STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2015AP000756-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FREDERICK S. SMITH,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in the Circuit Court for Dane County, the Honorable Stephen Ehlke, Presiding

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REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. Sergeant Gonzalez violated the Fourth Amendment when he continued to detain Mr. Smith by unlawfully extending the stop and by opening the car door after reasonable suspicion had dissipated.

The State relies on two Wisconsin cases: *Williams* and *Winberg*. Neither of these cases is on point. In *State v. Williams*, 2002 WI App 306, the court of appeals determined that the need to make a report of the event would justify the request for identification. However, as Smith has already briefed, the concerns justifying the police in making a report in *Williams* are absent here. (Smith Brief-in-Chief at p. 14).

State v. Winberg, 2013AP2661-CR is an unpublished one-judge District III Wisconsin Court of Appeals case.[1] Although the case may be cited for its persuasive value, it is not precedent and is not binding on any court. Wis. Stat. § 809.23(3)(b). As a one-judge opinion, it does not reflect the thinking of even one panel of the Wisconsin Court of Appeals.

Furthermore, neither *Williams* nor *Winberg* involved the officer opening the car door. In each of those cases, it was the request for identification that was deemed acceptable under the circumstances of those cases. *Williams*, 2002 WI App 306, ¶22; *Winberg*, 2013AP2661-CR, ¶22-23, n.5, Neither case held that the officer had the right to first open the door himself. *Id*.

Although the scope of the investigative methods may have been reasonable in *Williams* and *Winberg*, Gonzalez's act of opening the car door without permission in the instant case is far more intrusive, grossly exceeds the scope of a reasonable seizure, and was an unlawful extension of the stop without any suspicion whatsoever. This act is hard to square with *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), which requires the investigative methods

[1] Smith has provided a copy of the *Winberg* opinion pursuant to Wis. Stat. § 809.23(3)(c).

used in a seizure to be the "least intrusive means reasonably available…" to the officer.

II. By opening the car door, Sergeant Gonzalez conducted an unlawful search.

As argued in his brief-in-chief, opening the car door constituted a search that required probable cause. (Smith's Brief at p. 16-18). When Gonzalez opened the door, he did not even have reasonable suspicion to believe Smith had committed a crime, let alone probable cause. (36:17-18, 20-21).

The State argues that the *Williams* case permitted Gonzalez to request Smith's license, and "the fact that Sergeant Gonzalez had to walk around to the passenger side of the car and open that door to accomplish this does not alter the analysis." (State's Response Brief at p. 10).

Smith disagrees on both points. As already argued, *Williams*, in which the court held that the need to make a report would justify the request for identification, involved a much more prolonged stop for a much more serious offense.

The State notes that Wis. Stat. § 343.18(1) requires a driver to carry his or her license and present it on demand to any traffic officer. However, suspicionless detentions for license checks are unconstitutional. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

Even if this court finds that Gonzalez was permitted to ask Smith for his license, *Williams* does not grant officers unfettered discretion to conduct searches and open car doors. The State ignores the facts that (1) the intervening event – the opening of the car door – constitutes a search, (2) this search occurred without any prior request for identification, and (3) this search was executed without probable cause (or even reasonable suspicion) to believe a crime had been committed. There is a big difference between asking for a license and pre-emptively opening the car door before any such request is made – particularly when it is done without any inkling of criminal behavior.

Although Gonzalez testified that he opened the door in order to more effectively communicate with Smith, it is the breach of Smith's privacy interest – and not Gonzalez's motivation – that is determinative under *Soldal v. Cook County, Ill*., 506 U.S. 56, 69, 113 S. Ct. 578 (1992); (36:21).

III. The State has not met its burden under the inevitable discovery doctrine.

The State argues that if the driver side window or door had been operational, Gonzalez would have detected the signs of intoxication from there, which would have led to Smith's arrest for drunk driving. (State's Brief at p. 10). If the State is making an inevitable discovery argument, then the State has failed to carry its burden as to the three prongs of that doctrine.

First, the State cannot say there is a reasonable probability the evidence would have been discovered by lawful means but for the police misconduct. *State v. Lopez*, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996). The sole scenario depicted by the State – in which the driver side window and door are operational – is an impossible scenario here. In this case, the driver side window and door were broken. (36:9). They were never going to open. Despite having spoken with Smith and viewing him through that closed window, Gonzalez did not, and was never going to, observe signs of intoxication via those means. (36:9-11,20). This argument necessarily fails under the first prong of the inevitable discovery doctrine. The State ends its analysis there, but Smith will continue.

It would be pure speculation to say what exactly would have happened had Gonzalez not improperly opened the door.

Perhaps Gonzalez would have just said through the closed passenger window, "I'm sorry, I thought you were someone else," and Smith would have been on his way. There is no evidence that Gonzalez even intended on requesting Smith's driver's license in the first place while reasonable suspicion was dispelled. (36). Gonzalez testified that the reason he wanted the door open was for "ease of communication." (36:21). Although talking through the

window was not ideal, Gonzalez also testified that he was able to communicate with Smith, Gonzalez could hear Smith, Smith responded to Gonzalez, and Gonzalez did not have to repeat himself – all through the closed window. (36:18-19,22). This suggests that, if the car door had not been opened, Gonzalez might have just given Smith a quick explanation through the closed window and been on his way.

Perhaps Gonzalez would have asked Smith to roll down the passenger side window. Even so, it would be pure speculation to say that Gonzalez would have still detected the signs of intoxication. This scenario presents its own set of unknowns: How far would Smith have rolled the window down? Would he have opened it just a crack? Would Gonzalez have noticed the signs of intoxication with the window cracked an inch? Two inches? If not, would Gonzalez have even asked Smith for his driver's license? Or would Gonzalez have simply explained his mistake and ended the encounter? An open door provides close and opportunistic physical access and contact with an occupant in a way that cracking a window does not. It would be pure conjecture and unfounded in the record to infer that Gonzalez would have detected the signs of intoxication had Smith simply cracked the passenger window pursuant to the officer's hypothetical request.

The point is, we cannot say with any reasonable probability what would have happened. Gonzalez himself testified that he did not know what he was going to do had the passenger door not opened up. (36:21).

Finally, the State cannot show, and has not attempted to argue, that the government was actively pursuing some alternative line of investigation at the time of the misconduct. This is not a situation in which the police had obtained a valid warrant at the time of the unlawful activity. *State v. Avery*, 2011 WI App 124; *State v. Pickens*, 2010 WI App 5, ¶49. The inevitable discovery doctrine fails here.

CONCLUSION

WHEREFORE, for all the reasons stated above, Frederick Smith respectfully requests that this Court vacate

his judgment of conviction and remand to the circuit court with directions that all evidence derived from his stop be suppressed.

Dated this 14th day of November, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief in proportional serif font. The length of the brief is 1,289 words.

CERTIFICATION 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 context 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 14th day of November, 2015.

Signed:

_____

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CERTIFICATION AS TO MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that this brief was deposited in the United States mail for delivery by first class or priority mail on November 16, 2015. Postage has been pre-paid. This brief is addressed to: Nancy Noet, P.O. Box 7857, Madison, WI 53707-7857 and Clerk of Court, WI Court of Appeals, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 16th day of November, 2015.

Signed:

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APPENDIX

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