STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No.: 2015-AP-597

-vs-

JOHN C. MARTIN,

Circuit Court
Case No.: 2014-CM-1423

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Appeal from the
Circuit Court of Winnebago County,
The Honorable Barbara Hart Key, Presiding

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STATEMENT OF THE ISSUES

The issue before this court is whether the motion to suppress evidence should be granted. The trial court answered in the negative and denied Defendant-Appellant's motion to suppress evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant does not request oral arguments because the issues can be fully described in the brief. However, although the case presents the issue of well settled law, publication may assist and provide guidance in future cases where the alleged reasonable suspicion results from detection of odor in a public place is the central issue of the case. That line of cases has not developed as extensively as the doctrine for detection of odors emanating from the passengers' compartments of automobiles. See 188 A.L.R. Fed. 487 (Originally published in 2003) (federal cases); See also 123 A.L.R.5th 179 (Originally published in 2004) (state cases).

STATEMENT OF THE CASE

On July 10, 2014, a criminal complaint was filed against John C. Martin (hereinafter "Martin") which alleged that Martin was guilty of possession of illegal drug substances contrary to Wis. Stats. §§ 961.41(3g)(c) and 961.41(3g)(e). On December 18, 2014, a hearing was held at which Honorable Judge Key presided over Martin's motion to suppress all incriminating evidence against him that was

discovered as a direct result of Oshkosh Police Department's violation of Martin's 4th Amendment right against unreasonable searches and seizures. Specifically, Martin argued that the Oshkosh Police lacked reasonable suspicion to conduct a *Terry* stop, that the responding officers ordered him to follow them to the back of the bar, that he submitted to the officers' authority, and that officers subsequently elicited an involuntary confession by resorting to coercive tactics and making impermissible threats.

The trial court found that Martin's testimony was self serving, that the police officers' testimony was more reliable, and that the police officers conduct did not amount to impermissible and coercive techniques designed to elicit involuntary confessions. The exercise of the trial court's discretion on this part of the ruling - one finding that Martin's testimony was self serving and that the confession was voluntarily made - is not challenged on this appeal.

The trial court also found that reasonable and articulable suspicion existed from the outset of the police officer's observations. The officer observed that "one person and one person only [came] out of the bathroom" and the officer later detected the odor of marijuana in that bathroom. Hence, Martin's motion to suppress all incriminating evidence against him and in the State's possession was denied and his suppression claim dismissed.

Subsequently, Martin entered a "Not Guilty" plea on his alleged violation of Wis. Stat. § 961.41(3)(c), which was dismissed on Prosecutor's motion, and a "No Contest" plea on his alleged violation of Wis. Stat. § 961.41(3g)(e). Sentence was entered against Martin, for violation of Wis. Stat. § 961.41(3g)(e), on January 12, 2015.

Martin now appeals the trial court's decision to deny his motion to suppress and to dismiss his claim based upon what Martin alleges was a clearly erroneous interpretation of what constitutes "reasonable suspicion" necessary to conduct a *Terry* stop - an omission which, if proven, constitutes a reversible error.

STATEMENT OF THE FACTS

The officers arrived at a tavern while attempting to execute an arrest warrant. Officer Franklin of the Oshkosh Police Department reported seeing a bearded male in a green shirt walk out of the men's bathroom. (R. Incident Report Franklin, p. 3). The officer reported that he verified that the individual that walked out of the bathroom was not the individual that the officers were searching for. Id. None of the officers who observed Martin walk out of the bathroom noticed any odor emanating from Martin's person, glossy or red eyes, or any display of nervous behavior. (R. Transcript, 14:2 - 14:6) After verifying that Martin was not the man the officers were searching for, Officer Franklin then proceeded to search the men's bathroom to verify whether the person the officers were searching for was

located there. (R. Incident Report Franklin, p. 3). No persons were discovered in the bathroom but Officer Franklin reported detecting an odor of marijuana. Id. Upon detecting the odor of marijuana, Officer Franklin searched for evidence of drug and drug paraphernalia but did not find any. Id. After exiting the bathroom, Officer Franklin requested that Officer Pierce go in the bathroom and investigate the odor. Officer Pierce reported detecting an odor of marijuana and air freshener. (R. Incident Report Pierce, p. 5) Officer Pierce also conducted a search for evidence of drugs and drug paraphernalia but found nothing. Id.

After exiting the bathroom, Officer Pierce reported that two more officers went into the bathroom to investigate the odor. (R. Incident Report Franklin, p. 3) None of the officers reported finding any evidence of drugs or drug paraphernalia. Id. Upon exiting the bathroom and during the entire duration of the officers' search of the bathroom, Martin was seated at the bar with a group of people. Approximately 10 to 15 minutes after initially seeing Martin exit the bathroom, police officers approached him and ordered him to follow them to the back of the bar. (R. Transcript, 10:5-10:14). The trial court found that reasonable suspicion was present from the outset of the police officers' observation of Martin exiting the bathroom and the officers' detection of raw marijuana odor in the bathroom from which Martin emerged upon the officers' arrival. (R. Transcript, 32:12-33:4). Any subsequent facts are irrelevant for the purposes of this appeal which

challenges only the initial finding of reasonable suspicion based upon officers' observation of Martin exiting the bathroom that smelled like raw marijuana.

ARGUMENT

I. THE SEARCH OF DEFENDANT-APPELLANT LACKED REASONABLE SUSPICION NECESSARY TO CONDUCT A PROPER TERRY STOP.

Application of relevant constitutional principles to the facts relating to a motion to suppress incriminating evidence presents a question of law which the appellate court reviews de novo. State v. Rindfleisch, 2014 WI App 121, ¶ 17, 359 Wis. 2d 147, 161, 857 N.W.2d 456, review denied, (Wis. Mar. 16, 2015). Although the application of facts to the constitutional principles is reviewed de novo, the findings of fact by the trial court will be affirmed unless they are clearly erroneous. State v. Kennedy, 2014 WI 132, ¶ 16, 359 Wis. 2d 454, 856 N.W.2d 834. On this appeal, Martin does not challenge the circuit court's finding of fact, he simply asserts that the trial court improperly applied the 4th Amendment constitutional principles to the facts of this case. Therefore, this Court must conduct a de novo review of the trial courts order denying Martin's motion and dismissing his claims.

A *Terry* stop is justified by lesser standard than probable cause. State v. Anker, 2014 WI App 107, ¶ 14, 357 Wis. 2d 565, 574, 855 N.W.2d 483. In order to conduct a proper *Terry* stop, at the time the stop is made, the responding officers

must have “reasonable suspicion” that a “crime has been committed, is being committed, or is about to be committed...” Id. Wisconsin Statute § 968.24 is a full codification of the *Terry* rule. State v. Anderson, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990). The reasonable suspicion of a crime must be "grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law." State v. Colstad, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 414, 659 N.W.2d 394 (quoting State v. Colstad, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 414, 659 N.W.2d 394).

The question of what constitutes reasonable suspicion is a common sense test, based upon the totality of the circumstances, of what a “reasonable police officer reasonably suspect[ed] in light of his or her training and experience. Colstad, 260 Wis. 2d at 414 (quoting State v. Young, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App.1997)). While there is no obligation upon the police officer conducing a stop to first rule out the possibility of innocent behavior, State v. Anderson, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990), the totality of all the circumstances present at the time of the stop must be considered in determining whether the officer acted reasonably. State v. Popke, 2009 WI 37, 23, 317 Wis. 2d 118, 132, 765 N.W.2d 569. This is an objective standard. Id. An inchoate and unparticularized suspicion or hunch will not suffice. Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968); State v. Waldner, 206 Wis.2d 51,

56, 556 N.W.2d 681 (1996). Furthermore, a persons presence in the area of expected criminal activity, standing alone, does not rise to the level of reasonable suspicion that the person was, is currently, or will be engaging in criminal activity. State v. Pugh, 2013 WI App 12, 12, 345 Wis. 2d 832, 842-43, 826 N.W.2d 418 (citing Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)).

Applying the standard set forth above, it is clear that the trial court erred in applying the constitutional principles of the 4th Amendment *Terry* stop doctrine to the facts of this case. Numerous Wisconsin cases have found that reasonable suspicion was unfounded even when the State presented facts more convincing than those the Oshkosh Police officers had at the time they seized Martin.

First, in Washington, this Court ruled that the police did not have reasonable suspicion to detain the defendant when the police 1) observed the defendant in front of a vacant house where loitering was reported, 2) knew the defendant did not live in the area, 3) knew that defendant had been previously arrested for selling narcotics, 4) received a complaint that the a person had been loitering in the area, 5) intended to cite defendant for loitering, and 6) knew that the area was a high crime neighborhood. State v. Washington, 2005 WI App 123, 3, 17, 284 Wis.2d 456, 460, 471, 700 N.W.2d 305. Despite having the witness testimony, observing the defendant near the vacant house where suspected criminal

activity was allegedly taking place, and defendant's nervousness and subsequent retreat backwards after noticing the officers' presence, the facts in Washington still did not rise to the level necessary to establish that reasonable suspicion existed that the defendant was committing a crime. State v. Washington, 2005 WI App 123, ¶ 19, 284 Wis. 2d 456, 472, 700 N.W.2d 305.

Second, this Court's ruling in the Gordon case is directly on point. In Gordon, the finding that the defendant was in a high crime area known for violent crime and gun violence, that defendant and his companions recognized the police officers' presence, that upon recognizing the police defendant reached toward his left front pant pocket to allegedly make a "security adjustment" - conscious or unconscious movement of concealing one's illegal firearm upon observing the police - and the police officers thought that the defendant was too young to have a conceal carry permit, the police officers lacked reasonable suspicion to conduct a *Terry* stop of the defendant. State v. Gordon, 2014 WI App 44, ¶ 18, 353 Wis. 2d 468, 481, 846 N.W.2d 483, review denied, 2014 WI 122, ¶ 18, 855 N.W.2d 696. This Court summed up the findings of the trial court into three factors - high crime rate, observation of police presence, and patting down one's pockets - and clearly deemed that such scant evidence cannot constitute a basis for reasonable suspicion necessary to execute a proper *Terry* stop. Id. In fact, this Court expressly recognized that to allow a finding of reasonable suspicion on those three factors

would negate the reasonable suspicion requirement altogether. Id.

Similarly, in Ruffin - a *Terry* pat-down case which also interpreted what constitutes reasonable suspicion based on the totality of the circumstances and a set of reasonable and articulable facts from which a reasonable police officer could discern that the defendant was engaged in criminal activity - the United States District Court Eastern District of Wisconsin held that no reasonable suspicion to conduct a *Terry* pat-down search existed when the police had information that the defendant was in a high crime area, matched the description of a witness who ran away from the scene of the crime but who did not match the description of any of the robbers and who, after observing the police, attempted to walk in a different direction. United States v. Ruffin, 448 F. Supp. 2d 1015, 1020 (E.D. Wis. 2006). Although the Ruffin situation dealt with reasonable suspicion to conduct a *Terry* pat-down, the fact that the police improperly assumed that defendant was involved in a crime when he could just as well have been a witness is instructive to the facts of this case. Id. at 1018. This finding is instructive because it suggests that mere presence at the scene of the crime does not give rise to reasonable suspicion that the person is involved in criminal activity. The Ruffin court justified this theory by stating that if mere presence at the scene of a crime was enough to justify reasonable suspicion for a *Terry* pat-down, individuals living in high crime areas would be subject to constant police badgering simply because of the fact that their

economic circumstances do not permit them to live in a nice part of town. Id. at 1019.

Although all of the above cited authorities found a lack of reasonable suspicion to conduct a *Terry* stop, the facts upon which the Oshkosh Police officers relied to conduct a *Terry* stop of Martin are even more scant than the inadequate facts addressed in the above cited authorities. In the case before this Court, police officers 1) did not detect a smell of marijuana emanating from the Martin's person either upon first observing him exit the bathroom or upon subsequent seizure of the defendant, 2) did not observe that Martin had glossy red eyes or that Martin was impaired in any way, 3) had no reason to suspect that Martin attempted to avoid the police especially when taking into consideration the fact that even upon observation of the officers' presence Martin calmly walked back to his seat at the bar and remained there for the entire time the police were present - approximately 10-15 minutes between the time he first observed the officers until they approached and seized him, 4) did not observe any signs of nervousness by Martin until after he was seized. Furthermore, Martin was present in a public institution with other patrons and, apart from observing him walk out of the bathroom upon their arrival, the responding officers had no independent and articulable facts suggesting that Martin was any more culpable than any other patron present in the tavern at the time of the officers' arrival. Therefore, Martin's

seizure was more a product of random chance, mere probability, the police officers' hunch, and his presence in an area expected of criminal activity then it was a product of reasonable suspicion based on a set of reasonable and articulable facts that Martin was committing a crime.

The trial court's only finding was that 1) the police officers observed Martin exit the bathroom and 2) subsequently finding that the bathroom from which Martin exited smelled like marijuana. Based on the totality of the circumstances analysis, the trial court's application of the law to the facts of this case does not pass constitutional muster for establishing that reasonable suspicion warranted the seizure. When taking into consideration the totality of circumstances - such as evidence that the Martin was in a public institution and, apart form his untimely presence in an area of expected criminal activity, showed no evidence of any wrongdoing - it becomes blatantly obvious that Martin's seizure was not based on reasonable suspicion but merely on a mere probability, random chance, and the officers' hunch that Martin might actually be the one in possession of the controlled substance. Such scant factual record is inadequate to support a finding of reasonable suspicion. See State v. Washington, 2005 WI App 123, ¶ 19, 284 Wis. 2d 456, 472, 700 N.W.2d 305; State v. Gordon, 2014 WI App 44, ¶ 18, 353 Wis. 2d 468, 481, 846 N.W.2d 483, review denied, 2014 WI 122, ¶ 18, 855 N.W.2d 696; United States v. Ruffin, 448 F. Supp. 2d 1015, 1020 (E.D. Wis.

2006); Terry v. Ohio, 391 U.S. 1, 27, 88 S. Ct. 1868, 1888, 20 L. Ed. 2d 889 (1968); State v. Waldner, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996). Furthermore, trial court's application of the law to the facts was improper because Martin's presence in an area of expected criminal activity was the sole factor upon which the trial court based its finding that reasonable suspicion existed that Martin was involved in criminal activity. See State v. Pugh, 2013 WI App 12, 12, 345 Wis. 2d 832, 842-43, 826 N.W.2d 418 (citation omitted) (mere presence in an area of criminal activity, without more, is not enough to establish reasonable suspicion that a person is engaging in illegal activity).

II. FRUIT OF THE POISONOUS TREE DOCTRINE REQUIRES SUPPRESSION OF ALL INCRIMINATING EVIDENCE IN THE STATE'S POSSESSION.

The fruit of the poisonous tree doctrine is a device that prohibits State's use of evidence that "owes its discovery to illegal government activity." State v. Knapp, 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 98, 700 N.W.2d 899. Evidence found pursuant to an unlawful seizure is categorized as a "fruit of the poisonous tree." State v. Washington, 2005 WI App 123, ¶ 1, 284 Wis. 2d 456, 700 N.W.2d 305.

Because all of the State's evidence against Martin was discovered as a result of the improper Terry stop, the incriminating evidence must be suppressed pursuant to the fruit of the poisonous tree doctrine.

CONCLUSION

Wherefore, the defendant-appellant, John C. Martin, requests that this court reverse and remand the trial court's decision denying the defendant's motion to suppress evidence, because the *Terry* stop of the defendant-appellant was not based on reasonable suspicion and was merely a product of random chance, mere probability, the police officers' hunch, and defendant-appellant's presence in an area of expected criminal activity.

CERTIFICATION

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 double spaced Times New Roman font. The length of this brief is 3004 words. I hereby also certify that I have submitted an electronic copy of this brief which complies with requirements of section 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.

/s/ Brian D. Hamill
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Dated this 16th day of June, 2015.

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