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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

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I. Application of the Common Sense Test to the Facts of This Case Would Not Give Rise to Reasonable Suspicion That Mr. Martin Committed a Crime.

The State argues that police officers' knowledge that a crime has been committed in a public place and their observation of one person in the vicinity of the suspected criminal activity gives rise to reasonable suspicion that the person was engaging in criminal activity. This statement is a far stretch from the set of reasonably articulable facts needed to establish reasonable suspicion that a crime was being committed or afoot.

The fact that an odor of marijuana in a public place does not give rise to reasonable suspicion that a person present in the vicinity of the odor is committing a crime, especially where the odor is detected in a crowded public place, has been ruled upon by a Wisconsin trial court. Circuit court for St. Croix County, Honorable Eric J. Lundell, ruled that a trooper's observance of a vehicle occupant smoking what he thought was marijuana and detecting an odor of it coming from the front of the his vehicle, which at the time was located behind the defendant with one other vehicle between them, did not give rise to reasonable suspicion that the occupants were engaging in criminal activity. See State v. Tighe, No. 95-CM-463 (Wis. Cir. Ct. St. Croix Co., April 29, 1996), aff'd No. 96-1319-CR (Ct. App. Dec. 3, 1996) (unpublished). In handing down the order granting defendant's

suppression motion, Honorable Judge Lundell concluded that on the day of the concert the entire area between Houlton and Hudson smelled like marijuana, that the marijuana odor could have been emanating from any vehicle on the highway, and that that the trooper was not reasonable in singling out the defendant's vehicle. See id. Although Tighe is an unpublished opinion, and pursuant to Wis. Stat. § 809.23 cannot be cited as precedent or authority, the decision can be cited to demonstrate this Court's affirmation of the trial court's order. See Brandt v. Labor & Indus. Review Comm'n, 160 Wis. 2d 353, 362-64, 466 N.W.2d 673 (Ct. App. 1991) aff'd, 166 Wis. 2d 623, 480 N.W.2d 494 (1992) (holding that informing the court "that an unpublished appellate decision reversed a cited circuit court decision does not elevate the appellate decision to precedential or authoritative status" but "simply informs the court as to the ultimate outcome of the case on appeal" and is not barred by Rule 809.23)

Just like the facts of the case over which Honorable Judge Lundell presided, where the trooper was coincidentally located in close proximity behind defendant's vehicle at the time he detected the odor of marijuana, here, the police coincidentally observed Martin exit the bathroom that smelled like marijuana. In the present case, suspicion that Martin was engaging in criminal activity was based on Martin's mere presence in the bathroom at the time the officers arrived. The police lacked any other articulable fact linking Martin to the odor of marijuana. Upon first observation of Martin, the police never detected any smell

coming from Martin's person, they did not observe red or glossy eyes, nor did they observe that Martin was impaired in any way. Furthermore, anyone who was present at the tavern at the time the police entered could have been responsible for the marijuana odor.

Moreover, both Wisconsin and federal decisions have repeatedly stated in the past that mere presence in the area of criminal activity, standing alone, is not enough to give rise to reasonable suspicion that a crime was being committed or afoot. See United States v. Ruffin, 448 F. Supp. 2d 1015, 1019 (E.D. Wis. 2006). In Ruffin, police knew that a crime had been committed and that the defendant had been present at the scene of the crime. Id. at 1020. However, the court found lack of reasonable suspicion because mere presence at the scene of the crime, absent any other articulable facts, cannot link one to being the actual perpetrator of the crime. See Id. at 1018. Similarly, here, Martin's presence in the bathroom which smelled like marijuana and was located in a public place that is frequented by many individuals, cannot give rise to reasonable suspicion that Martin was in fact the one committing the crime. Martin's untimely use of the bathroom implicates him no more or less than any other person present at the bar at the time the police officers entered the premises.

II. Officers' First Hand Knowledge That a Crime Was Committed is Irrelevant to the Outcome of This Case.

The State next attempts to argue that the facts in, 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, United States v. Ruffin, 448 F. Supp. 2d 1015 (E.D. Wis. 2006), are distinguishable from the facts of this case because here the police had first-hand knowledge that a crime had been committed, based on the strong odor of marijuana. However, this argument is unsupported by any authority.

First, the State does not provide any insight as to how the presence, or lack, of officers' first-hand knowledge would contribute or deter away from the analysis of establishing the existence of reasonably articulable facts giving rise to reasonable suspicion that a crime was being committed. The State merely establishes that in the present case the officers had first-hand knowledge of criminal activity but fails to provide any reasoning as to why the facts in Washington, Gordon, or Ruffin would not be controlling in the outcome of the present case.

Second, in Ruffin there was no doubt that a crime had been committed or that the defendant was present at the scene of the crime. See United States v. Ruffin, 448 F. Supp. 2d 1015 (E.D. Wis. 2006). The focal point in the Ruffin case was whether the facts known by the police supported the police officers' conclusion that Mr. Ruffin was the actual perpetrator merely because his presence at the scene of the crime. See id. at 1018. Ruffin could have just as well been an innocent witness, here, just as Martin could have been an innocent bystander who

just happened to be at the wrong place at the wrong time. Other than Martin's untimely presence in the bathroom, no other facts linked him to criminal activity.

The State's argument that first-hand knowledge is a relevant factor in establishing reasonable suspicion is only applicable to cases where the police receive an anonymous tip that a crime has been committed and the focus then shifts on establishing the veracity of the caller who provided the police with the information and whether officer had information independent of the anonymous caller whose veracity is questionable. The facts of this case are entirely different from the line of cases dealing with tips received from anonymous callers. Therefore, in the present case, first-hand knowledge of a crime is entirely irrelevant to the analysis of whether police had reasonable suspicion to conduct a *Terry* stop of Martin.

If the State's argument was found persuasive by this Court, then any resident in a multi-family housing building located in a crime ridden neighborhood could be stopped and interrogated by law enforcement officers merely because the public hallways in the building leading to his/her apartment may smell like marijuana. Unfortunately, some citizens have no other choice but to live in these conditions and their 4th Amendment protections cannot diminish because they cannot afford to live in a neighborhood with less crime. The minimal hunch that supposedly gave rise to reasonable suspicion in this case is exactly the type of unreasonable intrusion that the adoption of the 4th Amendment was intended to

deter. See United States v. Ruffin, 448 F. Supp. 2d 1015, 1019 (E.D. Wis. 2006).

III. State's Reliance on the Guzy Decision is Improper Because the Facts and Circumstances in Guzy Differ Significantly From the Facts Presented in Martin's Case.

The State's final argument rests on the Guzy court's ruling that, under a set of very narrow circumstances, the law must allow police officers the "opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect." State v. Guzy, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987)(citation omitted). The State attempts to argue that the officer's right to "temporarily freeze" the situation exists every time a police officer feels the need to conduct an investigation. However, the State's argument oversimplifies and misinterprets the substantive law behind the Guzy holding.

Contrary to the State's argument, one stating that observing an individual exiting a public bathroom that smells like marijuana is enough for the officers to "temporarily freeze" the situation in order to begin an investigation, the Guzy Court explicitly stated that "[n]o litmus paper test is available to resolve this issue." State v. Guzy, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987) (quoting 3 Wayne R. LaFave, *Search and Seizure,* sec. 9.3(d), at 461 (2d ed. 1987)). Instead, the analysis must focus on "when" the factual circumstances – ones usually involving the possibility of the suspect evading the police – allow the officers the opportunity to "freeze the situation." See id. Here, no facts indicate that any of the

responding police officers feared the possibility of losing the suspect or control over the situation.

In asserting that the Guzy holding applies to the facts of the present case, the State fails to recognize the obvious factual differences between the circumstances presented in this case and those circumstances upon which the Guzy decision was based. In Guzy, the suspicion arose from the suspect's unique physical features and long hair, as well as the fact that there were very few vehicles on the highway at 2:30 a.m. Guzy, 139 Wis. 2d at 682. Furthermore, the officers in Guzy had legitimate reason to fear that they would lose the bank robbery suspect and opportunity to investigate the crime because the area in which the crime was committed, and the suspect's vehicle spotted, was approximately two miles away from the Minnesota border. Id.

Unlike Guzy, here, the officers here did not noticed anything suspicious about Martin upon first observing Martin exit the bathroom. Furthermore, the undisputed facts indicate that Martin never attempted to leave the scene, and that the police officers waited between ten and fifteen minutes before approaching Martin. This is clearly demonstrates that the exigent circumstances that existed in Guzy were simply not present here. Lastly, unlike Guzy, where there were only few vehicles on the road thus increasing the likelihood that the vehicle stopped belonged to the robbery suspect, See Guzy, 139 Wis. 2d at 682, Martin was seized in a public place full of people and in broad daylight. For these reasons, the Guzy

ruling simply does not apply to the facts of the present case.

CONCLUSION

For the reasons set forth above, and those reasons discussed in his initial brief, defendant-appellant requests that this Court reverse the decisions of the circuit court and suppress all incriminating evidence obtained as a direct result of the unlawful seizure.

Dated this 10th day of July, 2015.

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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 1860 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 and that 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 10th day of July, 2015.

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