STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP000291-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL TAWAN SMITH,

Defendant-Appellant.

On Appeal from the Denial of a Pretrial Motion to Suppress Evidence and the Judgment of Conviction Entered in the Rock County Circuit Court, the Honorable James P. Daley, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. A Confidential Informant's Vague Statement That Mr. Smith was Selling Drugs, and a Trash Pull That Produced .21 Gram of Marijuana Stems and Roach Cigarettes and Established That at Least Two People Resided at the Residence, Did Not Provide Probable Cause to Arrest Mr. Smith.

The state has conceded that the four unspecified "pieces of intelligence" add little to a probable cause to arrest analysis. (Respondent's brief, p. 7, n. 1). Therefore, the question before the court is whether (1) a confidential informant's (whose reliability is relatively unknown) vague statement that Mr. Smith was selling drugs, and (2) a trash pull that produced a small amount of marijuana stems and roach cigarettes and established that at least two people resided at the residence, constitutes probable cause to arrest Mr. Smith.

Officer Mackey's search warrant affidavit may have provided probable cause to support the inquiry as to whether evidence of a crime would be at a particular location, as addressed in Mr. Smith's brief-in-chief. However, this "quantum of evidence" that provided the requisite probable cause to *search* Mr. Smith's residence was in no way sufficient to *arrest* Mr. Smith. *See* ***State v. Secrist***, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). The totality of the evidence would not lead a reasonable police officer to believe that Mr. Smith had "probably committed a crime." ***State v. Kutz***, 2003 WI App 205, ¶ 11, 267 Wis. 2d 531, 671 N.W.2d 660.

A. A reasonable person in Mr. Smith's position would have felt under arrest the moment he was removed from the vehicle.

The state argues that Officer Mackey's initial interaction with Mr. Smith was an investigatory stop based on reasonable suspicion and that Mr. Smith was detained, not arrested, pursuant to the search warrant for his residence. The state is wrong in both respects.

The circuit court's finding that there was probable cause to arrest Mr. Smith in this case in and of itself demonstrates that the facts and circumstances of Mr. Smith's detention was more than a ***Terry*** stop. *See* ***Terry v. Ohio***, 392 U.S. 1 (1968). There is no "litmus-paper test for determining when a seizure exceeds the bounds of an investigative stop" and becomes an arrest because of the "endless variations in the facts and circumstances." ***Florida v. Royer***, 460 U.S. 491, 506 (1983). However, when police restraint is so intrusive that it may be indistinguishable from an arrest, probable cause is required. *See* ***Dunaway v. New York***, 442 U.S. 200, 212–16 (1979).

The objective test for whether a person has been arrested "is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***State v. Marten-Hoye***, 2008 WI App 19, ¶ 14, 307 Wis. 2d 671, 746 N.W.2d 498. (citations omitted). A reasonable person in Mr. Smith's position would have believed he was "in custody" when Officer Mackey stopped him and immediately put him in handcuffs.

Here, Mr. Smith was in a moving vehicle when the police pulled him over, blocks away from his residence. Three officers approached Mr. Smith in his

stopped car. (14:8). Officer Mackey "got him out of the vehicle" and put him in handcuffs. (29:8; 14:8; App. 113). While Officer Mackey testified that he told Mr. Smith that he was being detained pursuant to a search warrant, this statement is not dispositive as to whether a reasonable person, in Mr. Smith's position, would have felt in custody under the totality of the circumstances. (29:7; App. 112). Officer Mackey's actions in pulling Mr. Smith over, approaching his vehicle with two other officers, and immediately removing him from the vehicle and putting him in handcuffs constitute an arrest. A reasonable person in Mr. Smith's situation would have felt under arrest.

The state also argues that Officer Mackey's testimony that Mr. Smith was searched after he admitted to having marijuana on his person is unambiguous, as well as contends that this testimony may not now be impeached with Officer Mackey's police reports because Mr. Smith failed to do so at the motion hearing. (Respondent's brief, p. 6). The state is wrong in both respects.

While Officer Mackey's testimony states Mr. Smith was searched after he stated he had marijuana, the testimony alone is not clear as to whether Mr. Smith was handcuffed *prior* to stating he had marijuana. However, his police report is clear, and states that Mr. Smith was put in handcuffs before he stated he had marijuana in his pocket, and before he was searched:

> I detained Smith in handcuffs behind his back, safety locking the cuffs. Officer Miller and I then conducted a search of Smith and Smith uttered that he had a little bit of marijuana in his pants pocket.

(14:8).

The state's argument that Officer Mackey's testimony cannot now be impeached with his police report is incorrect. Officer Mackey testified that he includes all relevant facts in his police reports. (29:10). Additionally, any discrepancy between the police report and testimony was raised pursuant to the state's stipulation to include the police reports as part of the record. (14:1). The stipulation reads "the police reports shall be moved into evidence to supplement the record of the suppression hearing." (14:1). Further, stipulated facts are evidence, according to Wis. J.I.– ***Criminal***, 103.[1] The state has thus consented to allowing the court to consider the facts contained in Officer Mackey's police report.

His report is clear: Officer Mackey handcuffed Mr. Smith immediately after removing him from his vehicle—before the search and before Mr. Smith indicated he had marijuana. (14:8). These facts support the finding that a reasonable person in Mr. Smith's position would have felt under arrest the moment he was removed from his vehicle.

Finally, Mr. Smith has not abandoned any such argument that reasonable suspicion did not exist to stop him. As argued in his brief-in-chief, and above, Mr. Smith's stop was not merely a stop based on reasonable suspicion, but an arrest. The fact that the circuit court held that he was arrested by virtue of finding that there was probable cause to arrest demonstrates that this was not a simple, investigatory stop based on reasonable suspicion.

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[1] Wis. J.I.– ***Criminal***, 103 states that evidence consists of: 1) testimony of witnesses given in court whether on direct or cross-examination; 2) exhibits admitted by the court, whether or not they go to the jury room; and 3) any facts to which the lawyers have agreed or stipulated or which the court directs the jury to find.

However, if this court addresses whether there was reasonable suspicion to conduct an investigatory stop, it is Mr. Smith's position that there was no reasonable suspicion based on the record. An investigatory stop must be supported by reasonable suspicion, meaning it must be based on specific articulable facts and reasonable inferences from those facts, that an individual is or was committing a crime. ***State v. Colstad***, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 659 N.W.2d 394 (citations omitted).

Before being pulled over, Mr. Smith did not commit any traffic violations, and there is no indication that any criminal activity was afoot at the time that Mr. Smith was detained. (29:2-15; App. 107-120). A trash pull within 72 hours that established that two people lived at the residence, and also reveals a small quantity of marijuana stems and roach cigarettes, coupled with a confidential informant's (whose reliability is relatively unknown) vague statement, does not equate to reasonable suspicion that Mr. Smith committed a crime.

B. Mr. Smith was not detained pursuant to the search warrant, but arrested.

The state's reliance on ***Vorburger*** to support its argument that Mr. Smith was detained, not arrested, is misplaced. ***State v. Vorburger***, 2002 WI 105, 255 Wis. 2d 537, 648 N.W.2d 829. In ***Vorburger***, the co-defendant was detained pursuant to a search warrant when she was standing outside of the motel room to be searched, along with the room's registered occupant. ***Id.*** at ¶ 52. In finding the detention reasonable and not an arrest, the court noted, "The critical factor in this case…is the presence of a valid search warrant for contraband." ***Id.*** at ¶ 69.

The ***Vorburger*** court held that the defendants had voluntarily connected themselves with the motel room to be searched and their detention pursuant to the search warrant was reasonable under ***Summers***. ***Id.*** at ¶ 51; ***Michigan v. Summers***, 452 U.S. 692 (1981). The United States Supreme Court held in ***Summers*** that a person's detention incident to the execution of a search warrant was reasonable under the Fourth Amendment because the limited intrusion on personal liberty is outweighed by the special law enforcement interests at stake. ***Summers***, 452 U.S. at 702-05.

The United States Supreme Court subsequently limited ***Summers*** in ***Bailey***, holding that detention pursuant to a search warrant was unreasonable when an individual is beyond the perimeter of the premises to be searched. ***Bailey v. United States***, __U.S.__, 133 S. Ct. 1031, 185 L.Ed.2d 19 (2013). It is undisputed that at the time of Mr. Smith's arrest, he was blocks away from his residence. (29:11-12; App. 116-117). Indeed, at the motion hearing, the state and circuit court both agreed that Mr. Smith could not be detained pursuant to the search warrant. (29:15-18; App. 120-123). As such, unlike ***Vorburger***, the search warrant in the case at hand did not provide a basis for Mr. Smith's stop, detention, and subsequent search.

The ***Vorburger*** court also analyzed whether the co-defendant's continued detention after the search warrant had been executed constituted an arrest. In finding that a reasonable person would not feel as if she was under arrest in those circumstances, the court noted that she was allowed to go to the bathroom and her handcuffs were removed. The court stated that the "police were deescalating the conditions of her detention." 2002 WI 105, ¶ 86. Here, the record does not indicate that Mr. Smith was ever taken out of handcuffs or that the detention deescalated in anyway. Mr. Smith was in a

moving vehicle at the time of the seizure, three officers approached him while he was in his car, and two officers patted him down while he was put in handcuffs. (14:8). Objectively, Mr. Smith was arrested. Again, ***Vorburger*** is inapplicable to the facts of the case at hand.

C. Under the totality of the circumstances, the police did not have the requisite probable cause to arrest Mr. Smith.

Probable cause must exist to justify an arrest. ***Secrist***, 224 Wis. 2d 201, 209. "Probable cause for arrest exists when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Kutz***, 2003 WI App 205, ¶ 11, 267 Wis. 2d 531, 671 N.W.2d 660. The state, relying heavily on ***Secrist*** and ***Robinson***, contends there was probable cause to arrest. ***Secrist***, 224 Wis. 2d 201; ***State v. Robinson***, 2010 WI 80, 327 Wis. 2d 302, 786 N.W.2d 463. Neither ***Secrist*** nor ***Robinson*** mandate a finding of probable cause to arrest in Mr. Smith's case.

In ***Secrist***, an officer smelled a strong odor of marijuana coming from a vehicle and arrested the driver, the sole occupant of the vehicle, on drug charges. 224 Wis. 2d 201 at 205. A subsequent search of the vehicle led to evidence of drugs. ***Id***. The defendant argued that the odor was insufficient to establish that he was the one who smoked the marijuana. ***Id***. at 213. The court rejected that argument, holding "the odor of a controlled substance provides probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons..." ***Id***. at 204. However, in reaching this conclusion, the court stated that under the totality of the circumstances

test, where "the odor is not strong or recent, if the source of the odor is not near the person, *if there are several people in the vehicle*, or if a person offers a reasonable explanation for the odor," probable cause to believe the person is linked to the drug is diminished. ***Id***. at 218 (emphasis added).

Mr. Smith's case is not like ***Secrist***, where the officer witnessed a strong odor of marijuana, thereby connecting the illegal activity to one or more persons in the car *at the time* the officer pulled the vehicles over. In the case at hand, at least 72 hours before the search warrant was executed, a trash pull revealed .21 gram of roach cigarettes and stems in the trash, and that at least two people reside at the residence. (13:4; App. 104[2]). No evidence indicates when those items were thrown away, or who they belonged to.

Contrary to ***Secrist***, the illegal act in this case is not temporally or spatially connected with Mr. Smith. Here, the illegal act is more remote and cannot only be connected with the two inhabitants of the house, because a trash can could be accessed and used by the household's inhabitants, guests to the house, or any citizen on the street. Whereas in a ***Secrist*** scenario, the odor of marijuana suggests usage, and thus illegal activity, by at least one or more persons in the vehicle at the time the officer pulled the vehicle over, the presence of a trace amount of marijuana in a trash can, found 72 hours earlier and utilized by any number of people is not as probative. ***Secrist*** does not establish that the presence of marijuana in the trash can alone is sufficient to arrest Mr. Smith for possession.

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[2] The Index to Appendix inadvertently labeled pages 103-105 as the "Judgment of Conviction." However, the Index to Appendix should read that only pages 101-102 contain the Judgment of Conviction, and pages 103-105 are the "Affidavit for Search Warrant."

Finally, the State's relies on ***Robinson*** for its argument that the informant in this case was credible and reliable enough to establish probable cause to arrest Mr. Smith is misplaced. ***Robinson***, 2010 WI 80. The informant in ***Robinson*** was an "anonymous citizen" informant, completely different than the "confidential informant" in Mr. Smith's case, and therefore requires a different way to assess credibility and reliability of information.

In ***State v. Kolk***, 2006 WI App 261, 298 Wis. 2d 99, 726 N.W.2d 337, the court discussed the different types of informants, and distinguished between a "citizen informant," a "confidential informant," and an "anonymous [informant]." ***Id.***, ¶ 12. A citizen informant, the court said, "is someone who happens upon a crime or suspicious activity and reports it to police." ***Id.*** A confidential informant, on the other hand, is a person who often has a criminal past and who "assists the police in identifying and catching criminals." ***Id.*** "There is a difference between 'citizen-informers' and 'police contacts or informers who usually themselves are criminals.'" ***Id.***, *quoting* ***State v. Swanson,*** 164 Wis. 2d 437, 474 N.W.2d 148 (1991). An anonymous informant is a person whose identity is unknown, even to the police. ***Id.***

Depending on the type of informant involved, there are different ways to assess credibility. ***Kolk***, 298 Wis. 2d 99, ¶ 12. A citizen informant will be held to a less stringent standard for determining reliability than the confidential informant. ***Id.*** A confidential informant's reliability will depend at least in part on whether he or she has previously provided truthful information. ***Id.*** For anonymous informants, veracity must be assessed by other means, particularly corroboration. ***Id.***, *citing* ***Alabama v. White,*** 496 U.S. 325, 329 (1990).

Because ***Robinson*** dealt with an anonymous informant, the court used corroboration of innocent details to assess the informant's credibility. ***Robinson***, 2010 WI 80, ¶28. Furthermore, the ***Robinson*** court noted that the informant showed up to the police station to provide information and "was 'anonymous' only to the extent that he was nameless." ***Id***. In the case at hand, Officer Mackey received a tip from a "confidential informant." A confidential informant's reliability depends at least *in part* on whether he or she has previously provided truthful information. ***Kolk***, 2006 WI App 261, ¶ 12. Contrary to the state's assertion that "a common sense interpretation of Mackey's affidavit supports a conclusion that the informant had provided accurate information to the police in the past," a finding of reliability for a confidential informant, requires more than a mere statement deeming that informant reliable. (Respondent's brief pg. 9).

Here, Officer Mackey did not elaborate on what information the confidential informant had provided in the past, how it was deemed reliable, nor how the informant knew about Mr. Smith's alleged involvement in criminal activity. *See* ***Kolk***, 2006 WI App 261, ¶ 15 (the court concluded that the citizen informant had little reliability because the record contained "absolutely no suggestion of how the informant knew about the legal or illegal activities ascribed to [defendant].") ***Robinson*** is inapposite to Mr. Smith's case.

In sum, the search warrant may have provided probable cause to support the inquiry as to whether evidence of a crime would be at a particular location. However, a confidential informant's vague statement that Mr. Smith was selling drugs combined with a trash pull that produced .21 gram of marijuana stems and roach cigarettes and

established that at least two people resided at the residence would not lead a reasonable police officer to believe that Mr. Smith had "probably committed a crime." Therefore, Mr. Smith's arrest is invalid. If the court agrees, then the subsequent search was illegal, and the court must suppress the evidence directly found as a result of the search, which would include Mr. Smith's statements and the items recovered from his person and vehicle. ***Mapp v. Ohio***, 367 U.S. 643 (1961).

CONCLUSION

For the reasons stated, Mr. Smith respectfully requests that this court vacate his judgment of conviction and remand to the trial court with directions that all evidence derived from his unlawful arrest be suppressed.

Dated this 17th day of August, 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 2,977 words.

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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:

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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 17th day of August, 2015.

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