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

DEFENDANT-APPELLANT'S REPLY BRIEF

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

A. The officer's detention of Wilson was unreasonable.

In upholding the officer's detention of Jennifer Wilson, the state merely reiterates the undisputed facts presented at the suppression hearing (all of which were discussed in Wilson's brief-in-chief), and without any legal analysis or citation to precedent, simply makes the conclusory assertion that "Officer Meves had reasonable suspicion that some kind of criminal or drug-related activity had taken or was taking place, and was thus justified in making a brief, investigatory stop." Respondent's brief at 7.

Thus, the state makes no attempt to respond to the arguments Wilson presented at pages 8-15 of her brief-in-chief, which explained why the facts here did not provide the officer with reasonable suspicion of criminal activity. Nor does the state attempt to distinguish or even to discuss the numerous cases Wilson cited in support of her argument at pages 10-15 of her brief.

The state merely cites facts which are remarkable not because of what they *tell us* about Jennifer Wilson, but because of what they *fail* to establish about her and her activities that night. At the risk of repeating arguments made in her brief-in-chief, Wilson deems it important to again emphasize the following:

First, the state notes that the neighbor whose call triggered this investigation "had indicated it appeared a drug transaction was taking place." State's brief at 7. But the record does not reveal *why* the neighbor held this belief. As far as the record reveals, the anonymous caller did not see the female interact with anyone, and did not see where the female went after entering the alley. The caller was therefore merely conveying nothing more than an "inchoate and unparticularized suspicion or 'hunch,' " which, even if it had been that of an experienced police officer, would not be sufficient to provide the officer with the "reasonable suspicion" necessary to support an investigative detention. ***Terry v. Ohio,*** 392 U.S. 1, 27 (1968). Needless to say, there is no greater reason for crediting the inchoate hunch of an anonymous citizen.

Second, the state could not establish that Wilson had any connection to the red pickup truck parked on Eighth Street near the alley. The caller provided no description of the female who alighted from that vehicle, so there is no way of knowing whether Wilson was the person the caller saw. Officer Meves stopped Wilson while she was still in the alley. The mere fact that Wilson was walking toward Eighth Street ten-to-fifteen minutes after the caller's observation, (53:9), does not establish that she was returning to the supposedly suspicious vehicle.

Third, the manner in which the truck was parked did not suggest that its occupant(s) were engaged in criminal activity. The truck was not parked illegally. It was parked on a city street. The record does not reveal which house in the block, if any, the female may have visited, or whether a more convenient parking spot was available near that house. Any inference of criminal activity arising from the location of the truck was simply unwarranted.

Fourth, the fact that a house in that block, at 1224 Oakland, was known to be the residence of a drug dealer hardly establishes a legitimate basis for stopping Wilson, for the simple reason that the state failed to establish that Wilson *went* to that house, or that she interacted with anyone at that house. Without any evidence that Wilson had just interacted with *someone* in the area, and that the interaction was suggestive of a drug transaction, the state is merely left with the untenable assertion that her mere presence in the general vicinity of a house thought to harbor a drug dealer provided the officer with a constitutionally sufficient basis for detaining her. Well-settled caselaw, including the decision of the United States Supreme Court in ***Brown v. Texas***, 443 U.S. 47 (1979), establishes that a pedestrian's mere presence near a home at which there were reports of criminal activity does not provide a sufficient basis for concluding that the pedestrian herself is engaged in criminal activity. *See,* cases cited at pages 10-11 of Wilson's brief-in-chief. As Wilson has already observed, the state addresses none of this caselaw in its brief.

For these reasons, the officer lacked reasonable suspicion to stop Jennifer Wilson.

B. The officer's frisk of Wilson was unreasonable.

The state's argument concerning the validity of the frisk is equally unpersuasive. The state begins that argument by noting that the officer's observation of Wilson in the alley "was consistent with the complainant's description of a potential drug transaction involving a female entering the alley." State's brief at 8. But it bears repeating that the anonymous caller provided no "description of a potential drug transaction:" the caller merely stated that a female had alighted from a truck and entered the alley. That Wilson was

found walking alone in the alley ten-to-fifteen minutes later is not in any way consistent with the notion that she had engaged in a drug transaction.

The state proceeds to again repeat the uncontested facts regarding the officer's encounter with Wilson, and to again assert, without citing a single case involving similar facts, that the officer "had reasonable suspicion to believe that the defendant may be armed and dangerous." State's brief at 8.

The argument appears to be based on two distinct theories, both of which are controverted by existing caselaw.

First, the state notes that Officer Meves "is not required to take unnecessary risks in the performance of [her] increasingly hazardous duties," a principle which Wilson does not dispute. However, the state *also* notes in that respect that Officer Meves testified that she has "'pulled weapons off of 92-year-old men' who appeared to pose no threat to her." State's brief at 8. The state is apparently suggesting that *every* investigative stop is *potentially* dangerous to an officer, that it can *never* be determined with any degree of certainty whether a particular suspect is armed and dangerous, and that because officers should not be required to risk danger to themselves during these encounters, they should be able to routinely frisk *every* person they detain for investigative purposes, *regardless* of the circumstances known to the officer at the time. Indeed, Officer Meves testified that it was her "routine" and "habit" to perform protective searches during investigative detentions, precisely because "Anyone can have a weapon on them at any time." (53:20).

If this is the state's argument, it is patently contrary to ***Terry*** and its progeny. ***Terry*** holds that there must be reasonable suspicion both to support the forcible stop *and* to

conduct the protective search for weapons. That is, an officer is not justified in frisking *every* person he/she detains, even if that means that a person who might otherwise appear not to be armed and dangerous might actually pose a threat to the officer's safety. Were it otherwise, the ***Terry*** holding would be reduced to a consideration only of the validity of the initial detention. Moreover, even the state acknowledges (at page 8 of its brief) that a reviewing court must apply a "case-by-case" approach and must consider "the totality of the circumstances" in evaluating the validity of a protective search. Yet, the state's argument here eschews that approach and consideration, in favor of permitting a search of every person whom an officer detains.

Second, the state argues that because "drug activity often involves weapons" and because Wilson was suspected of drug activity, a protective search was necessarily appropriate. State's brief at 8. Once again, existing precedent, cited at pages 18-20 of Wilson's brief-in-chief, soundly rejects that argument. Even if Wilson were suspected of drug *dealing*, our supreme court has twice declined to adopt 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. Of course, in this case, 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*, and cases from other jurisdictions have held that the suspicion of mere *possession* of drugs does not provide an adequate basis for frisking a suspect. *See*, cases cited at page 19 of Wilson's brief-in-chief. The state makes no attempt to distinguish or even discuss any of the cases mentioned above.

Finally, the state notes that "the resident at the house [at 1224 Oakland] was a known cocaine and marijuana distributer[sic] and had violent tendencies." State's brief at 8. That fact is simply irrelevant to the present discussion. The officer certainly would have had a basis for frisking the *known drug dealer* had she encountered him/her, but Wilson clearly was not that person. Even if one assumed that Wilson had somehow interacted with that person that night, that fact would not give the officer an objectively reasonable basis for searching *Wilson*. ***Ybarra v. Illinois***, 444 U.S. 85, 92-94 (1979).

For these reasons, the officer lacked reasonable suspicion to conduct the pat-down search of Jennifer Wilson.

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

In her brief-in-chief at 21, Wilson argued that the envelope containing contraband, which the officer retrieved from the interior pocket of Wilson's pullover, was the fruit of the officer's illegal stop and frisk, and she cited ***Wong Sun v. United States***, 371 U.S. 471, 484-88 (1963) for this proposition.

The state does not respond to that argument, but argues instead that Wilson *voluntarily consented* to the retrieval and search of the envelope. State's brief at 9. The argument is misplaced. As our supreme court observed in ***State v. Phillips***, 218 Wis. 2d 180, 205 n.9, 577 N.W.2d 794 (1998):

> While the analysis and facts considered in the voluntariness and "fruits" tests "overlap to a considerable degree, they address separate constitutional values and they are not always coterminous." ***United States v. Melendez-Garcia***, 28 F.3d 1046, 1054

> (10th Cir. 1994). It is important "to understand that (i) the two tests are not identical, and (ii) consequently the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was both voluntary and not an exploitation of the prior illegality." *Id*. at 1054-55 (quoting Wayne R. LaFave, 3 Search and Seizure § 8.2(d) at 190 (1987) (citations omitted)).

Thus, "The mere fact that consent to search is voluntary within the meaning of ***Schneckloth*** and ***Rogers*** does not mean that it is untainted by prior illegal conduct." ***Phillips***, 218 Wis. 2d at 204. The court in ***Phillips*** went on to cite ***Wong Sun*** and ***Brown v. Illinois***, 422 U.S. 590, 602 (1975) for the proposition that, "When, as here, consent to search is obtained after a Fourth Amendment violation, evidence seized as a result of that search must be suppressed as 'fruit of the poisonous tree' unless the State can show a sufficient break in the causal chain between the illegality and the seizure of evidence." 218 Wis. 2d at 204-05.

Brown set forth three factors for determining whether the causal chain has been sufficiently attenuated: "(1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." ***Phillips***, 218 Wis. 2d at 205; ***Brown***, 422 U.S. at 603-04.

In this case, all three factors weigh in Wilson's favor. Officer Meves frisked Wilson immediately after stopping her and telling her that she was investigating a suspicious situation. (53:12). While conducting that frisk, the officer felt what she believed to be "some kind of padded envelope," asked Wilson what was in it, and asked for and received Wilson's permission to look at it. At Meves' request, Wilson removed the envelope and handed it to Meves, who

immediately searched it and found the contraband in question. (53:13-14). Thus, the envelope was obtained, searched and seized within seconds of both the illegal stop and the illegal frisk. There were no "intervening circumstances" of any kind: there was a seamless transition from the stop to the frisk to the retrieval and search of the envelope. As Wilson has hopefully established, both the stop and frisk were flagrant violations of ***Terry*** and its progeny. As Officer Meves readily conceded at the suppression hearing, she was seeking to obtain not only weapons but contraband as well. (53:14, 19). And as the trial court acknowledged, (53:26-27; App. 103-04), an officer may not search for contraband when conducting a protective search for weapons. Hence, the invalid "purpose" of the search weighs in Wilson's favor as well.

For these reasons, the envelope and its contents were fruits of the illegal stop and frisk, and must be suppressed regardless of whether Wilson's consent to the removal and search of the envelope was otherwise voluntary.

Because the state does not dispute Wilson's contention that the error in failing to suppress the challenged evidence cannot be considered harmless, the state is deemed to have conceded that argument. ***Charolais Breeding Ranches, Ltd., v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

CONCLUSION

For the reasons stated in the briefs she has filed, Jennifer L. Wilson respectfully urges the court to reverse her convictions and to remand the case to the circuit court.

Dated this 9th day of March, 2015.

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 2,259 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 9th day of March, 2015.

Signed:

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