inside the back passenger side of the vehicle, what was in plain view to Officer Hackett was only part of a clear plastic bag. To clarify what specifically was visible to Officer Hackett required him being recalled by the court for additional testimony. (R44:37; App. 137). In response to the court asking what he saw sticking out, over the lip, Officer Hackett testified he saw, "just the plastic bag. I didn't see the green leafy material until after I pulled out my flashlight and I looked into the compartment." (R44:38.; App. 138, lines 7-10.) Officer Hackett was then asked additional questions by both parties. On behalf of Mr. Peter, Attorney Melissa Nepomiachi at this point asked Officer Hackett, "And you didn't know until you opened the flap and looked in with a flashlight

that it may be a controlled substance?", to which Officer Hackett answered, "That's true." (R44:40; App. 140, lines 15-18). There are two key facts discovered here regarding the application of plain view. First, Officer Hackett did not see suspected evidence or contraband initially, but only part of a plastic bag. Second, to observe the suspected evidence or contraband, Officer Hackett had to first open the flap behind the passenger seat.

When law enforcement only observes part of a package or container, but not actual evidence itself, an issue exists with the application of plain view. What Officer Hackett initially observed here is similar to what law enforcement initially observed in *State v. Sutton*, 2012 WI App. 7, 338 Wis.2d 338, 808 N.W.2d 411. In *Sutton* a law enforcement officer entered a suspect's vehicle as part of a protective sweep for weapons. *Sutton* at ¶ 5, 338 Wis.2d at 343, 808 N.W.2d at 414. While conducting the protective sweep, the officer observed opaque vials, which she opened to discover pills she believed to be Ecstasy. (*Id*.) In that case, the Court of Appeals found the pills were not in plain view, holding, "Although the opaque cylinders were 'in plain view' the pills were not." *Sutton* at ¶ 9, 338 Wis.2d at 345, 808 N.W.2d at 415. Similar to this case, what Officer Hackett observed from the position he was lawfully in was only a packaging but not contraband itself. The incriminating character of the item was not apparent until he physically manipulated the scene.

In *Sutton* the physical manipulation came by opening the cylinders. In the present case, it came by Officer Hackett opening the flap behind the passenger seat. Opening the flap may be a very minor physical manipulation, but it is nonetheless a physical manipulation. Plain view cannot be created by manipulating and moving items. In *Arizona v. Hicks*, the Supreme Court held that moving parts of stereo equipment in order to view its serial number constituted a search. *Hicks*, 480 at 324-325, 107 S.Ct. at 1152. The Court further explained that while merely observing parts of an item that came into view from a justified position was not a search because there was no additional invasion of an individual's privacy, "taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion" of privacy. *Id*. at 325, 1152.

Applying the principles of *Hicks* to the present case, Officer Hackett had justification to be in his position inside the rear passenger side of the vehicle to determine whether the case of beer was open. He determined it was not. (R44:16; App. 116). At this point, his objective for being inside Mr. Peter's vehicle, to investigate an observed potential intoxicant, was satisfied. Officer Hackett's additional action to open the passenger seat flap to expose the contents of the plastic bag was then a separate intrusion that was unjustified.

The circuit court, in making its ruling, remarked that Officer Hackett did not have to touch the plastic bag in order to observe its contents. (R44:47; App. 147, lines 12-13). That fact is immaterial, though, because while Officer Hackett did not have to touch the bag to observe its contents, he acknowledged that he had to not only touch, but actually open the passenger seat flap in order to observe the green leafy substance. Whether it was the bag itself or the compartment inside the vehicle containing bag, it was still a physical manipulation required to expose what was concealed. What was concealed and not in plain view was the incriminating character of the item. Given additional action was required by Officer Hackett to expose the concealed substance, his observation and seizure of it cannot be supported by plain view.

C. Officer Hackett's opening of the pouch to observe more of the plastic bag constituted are search, which was not supported by probable cause.

From a justified position to inspect the unopened case of beer, Officer Hackett was able to observe the corner of clear plastic bags; however, he lacked probable cause to believe there was any connection between the clear plastic bags and criminal activity. Probable cause is found based upon, "under the totality of the circumstances, given all the facts and circumstances…there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Sveum*,

2010 WI 92, ¶ 24, 328 Wis.2d 369, 390, 787 N.W.2d 317, 327 (quotation marks and quoted sources omitted).

At the time at which Officer Hackett observed the clear bags, there were very few facts to support probable cause of any crime. Officer Hackett knew there was a single-car accident and did not have an explanation for the accident. (R44:5; App. 105). At no point did he indicate he knew of any unsafe or erratic driving by the driver of the vehicle. Officer Hackett did not observe any indication of intoxication of Mr. Peter. (R44:21-22; App. 121-122). Additionally, Officer Hackett stated that he did not smell any odor of marijuana. (R44:17, App. 117). The only possible evidence of criminal activity lawfully observed by Officer Hackett was the presence of a case of beer. However, that was quickly discarded as evidence as soon as Officer Hackett noticed it was unopened. So after having the opportunity to observe Mr. Peter, the accident scene, and even the case of beer, Officer Hackett still only had an unexplained accident as a fact and circumstance to support probable cause of a crime. This is the point that he observed the corner of clear plastic bags.

Officer Hackett testified that based upon his training and experience that bags of this nature can be used to transport drugs. (R44:38; App. 138). However, he also acknowledged that what he observed appeared to be a sandwich bag, purchased at a grocery store and used to carry multiple objects. (R44:40; App. 140). While a case of Miller Lite beer, by its

labeling, is highly likely to contain alcohol, the same certainty cannot be applied to the contents of a clear plastic bag. It cannot be said there is a fair probability a sandwich bag, observed only by its corner and none of its contents, will contain contraband. This is particularly true when the officer, prior to observing the bag, has already observed an absence of any suspicious odor or signs of intoxication of the sole occupant of a vehicle.

## CONCLUSION

This Court should reverse the decision of the circuit court denying the motion to suppress evidence. The suspected controlled substance was not in plain view because it required an additional search by Officer Hackett to become exposed. Additionally, what was observed in plain view by Officer Hackett lacked probable cause to believe it was connected to criminal activity.

Dated at Milwaukee, Wisconsin this 27th day of October, 2014.

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## CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC COPY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19 for a brief produced with a proportional serif font. The length of this brief is 2,274 words.

I further certify that I have submitted an electronic copy of this brief, excluding the Appendix, that complies with the requirement of Wis. Stat. (Rule) § 809.19(12), and the text of the electronic copy of the brief is identical to the text of the paper copy.

Dated at Milwaukee, Wisconsin this 27th day of October, 2014.

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