STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP002358-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JENNIFER L. WILSON,

Defendant-Appellant.

Appeal from the Judgment of Conviction
Entered in the Brown County Circuit Court,
the Honorable Donald R. Zuidmulder Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the investigating officer lack reasonable suspicion to stop and frisk the defendant?

The trial court answered, "No," and denied the defendant's motion to suppress the evidence obtained as a result of the stop and frisk.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The undersigned attorney expects the parties' briefs to adequately address the issue presented, and accordingly believes that oral argument would be only marginally beneficial to this court in deciding the appeal. Because this is a one-judge appeal, publication of the court's decision would not be warranted. Rule § 809.23(1)(b)4.

STATEMENT OF THE CASE AND FACTS

On April 8, 2014, Jennifer L. Wilson pleaded guilty to two misdemeanors: possession of cocaine, a violation of Wis. Stat. § 961.41(3g)(c); and possession of drug paraphernalia, a violation of Wis. Stat. § 961.357(1). (24; 56:2). That same day, Circuit Judge Donald R. Zuidmulder withheld sentence on both counts, and placed Wilson on probation for 18 months. (56:8; 30).

Pursuant to Rule § 809.30, Wilson now appeals from the judgment, contending that the trial court erred when it denied her motion to suppress the evidence obtained by the arresting officer. Wisconsin Statute § 971.31(10) permits Wilson to pursue this appeal despite her guilty pleas.

In her pre-trial motion, Wilson sought to suppress all of the evidence which Green Bay Police Officer Mallory Meves obtained as a result of what Wilson contended was an unconstitutional seizure and frisk of her person. (17). The trial court heard this motion on February 25, 2014. (53). The following is a summary of the evidence adduced at that hearing.

On October 21, 2012, at 9:39 p.m., Patrol Officer Meves was dispatched to investigate a suspicious vehicle in the city of Green Bay. (53:4-6). An anonymous caller had reported that a red pickup truck had parked on Eighth Street near an alley behind South Oakland, and that a female had alighted from the truck and walked southbound down the alley. (53:6-7, 9, 17).

Meves knew that in the past there had been frequent calls regarding drug activity in the area. (53:6). The Green Bay police had been keeping an eye on a particular house in that block which she characterized as a "drug house," at which Meves stated there had been "a lot of foot traffic, vehicle traffic, people park on the street then walk down the alley, vehicles out in front of the address at random times." (53:6-7). A resident of that house was known to have manufactured or delivered cocaine and marijuana, "and also had violent tendencies and a warrant out for his arrest." (53:15). The house in question was located at 1224 South Oakland, four houses south of where the pickup truck had parked. (53:11). The house could be accessed from the alley or from a driveway on South Oakland. (*Id*.).

Meves arrived at the scene approximately ten-to-fifteen minutes after receiving the dispatch. (53:9). She immediately spotted the pickup truck described by the anonymous caller. (53:8). While another officer attempted to

determine whether the truck was occupied, Meves observed a female (eventually identified as Wilson) walking northbound in the alley, in the direction of the parked truck. (53:8-10, 17-18). Meves saw no one else in the area, but did see "some activity from the house" at 1224 South Oakland. (53:11). Meves turned her spotlight on Wilson, ordered her to stop, and approached her in the alley. (53:8-10, 17-18). Wilson complied with the order. (53:10, 18). Meves conceded at the suppression hearing that at this point, Wilson was detained, as she was not free to ignore Meves' commands. (53:18).

Meves told Wilson that she was investigating a suspicious situation and that she would pat Wilson down "for officer safety, checking for weapons, needles, anything that might stab me or anything like that for my safety." (53:12). She asked Wilson if she had any items like that, and Wilson replied that she did not. (53:12-13). Meves conceded at the suppression hearing that, as she stated in her police report, the actual purpose for the pat down search was to look for "weapons and/or contraband." (53:19).

Meves held Wilson's hands as she patted down the exterior of Wilson's clothing. (53:13, 19). She recovered no weapons. (53:13). However, Meves felt "some kind of padded envelope" in the interior pocket of Wilson's pullover, something which Meves believed was "packaged funny" and "didn't feel normal." (53:13-14.). Meves asked Wilson what the object was, and Wilson replied that it was an envelope with money in it. (*Id*.). Meves asked for and received Wilson's permission to look at the object. (*Id*.). At Meves' request, Wilson removed the envelope so that Meves could "ensure there were [no] weapons and/or contraband in there." (53:14). Wilson gave the envelope to Meves, who found inside the envelope cash, some money notations, and two "pinch baggies" containing a white powder substance which

Meves believed to be cocaine. (53:13-15). A subsequent test established that the substance was indeed cocaine. (53:15).

When asked by the prosecutor at the suppression hearing why she believed "there is potentially something suspicious going on here," Meves confirmed that her belief was based on her knowledge of the area (and specifically, the residence that Wilson appeared to be coming from), and the fact that "this vehicle may be involved in suspicious activity." (53:20-21).

Meves explained at the suppression hearing why she believed it necessary to conduct the pat-down search of Wilson:

> Anyone can have a weapon on them at any time. You know, I've pulled weapons off of 92-year-old men who posed no harm to me at all. So it's just a safety thing. I don't want to get stabbed with a needle. I don't want to be cut, you know, and it's just—you know, it's my routine.

(53:20). Meves denied that there was anything in particular about Wilson which justified the search, admitting that protective searches were "just my habit." (*Id.*). She did, however, confirm that she also took into account her knowledge of the area, that Wilson "appeared to be coming from a known drug house," that she was "potentially [ ] involved in some sort of drug activity," and that "in prior instances similar activity might involve the possession of weapons or use of weapons." (53:21). She noted, "The gentleman who did reside [at the suspected drug house] at that time did have violent tendencies and known weapons." (*Id.*).

Defense counsel argued that the officer lacked reasonable suspicion either to stop Wilson or to frisk her for weapons. (53:22-24). Ruling from the bench, the court rejected these arguments. (53:24-28; App. 101-05).

The court identified various circumstances which provided the officer with reasonable suspicion to detain and frisk Wilson. The court noted that the officer was familiar with the neighborhood, and knew that there was a drug house in the area. (53:25; App. 102). The vehicle that she was dispatched to investigate was suspiciously parked near the alley, rather than in front of a house. (53:25-26; App. 102-03). It was 9:39 p.m., and dark, and the alleyway was "in an area in which drug activity [ ] occurs." (53:26; App. 103).

These circumstances, said the court, enabled it to find "that the officer on the totality of the circumstances had a reasonable suspicion to believe that the party that she was engaging in was either involved in a drug transaction or maybe a party to a drug transaction." (53:27; App. 104). The court ruled that the officer's suspicion of drug activity enabled her to "exercise[ ] her right under ***Terry*** to—to pat the person down for weapons." (*Id*.). The court concluded that Wilson then consented to the removal of the envelope from her jacket, and that the contraband was in plain view in the envelope. (53:27-28; App. 104-05). The court accordingly concluded that there was no Fourth Amendment violation, and it refused to suppress the cocaine and drug paraphernalia. (*Id*.).

Wilson now renews her challenges to both the stop and the frisk. Additional facts pertinent to this issue are stated below.

ARGUMENT

The Officer Lacked Reasonable Suspicion to Stop and Frisk the Defendant, and the Fruits of Those Actions Should Therefore Have Been Suppressed.

A. Standard of review.

The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution guarantee the rights of citizens to be free from "unreasonable searches and seizures."

As will be discussed below, it cannot be disputed that Officer Meves both seized and searched Wilson. The question in this appeal is whether the seizure and search were "unreasonable" under the totality of the circumstances known to the officer at the time that she took these actions.

Whether the officer's actions violated Wilson's constitutional guarantees involves an issue of constitutional fact. In resolving such issues, this court defers to the trial court's findings of historical facts, and affirms those findings unless they are clearly erroneous. This court, however, independently reviews the trial court's application of constitutional standards to those historical facts. ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis.2d 675, 729 N.W.2d 182.

The historical facts in this case are undisputed. It is the constitutional significance of those facts which is at issue here.

B. The officer's detention of Wilson was unreasonable because she lacked reasonable suspicion to believe that the defendant had engaged in a drug transaction.

Under the Fourth Amendment, an officer has "seized" a person "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty" of that person. ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968). One's liberty is restrained only if the person actually yields to either the application of physical force or the show of authority. ***California v. Hodari D.***, 499 U.S. 621, 626 (1991).

Here, Officer Meves shone a spotlight on Wilson as she was walking in the alley, and ordered her to stop. Wilson complied with the command. (53:8-10, 17-18). Wilson was accordingly "seized" when the officer initiated the ensuing investigation and frisk. The officer conceded as much, (53:18), and the trial court appears to have assumed that the officer had indeed seized Wilson.

Although ***Terry*** itself focused on the validity of a protective search conducted during the course of an investigative detention, subsequent cases have applied its principles and reasoning in determining whether the investigative detention itself was "unreasonable" under the Fourth Amendment.

"[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." ***United States v. Sokolow***, 490 U.S. 1, 7 (1989), *quoting,*

Terry, 392 U.S. at 30. *See*, Wis. Stat. § 968.24 (codifying ***Terry***).

These "articulable facts" must be judged against an "objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" ***Terry***, 392 U.S. at 21-22.

In applying this objective standard, a reviewing court must consider the "totality of the circumstances—the whole picture;" in other words, all of the facts and circumstances which were known to the officer at the time of the stop. ***United States v. Cortez,*** 449 U.S. 411, 417 (1981).

With these basic principles in mind, Wilson now turns to a discussion of the facts which were known to Officer Meves when she initiated the encounter with Wilson. What is striking about this case is that while the officer seemed to be familiar with the neighborhood in which this encounter transpired, she knew remarkably little about Wilson herself. An anonymous caller had reported that a truck had parked near the alley in question, and that a female had alighted from the vehicle and walked down the alley. However, the caller did not describe the female (or if he/she did, the record does not reflect that description, and the dispatcher did not communicate the description to Officer Meves). (53:17). The officer arrived at the scene ten-to-fifteen minutes after receiving the dispatch. She encountered Wilson while the defendant was still in the alley, walking northbound, in other words, in the general direction of the parked vehicle.

It could not reasonably be assumed from these facts that Wilson was the female who had parked and alighted from the red pickup truck. Nothing other than her mere presence in the alley connected her to the vehicle, and given the lapse of

time between the caller's observations and those of the officer, that fact alone is insufficient to support the inference that Wilson was the female whom the caller had seen. This was a residential neighborhood. The anonymous call was made at approximately 9:30 p.m. The alley was presumably open to the public. The officer could not reasonably discount the possibility that Wilson was a resident of the neighborhood merely strolling through the alley, as any person would have been entitled to do. Because Meves stopped Wilson while she was still in the alley, the assumption that she was "returning" to the parked vehicle is based on nothing more than pure conjecture.

Regardless, Wilson's purported connection to the pickup truck is essentially a red herring. Even if one *does* infer that Wilson actually drove the truck to this location, that fact does not by itself support suspicion of criminal activity. The parking of the truck on Eighth Street was not itself suspicious. Meves conceded that the truck was legally parked. (53:16). While the truck was not parked in front of whatever house the female suspect was apparently visiting, the record does not indicate the extent to which parking spots were available in front of all of the houses which abutted the alley. Officer Meves did, however, testify that there "were other vehicles there."[1] (53:11).

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[1] The testimony was given in response to the question, "Was there anyone else in the area at that time other than Officer Meyer and the person he was dealing with?" (53:11). Meves responded that there was "some activity from the house that they were coming from," apparently referring to the suspected "drug house." She then stated, "There were other vehicles there, but, you know, I was tending to the matter at hand." (*Id.*). It is unclear from this question and answer whether the "other vehicles" were "in the area" (as the question was phrased) or were specifically located near the house associated with drug activity.

Thus, the officer had no basis at all for assuming that Wilson—even if she *were* the person who had parked the pickup truck—visited the particular house associated with drug activity. The anonymous caller apparently did not mention that he/she had seen the female go to that particular residence. Meves first saw Wilson in the alley. Meves did not say how close Wilson was to this residence when she first spotted her. There were other residences which abutted the alley, as Meves testified that the suspicious house was "about four houses to the south" from where the pickup was parked. (*Id*.). These, and presumably, other houses could be accessed from either side of the alley. Nothing in the record supports the assumption that Wilson visited the particular house at 1224 South Oakland. Nor is there anything in the record to support the notion that any *other* house in that block, or in that neighborhood, was associated with criminal activity. Under the facts of this case, there was no articulable basis for suspecting Wilson of criminal activity unless—at a minimum—the facts support the inference she visited or was somehow otherwise connected with the house at 1224 South Oakland.

The mere fact that Wilson was walking in an area *near* a house which was known to have been the site of prior drug activity does not render her conduct sufficiently suspicious to justify an investigative detention. ***Brown v. Texas***, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct").

The court observed in ***Brown*** that "appellant's activity was no different from the activity of other pedestrians in that neighborhood." *Id*. Brown, like Wilson, was discovered in an alley. 443 U.S. at 48. If anything, Brown's conduct was

more suspicious than Wilson's, because Brown and another man, when first seen by the officers, were a few feet from each other and walking in opposite directions, leading both investigating officers to believe that "the two had been together or were about to meet until the patrol car appeared." *Id*. Here, neither the officer nor the anonymous caller claimed to have seen Wilson interacting with anyone else in the neighborhood.

Consistent with ***Brown***, two Wisconsin cases have held that officers lacked reasonable suspicion to seize a suspect, despite the suspect's presence near a house at which there had been reports of criminal activity. ***State v. Washington***, 2005 WI App 123, ¶ 17, 284 Wis. 2d 456, 700 N.W.2d 305 (officer seized person observed in front of house at which officers were investigating report of loitering and drug sales); ***State v. Pugh,*** 2013 WI App 12, ¶¶ 2-3, 12-13, 345 Wis. 2d 832, 826 N.W.2d 418 (officer seized person at about 11 p.m. as he walked behind vacant apartment building, about fifty feet from a drug house the officers were investigating). It is worth noting that reasonable suspicion was deemed lacking in ***Washington*** even though the officers knew that Washington did not live in the area and that he had previously been arrested for narcotics sales. 284 Wis. 2d 456, ¶¶ 3, 17.

The fact that this incident occurred at about 9:30 p.m. does not render Wilson's conduct any more suspicious. ***State v. Cooley***, 229 N.W.2d 755, 761 (Iowa 1975) ("9:30 p.m. is a reasonable hour to be traveling city streets"); ***United States v. Blair***, 524 F.3d 740, 751 (6th Cir. 2008) (defendant stopped at 10:30 p.m., "an hour not late enough to arouse suspicion of criminal activity"). This factor, even in conjunction with the fact that there had been drug activity in the area, is insufficient to justify an investigative detention.

State v. Santos, 267 Conn. 495, 838 A.2d 981, 990-91 (2004) ("the mere presence of the defendant and his companion in a high crime area at night is not sufficiently indicative of criminal activity to justify the investigative detention"); ***Strange v. Commonwealth***, 269 S.W.3d 847, 852 (Ky. 2008) ("presence in a high crime area at night … is not sufficient evidence to justify an investigatory stop"); ***Crain v. State***, 315 S.W.3d 43, 53 (Tex. Cr.App. 2010) ("walking late at night in a residential area in which burglaries occurred mostly after midnight" insufficient to justify stop).

Even if one assumes (without any evidence to support the assumption) that Wilson *visited* the house at 1224 South Oakland on the night in question (as opposed to some other house abutting the alley), that fact fails to provide an objectively reasonable basis for believing that she engaged in criminal activity. ***State v. Doughty,*** 170 Wash.2d 57, 239 P.3d 573, 575 (2010) ("Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes"). The record is devoid of facts to suggest that Wilson actually *made contact* with anyone at the suspected drug house.

Even if she did so, mere "contact" with some unidentified person at a suspicious residence is not sufficient to support the inference of criminal activity. The record here does not reveal who currently lived at the residence,[2] or whether everyone who lived there was suspected of "drug activity." Even if it could be assumed (again, without any

[2] It is unclear from the record whether the known drug dealer to whom the officer alluded still lived at 1224 South Oakland. There was an active warrant for that person's arrest, so presumably, if the police knew they could find him at the residence, they would have executed that warrant.

evidence to support the assumption) that Wilson had some type of contact with a person known to have previously been engaged in drug activity at that residence, that fact would not provide reasonable suspicion to warrant Wilson's seizure. *See,* ***Sibron v. New York,*** 392 U.S. 40, 62 (1968) (that suspect merely talked to a number of known narcotics addicts over a period of eight hours was insufficient to justify stop and frisk). Simply put, more information concerning the *nature* of Wilson's supposed "contact" with this residence and the person(s) supposedly contacted is needed for this fact to amount to reasonable suspicion.

In this regard, this court's decision in ***State v. Young***, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997), is instructive. Young was observed having a "short-term contact" with another man in a "high drug-trafficking area." 212 Wis. 2d at 420-21. Despite a trained narcotics officer's testimony that such contact could have signified a drug transaction, 212 Wis. 2d at 426-27, this court concluded that the officer lacked reasonable suspicion to stop Young based solely on this contact. 212 Wis. 2d 429-433. In doing so, the court emphasized that the officers "did not know if Young had exchanged any item with the individual or touched the individual." 212 Wis. 2d at 429. The court accordingly concluded that the conduct which the officer deemed suspicious was "conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in residential neighborhoods where drug trafficking occurs." 212 Wis. 2d at 429-430.

Of similar import is ***State v. King***, No. 13AP1068-CR, 2014 WL 552735 (Wis. Ct. App. Feb. 13, 2014) (unpublished).[3] The police in ***King*** had received "numerous pieces of intelligence" concerning drug activity at a particular parking lot, and at approximately 9:25 p.m. on the night in question, observed a vehicle with at least two occupants parked at that lot for approximately five minutes. *Id.*, ¶ 3. While they saw the car's interior light go on and off a couple of times, they were unable to observe any interactions between the occupants. *Id.*, ¶¶ 3, 19. Aside from the vehicle's location, the officers observed no other suspicious or peculiar behavior. The court held that these observations were insufficient to justify the seizure of King (the vehicle's driver), and suppressed the evidence obtained as a result of the seizure. *Id.*, at ¶¶ 19-20.

Unlike the situation in both ***Young*** and ***King***, the record in this case does not even reflect with whom, if anyone, Wilson may have had contact. Even if one assumes that there *was* contact with *someone* at the suspected "drug house," the precise nature of such contact, in other words, whether anything was exchanged between Wilson and whichever person(s) she may have contacted, has not been established. Given this factual deficiency, it cannot reasonably be inferred from Wilson's mere presence in the area that she was engaged in drug activity.

No other facts known to Meves when she encountered Wilson in the alley provided her with an objectively reasonable basis for suspecting Wilson of criminal activity. As far as the record reveals, Wilson did not act nervously, she

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[3] Pursuant to Rule § 809.23(3)(b), this decision is cited for its persuasive value. As required by paragraph (c) of the rule, the decision is reprinted in the Appendix at 106-09.

obeyed the officer's commands, and she did not attempt to flee or to avoid contact with the officer in any other manner.

Given the totality of the circumstances facing Officer Meves, the facts simply do not "warrant a [person] of reasonable caution in the belief" that Wilson had just engaged in a drug transaction, or that she had engaged in any other criminal activity. Officer Meves had nothing more than an unparticularized hunch that Wilson was involved in drug activity, and such hunches do not amount to the requisite "reasonable suspicion." ***Terry***, 392 U.S. at 27. Therefore, the officer's seizure of Wilson was unreasonable, and it violated the Fourth Amendment.

C. The officer's frisk of Wilson was unreasonable because she lacked reasonable suspicion to believe that Wilson was armed and dangerous.

The Fourth Amendment does not grant officers the *independent* right to conduct "protective searches" whenever they suspect a citizen may be armed and dangerous. As Justice Harlan stated in his concurrence in ***Terry***:

> [I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence.

Terry, 392 U.S. at 32 (Harlan, J., concurring) (emphasis in original).

The Supreme Court appears to have adopted this reasoning in ***Adams v. Williams***, 407 U.S. 143, 146 (1972), when it stated, "*So long as the officer is entitled to make a forcible stop,* and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." (Emphasis added). *See*, 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.6(a) at 838-44 (5th ed. 2012).

The officer's investigation of Wilson's suspected criminal activity—specifically, the belief that she had just engaged in a drug transaction—provided the only conceivable justification for Officer Meves to have been in Wilson's immediate presence. If the officer was not entitled to "forcibly stop" or seize Wilson for this purpose, then neither could she frisk her. For this reason, this court need only address the validity of the frisk if it first concludes that the stop was constitutionally valid. Wilson's discussion of the validity of the frisk will therefore proceed on the assumption that the court has already determined that the circumstances enabled Officer Meves reasonably to suspect that Wilson had just engaged in a drug transaction.

Terry establishes the constitutional parameters of a protective search, or as it is commonly called, a "frisk." An officer may search a person suspected of criminal activity "to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." 392 U.S. at 24. A frisk is permissible only when the officer reasonably suspects that the individual "may be armed and presently dangerous." 392 U.S. at 30.

The principles which apply in determining the validity of an investigatory detention also apply in determining the validity of a frisk. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. "[D]ue weight must be given, not to the [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of [the officer's] experience." 392 U.S. at 27. The standard to be employed is an objective one: "whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [the officer's] safety or that of the others was in danger." *Id*. Once again, a reviewing court must consider the totality of the circumstances known to the officer at the time of the frisk. ***State v. Kyles,*** 2004 WI 15, ¶ 10, 269 Wis. 2d 1, 675 N.W.2d 449.

Wilson will now apply these principles to the facts of this case. It is worth noting at the outset that Officer Meves' subjective motivation for frisking Wilson did not comport with ***Terry***. The officer's purpose in conducting the search was not limited to a search for weapons: by her own admission, she also sought contraband. (53:14, 19). Moreover, the officer acknowledged that she frisked suspects as part of her "routine" and "habit," because she believed, "[a]nyone can have a weapon on them at any time." (53:20).

Because the court must employ an objective standard in evaluating the officer's conduct, Wilson acknowledges that the officer's subjective motivations for doing what she did are not dispositive of the constitutional validity of her actions. Thus, that Officer Meves was also searching for contraband (in violation of ***Terry***) does not matter so long as she had an

objectively reasonable basis for conducting a limited search for weapons. *See*, ***Whren v. United States***, 517 U.S. 806, 813 (1996). Furthermore, that she may not have been subjectively afraid of Wilson does not *necessarily* mean that she could not frisk her, for it is well-settled that subjective fear of the suspect is not a prerequisite to a valid frisk, and that "a frisk can be valid when an officer does not actually feel threatened by the person frisked or when the record is silent about the officer's subjective fear that the individual may be armed and dangerous." ***Kyles***, 269 Wis. 2d 1, ¶¶ 23-30.

Nonetheless, ***Kyles*** recognizes that the officer's subjective fear (or lack thereof) may still be considered as part of the "totality of the circumstances" in determining the validity of a frisk. 269 Wis. 2d 1, ¶¶ 34-39. The court in ***Kyles*** observed that in some cases, an officer subjective perceptions will help sustain the reasonableness of a frisk, while "[o]ther times, these perceptions may undercut a conclusion of reasonableness." *Id*., at ¶ 39.

In this case, it is telling that despite being asked twice to identify anything in particular about Wilson which might have made the officer feel that she was in danger, Officer Meves was unable to do so. She merely relied on her "routine" and "habit." (53:19-20). While not dispositive of the constitutional question, the officer's testimony is nonetheless significant. Had there been an articulable basis for believing Wilson was armed and dangerous, Officer Meves would likely have articulated it.

Even if one assumes that the officer had an objectively reasonable basis for believing prior to the frisk that Wilson was somehow involved in drug activity, that belief alone would not be sufficient to justify the frisk. Not everyone involved in drug activity is armed and dangerous.

See, ***Richards v. Wisconsin,*** 520 U.S. 385, 393 (1997) ("while drug investigation frequently does pose special risks to officer safety and preservation of evidence, not every drug investigation will pose these risks to a substantial degree"). The Wisconsin Supreme Court has twice declined to recognize a "*per se* rule that suspicion of drug dealing of itself would constitute circumstances justifying a protective search." ***State v. Johnson***, 2007 WI 32, ¶ 29 n.10, 299 Wis. 2d 675, 729 N.W.2d 182; ***State v. Williams***, 2001 WI 21, ¶ 53, 241 Wis. 2d 631, 623 N.W.2d 106.

Here, of course, even if one assumes that Wilson went to the house at 1224 South Oakland to *purchase* drugs, there is nothing in the record to suggest that she was a drug *dealer*, so there was even less reason to suspect that she would be armed. Cases across the country distinguish between drug users and drug dealers, and have recognized that the suspicion of mere *possession* of drugs does not provide an adequate basis for frisking a suspect. ***Upshur v. United States,*** 716 A.2d 981, 984(D.C. App. 1998) (court refuses to "impute a safety concern from the mere fact the officers believed appellant was buying drugs"); ***State v. Bishop,*** 146 Idaho 804, 203 P.3d 1203, 1219 (2009) (suspicion that suspect may be under influence of a narcotic insufficient to justify frisk); ***State v. Baker,*** 229 P.3d 650, 666 (Utah 2010) ("suspected possession of narcotics does not logically support an objectively reasonable belief that [the defendant] was armed and dangerous").

It bears repeating that the officer knew almost nothing about Wilson before she frisked her. Wilson had obeyed the officer's command to stop while still in the alley, and had provided identification upon request. (53:9). The officer apparently learned *after* the encounter that Wilson had previously been arrested, when she "verified her name with

our group mug shots." (*Id*.). Wilson evidently did not reach for a weapon, put her hands in her pockets, make any sudden movements or threatening gestures, or suggest in any other manner that she may have been armed. There is nothing in the record to suggest that Officer Meves noticed a bulge in Wilson's pullover jacket until she actually *felt* that bulge when conducting the protective search.

Nor could the frisk be justified by the time of night, the lighting conditions, or the remoteness of the area. Persons are no more likely to be armed and dangerous at approximately 9:30 p.m. than at other times of the day. While it was dark outside, Officer Meves' ability to observe Wilson was enhanced by the spotlight she shone on her. (53:17-18) This was a residential area of Green Bay. That there were no other pedestrians in the immediate vicinity of the stop did not make this encounter any more dangerous. Moreover, a back-up officer, Officer Meyer, was nearby to provide assistance if needed. (53:5, 7-8, 11).

One of the factors to which Meves testified in attempting to justify the frisk is that "the gentleman who did reside [at 1224 South Oakland] at that time did have violent tendencies and known weapons." (53:21). That fact is simply irrelevant to this analysis. The record does not establish that Wilson was in any way associated with that "gentleman," or that she had had contact with him on that evening. But even if one assumes that she *had* been in his company that evening, that fact would not entitle the officer to frisk *Wilson*. ***Ybarra v. Illinois,*** 444 U.S. 85, 92-94 (1979) (officer executing warrant to search tavern and tavern's bartender for evidence of narcotics dealing and possession lacked reasonable suspicion to frisk tavern patron).

Given the totality of the circumstances, the officer simply did not have an objectively reasonable basis to have believed that Wilson may have been armed and dangerous. The frisk was therefore invalid under the Fourth Amendment.

D. The fruits of the stop and frisk must be suppressed, and the convictions must be reversed.

Had Officer Meves not stopped and frisked Wilson, she would not have been in the position to feel, and eventually, seize the envelope containing cocaine and drug paraphernalia. This evidence was therefore "fruits of the poisonous tree," and must be suppressed. ***Wong Sun v. United States,*** 371 U.S. 471, 484-88 (1963).

Without this evidence, the state lacked any discernible basis for charging Wilson with either possession of cocaine or possession of drug paraphernalia. Thus, the trial court's error in refusing to suppress this evidence cannot be deemed harmless. *Compare,* ***State v. Armstrong***, 223 Wis. 2d 331, 370-72, 588 N.W.2d 606 (1999). Wilson's convictions must therefore be reversed.

CONCLUSION

For the reasons stated in this brief, Jennifer L. Wilson respectfully urges the court to reverse her convictions and to remand the case to the circuit court.

Dated this 16th day of December, 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 5,721 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 16th day of December, 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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.

Dated this 16th day of December, 2014.

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