STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP0195 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVE C. DETERDING,

Defendant-Appellant.

Appeal from an Order Denying Defendant's Motions to Suppress Entered in the Dane County Circuit Court, the Honorable Mariann Sumi, presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

I. The Trooper Did Not Have the Requisite Evidence to Warrant Removing the Bottle From Appellant's Pocket.

It appears that both parties agree that the proper reference for deciding this case lies in State v. McGill, 234 Wis. 2d 560, 609 N.W.2d 795 (2000). The disagreement is in what McGill actually stands for. The State insists that Appellant has mischaracterized the testimony of Trooper Larson (*See* Respondent's Brief at p. 8), but at the same time, the State attempts to supplement the testimony of Trooper Larson with its own thoughts, hopes, suspicions and beliefs. Additionally, the State conflates the holding of McGill, believing that an incorrect belief or suspicion by on officer, such as in McGill, is the same as not having any suspicion of a weapon, as in the case at bar.

First, addressing the issue of the testimony of Trooper Larson, the State has insisted, both at the trial court level and in this appeal, on inserting its suspicions into the factual record and relying on their suppositions to justify the search of Appellant's pocket. The most important thing to recognize here is the difference between Trooper Larson's testimony and the argument of the State. The crux of Trooper Larson's testimony is that he had no idea what the item was and did not suspect a weapon. (*See* Mot. Hr'g. 15:22-23; 40:16-17; 40:24-25). Trooper Larson stated on at least three separate occasions that he did not know what the object was, but never testifies that he suspected a weapon, even after prompting by

defense counsel about whether it felt like any weapon that Trooper Larson would have been aware of at the time. (*See* Mot. Hr'g. *Supra*). There is no mention by Trooper Larson of an explosive or of mace. These concepts do not appear until the State makes its argument to justify the search. (Mot. Hr'g 49:14-15).

The key point here is that Trooper Larson never suspected that this object was a weapon. If he did, he would have testified to that fact. Instead, the State supplemented the testimony with a litany of random items that could be used as weapons after the trooper finishes his testimony. Worse yet, is the items rattled off by the State do not resemble the description given by Trooper Larson. The State posited that the item could have been Mace, pepper spray or brass knuckles. It is not possible to know now whether Trooper Larson would be familiar with those weapons, but based on his training and experience, it is likely that he would have been trained on identifying those weapons. If that is true, then if Trooper Larson suspected those uncommon weapons, he would have testified that the bottle felt like pepper spray or brass knuckles. He didn't do so, and that can only be because he did not believe that the bottle felt like those weapons.

In its brief, the State relies on this supplanted "evidence" of mace or pepper spray, et cetera to justify the search of Appellant's pockets. But in doing so, it makes a drastic error. The State positioned itself to rely on argument as fact to justify the search of Appellant's pockets. In actuality, Trooper Larson never suggested that the item felt like mace, pepper spray or any other weapon he was familiar with. The question then, ultimately, becomes whether McGill, and the

other cases on frisks and searches allow for entry into the pockets of a citizen when an officer testifies that he did not know what an item was, but does not suggest that it may have been a weapon.

Both parties have relied on State v. McGill and this case does provide the appropriate guidance to determine the outcome in the present case. In McGill, the Court reiterated the consistent point that, "[a]ll that is required is a reasonable belief that the object might be a weapon." State v. McGill, 234 Wis. 2d 560, 575 (2000). Ultimately, it was determined that the McGill case involved a reasonable search of the defendant's pockets because the officer believed that the item might be a weapon. *See* id. at 575-78. Highlighted in McGill was that the item was a "hard, oblong object between two to four and one-half inches long" and that the officer "thought the object 'could have been a pocket knife'" Id. at 575. Such is not the case here. As has been made apparent previously, Trooper Larson did not express any belief that this bottle resembled any weapon he was familiar with. It was continuously described as a "hard object" and that Trooper Larson did not know what it was until he removed it.

This is the concept that is absent in the State's argument. The State has continued to take the position that every unknown object is subject to removal from pockets. That is not the rule in McGill or the other cases addressing frisks and subsequent searches. Terry v. Ohio set out the protective frisk rules, and although Terry has been discussed thoroughly throughout search and seizure cases, including previously in this case, it is worth discussing one secondary

portion of the Terry rule. Terry created the stop and frisk procedures. At the end of the Court's holding, it expressed the legality of a frisk, specifically setting about the legality of "a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him." McGill, at 569 (quoting Terry at 392 U.S. at 30-31). This frisk must be based on reasonable suspicion based on specific and articulable facts. *See* Id. at 571. It is hard to fathom any scenario where repeated "I don't know" type statements amounts to any specific or articulable fact to justify a further search. And if reasonable suspicion could not be supported, probable cause for a search is definitely lacking.

Further, a "Terry frisk is not to see if the defendant is hiding something that may be evidence of illegal activity. As the U.S. Supreme Court made clear, 'nothing in Terry can be understood to allow a generalized cursory search for weapons or, indeed, any search whatever for anything other than weapons.'" Id. at 581 (Abrahamson dissenting; quoting Ybarra v. Illinois, 444 U.S. 85, 93-94). The first portion of this statement is apt to the present situation; Terry frisks are not to see if the defendant is hiding something. That is what happened here. Appellant had a plastic bottle concealed in his pocket. The officer involved, curious as to what the item in Appellant's pocket was, reached in and removed the item. Trooper Larson stated no reason to suspect this to be a weapon during his testimony, specifically because there was no reason to believe it was a weapon.

Conclusion

For these reasons the decision of the trial court on February 18, 2014 finding that Trooper Larson was allowed to remove the urine bottle during a pat-down should be reversed. Further, the decision of the trial court to allow Trooper Larson to request Appellant perform field sobriety tests should also be reversed.

Dated this _____ day of _____, 2015.

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Certification as to Form/Length

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 1,211 words.

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Dated this _____day of _____, 2015.

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Certification of Compliance with Electronic Filing Requirement

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Dated this _____day of _____, 2015.

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