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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP002289 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DARRELL G. LEWIS,
Defendant-Appellant.

ON APPEAL FROM A DECISION BY THE
CIRCUIT COURT DENYING DEFENDANT'S
MOTION TO SUPPRESS FRUITS OF VEHICLE
SEARCH, ADAMS COUNTY, THE HONORABLE
CHARLES A. POLLEX, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

The Defendant does not request oral argument or
publication.

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ARGUMENT

I. POLICE WERE NOT RESPONDING TO A DOMESTIC DISTURBANCE; THE 911 CALLER NOTED THAT MR. LEWIS HAD LEFT HER RESIDENCE & WAS DRIVING INTOXICATED

The 911 caller in this case, Mr. Lewis's ex-girlfriend, was not calling police to report an on-going disturbance, rather she called police to notify them that he had left her residence driving and that he was intoxicated (2:3). The 911 caller does not indicate that Mr. Lewis was causing a disturbance; she states that he was "jumping on her couch", but does not otherwise indicate that he was causing a disturbance. Additionally, with respect to a gun that Mr. Lewis allegedly had in his possession, the 911 caller does not indicate that Mr. Lewis was handling the weapon in a dangerous or negligent way. The police report attached to the criminal complaint states that Mr. Lewis "jumped on her couch, is intoxicated and has a gun without a permit" (2:3). The caller does not state that Mr. Lewis has the gun in his hand while jumping on the couch, for

example. The caller does not specify whether Mr. Lewis had the gun holstered, if it was in his car, or if Mr. Lewis simply has a gun, at home perhaps, and to her knowledge he did not have a permit for it. In fact, after Mr. Lewis's arrest the 911 complainant, Kayla Lambert, admits to police that she "did not actually see a gun or have knowledge that one was involved today" and that "[she] was referring to a past history with Darrell's ex-wife and she said that he had a gun years ago. (2:5). The information from the 911 call does not create enough of a probability that Mr. Lewis has the gun on his person, or even in his car. As such, the State's argument that Mr. Lewis may have been committing disorderly conduct while armed, endangering safety by use of a dangerous weapon, or possession of a firearm while intoxicated are farfetched conclusions unsupported by the information given by the 911 caller to police.

II. THIS CASE IS DISTINGUISHABLE FROM *SMITER*

The State argues that this Court should review this case and apply its holding in *State v. Smiter*, 2011 WI App 15, 331 Wis. 2d 431, 793 N.W.2d 920, 923 (2011). The facts in *Smiter* are distinguishable from the facts in this case when one considers the law violations in question. In *Smiter* the defendant was arrested for possession of a marijuana blunt, police then searched his vehicle, and on appeal he argued that the police lacked a lacked reasonable belief that additional contraband or drugs related to the offense of arrest would be found in his vehicle. *Id.* at para. 14.

The nature of a drug arrest vs. an alcohol-related OWI arrest creates a crucial difference in the analysis of these vehicle searches. When an officer makes an arrest for possession of a controlled substance, it behooves him to search a vehicle recently occupied by the arrestee since charges related to possession of a controlled substance change incrementally if additional controlled substances are found. Wisconsin statute allows for stiffer penalties, including longer incarceration and higher fines, the more controlled substances a person possesses. In *Smiter*, had officers then found a ¼ kilo of THC in his vehicle, would likely be facing felony possession with intent to distribute charges. In the case at hand, the offense of arrest was an alcohol-related operating while intoxicated. There is nothing that could be found in Mr. Lewis's vehicle that would increase the penalties he could face for the offense

of arrest, operating while intoxicated. In other words, the penalties and charges for operating while intoxicated only change as the blood-alcohol content (“BAC”) changes. Mr. Lewis’s BAC was fixed, in a sense, at the time of arrest; the evidence that would secure his conviction (a BAC result from a blood draw), was not going to be affected in any way by any evidence that officers could find in his vehicle. In that way, this case is distinguishable from *Smiter*, since officers could not reasonably believe that they would find additional evidence of operating while intoxicated¹.

III. IT WAS NOT “MORE LIKELY THAN NOT” THAT OFFICERS WOULD FIND ADDITIONAL CONTRABAND OF OTHER OFFENSES IN MR. LEWIS’S VEHICLE

The State argues that pursuant to the holding in *Lefler* that officers had enough information to believe that it was *likely* that additional contraband related to other crimes other than the offense of arrest would be found in Mr. Lewis’s vehicle. State’s brief at 14. *Lefler*, again, in highly distinguishable from the facts at hand. Lefler was pulled over by police under suspicion of operating while intoxicated. Most importantly 1) Lefler was known to police to be a suspect in recent burglaries, 2) officers saw “prying type” tools in plain-view on the floor of Lefler’s vehicle, and 3) officers knew Lefler did not hold employment that required the use of such tools. *State v. Lefler*, 2013 WI App 22, 346 Wis. 2d 220, 827 N.W.2d 650. In *Lefler* there is a strong argument that it was more than likely that contraband would be found in Lefler’s vehicle relating to other crimes, i.e. burglary. Compare to the facts in this case. The officers had a 911 caller who gave unspecific information about a gun that may or may not be in Mr. Lewis’s possession, and that the caller believed that Mr. Lewis did not have a permit for it. When confronted by police Mr. Lewis was cooperative, he followed the instructions of officers and provided a plausible explanation as to his recent whereabouts. The holding, and rationale, of *Lefler*, as sound as it may be, is so distinguishable from the facts at hand that it further goes to establish that in the case before this Court officers did not have the requisite overwhelming belief that contraband related to another crime would be found.

¹ Officers had already found liquor bottles outside the vehicle, prior to conducting a search of the vehicle (2:3).

CONCLUSION

For the foregoing reasons, the Defendant-Appellant respectfully requests that this Court overturn the circuit court's ruling, vacate the judgment of conviction, and remand this case to the circuit court for further proceedings.

Respectfully submitted 16th of January, 2015

Luca L Fagundes
Bar No. 1078070

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the reply brief is 1165 words.

Luca L. Fagundes

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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.

Luca L. Fagundes

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 been so reproduced to preserve confidentiality and with appropriate references to the record.

Luca L. Fagundes

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1. Criminal Complaint, excerpt from Deputy Report for Incident 13-4007, Summons, Bail Bond documents