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WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF ROCK COUNTY
HONORABLE ROBERT DeCHAMBEAU

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT

V.

CIRCUIT COURT
CASE NO. 13CM440

JOHN D. ARTHUR GRIFFIN,
DEFENDANT-APPELLANT

REPLY BRIEF AND ARGUMENT OF APPELLANT

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ARGUMENT

I. Notwithstanding the arguments made by the state, at the time Officer Reed first made contact with the Griffin vehicle's occupants, reasonable suspicion did not exist.

In order for an investigatory stop to be reasonable under the Fourth Amendment, it must be based on reasonable suspicion. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968). Reasonable suspicion is a determination made by considering all of the facts and circumstances. State v. Colstad, 260 Wis. 2d 406, ¶8, 659 N.W.2d 394 (Ct.App.2003)(Emphasis added).

That totality of circumstances includes all the facts known to law enforcement at the relevant time; not just the facts that tend to support a finding of reasonable suspicion

In the present case, just prior to making initial contact with the occupants of the vehicle, Officer Reed learned some new and important information – he had overheard on the Beloit PD radio channel that the

vehicle suspected in the shooting at the Silver Slipper had Iowa registration and was likely a rental vehicle. (Doc. 34:9,22; Appendix A:9,22).[1] Since the vehicle Officer Reed had pulled over had Illinois registration, (Doc. 34:9,22; Appendix A:9,22), the new information directly contradicted any previously existing objective basis for suspicion of the Griffin vehicle.

By the time Officer Reed initially made contact with Mr. Griffin to request identification, the unusual passenger behavior previously observed by Officer Reed could not reasonably be interpreted as a possible attempt to discard a weapon, as there was then no objective basis to believe that a weapon was even present or that the vehicle had any connection to the shooting.

[1] In its brief (see state brief at page 9), the state refers to the new information as "Officer Reed heard more information concerning *the possibility* of an Iowa license plate on the silver Impala fleeing the scene of the shooting…" (Emphasis added). However, Officer Reed described a somewhat more definitive report at the motion hearing, "I heard the Beloit - over the Beloit radio that the suspect vehicle *was a silver Chevy Impala with Iowa registration*, and it was likely a rental." (Doc. 34: 22; Appendix A:22). (Emphasis added).

Since the suspected involvement in the shooting was source of any factually based reasonable suspicion, once the suspected involvement was contradicted by the new information, reasonable suspicion to effectuate the investigatory stop and request identification ceased to exist.

The state submits in its brief that "the request for identification did not make the seizure unreasonable." (see state brief at page 9). However, as the Wisconsin Supreme Court stated in State v. Griffith, "when a passenger has been seized *pursuant to a lawful traffic stop*, the seizure does not become unreasonable under the Fourth Amendment or art. I §11 simply because an officer asks the passenger for identification during the stop." State v. Griffith, 2000 WI 72, ¶65, 236 Wis.2d 48, 613 N.W.2d 72 (2000)(Emphasis added).

Accordingly, a prerequisite for a request for identification in this context is the existence of a lawful traffic stop. The record in this case does not indicate that

the Griffin vehicle had violated any traffic laws prior to being seized. Mention was made of the vehicle having tinted windows, but there is nothing in the record to suggest that the tinted windows violated any traffic law. Officer Reed stated at the motion hearing that he did not have any equipment to test the legality of the windows. (Doc. 34:63; Appendix A:63).

The only reason for the investigatory stop of the Griffin vehicle was its suspected involvement in the Beloit shooting. As discussed, by the time Officer Reed actually made contact with Mr. Griffin to ask for identification, there was no objective basis to believe that the vehicle was involved in the Beloit shooting. Accordingly, there was no "lawful traffic stop" by which an ensuing request for identification could be considered reasonable.

Although 'innocent' conduct may be such that the totality of circumstances amounts to reasonable suspicion, it must be such that "a reasonable inference

of unlawful conduct could be objectively discerned." State v. Young, 212 Wis.2d 417, 430, 569 N.W.2d 84 (Ct.App.1997).

When the new information learned by Officer Reed is factored into the calculus, a reasonable inference of unlawful conduct cannot be objectively discerned from the totality of facts known to Officer Reed at the time. That the Griffin vehicle was driving though an isolated area at 2:00am, and that unusual movement from the backseat to the front seat by one of the passengers had been observed, only yields a reasonable inference of unlawful conduct if there was a reasonable and objective basis to believe the vehicle was involved in the shooting. At the point in the timeline when Officer Reed made contact with Mr. Griffin and asked for identification, there was none. Without that connection, the innocent conduct observed by Officer Reed does not reasonably take on a suspicious nature.

The state also refers to the fact that after Officer Reed observed the passenger exit the vehicle, drew his gun and ordered the passenger back into the vehicle, the vehicle "drove off." (see state brief at page 10). Although this occurred prior to Officer Reed learning the new information about the suspect vehicle, it does not give rise to a reasonable inference of unlawful conduct. At that point, the Griffin vehicle had stopped at a red light/intersection and 'drove off' when the light turned green. (Doc. 34:7-8, Appendix A:7-8). Only then did Officer Reed activate his emergency lights "to stop the vehicle." (Doc. 34:8; Appendix A:8). Accordingly, the fact that the Griffin vehicle "drove off" when the light at the intersection changed to green is neither inherently suspicious nor reasonably indicative of some unlawful conduct.

Mr. Griffin would respectfully disagree with the court's characterization of this portion of the incident in the oral ruling hearing, "and the fact that when he got

out with his gun, he said I wanted you to halt, and they started to take off." (Doc. 35:5; Appendix B:5). Mr. Griffin would submit that there is no reasonable inference that because the vehicle proceeded through the intersection when the light turned green, they were fleeing from or reacting to Officer Reed drawing his gun.

Reference is also made to the vehicle having tinted windows (see state brief at page 10). As previously noted, there is nothing in the record or in the testimony of Officer Reed to suggest that the windows were tinted so dark that they violated any traffic law. Further, no argument appears to have been developed on the record either by the state or the court explaining exactly why tinted windows are inherently suspicious or indicative of unlawful conduct.

When the totality of facts is considered, Officer Reed had no reasonable suspicion to effectuate the investigatory stop of the Griffin vehicle and proceed to

make a request for identification. Although the Griffin vehicle was similar to the description of the suspect vehicle, it was also dissimilar in one key respect known to Officer Reed.[2] If Officer Reed believed that the description of the suspect vehicle as a silver Chevy Impala was accurate, he had no objective or reasonable basis to doubt Beloit PD radio's description of the vehicle as having Iowa registration.

Accordingly, when Officer Reed made contact with Mr. Griffin and requested identification, at that time no reasonable suspicion existed to support a seizure under the Fourth Amendment. At that point, the Griffin vehicle should have been allowed to leave the scene; the continued seizure of the vehicle and its

[2] At the hearing in which the court delivered its oral ruling, the court characterized the information indicating that the suspect vehicle had Iowa registration as "there was apparently confusion between what license plates were on – that were on the vehicle that he had stopped and vehicle they were looking for." (Doc. 35:4; Appendix B:4). Mr. Griffin would respectfully submit that confusion with respect to the identity of the suspect vehicle functioned to dissipate any previously existing reasonable suspicion.

occupants was unreasonable under the Fourth Amendment.

II. Mr. Griffin respectfully disagrees with the state's assertion that the initial investigatory stop was not extended, and reiterates his argument that there was insufficient reasonable suspicion to extend the stop.

After obtaining identification from Mr. Griffin, Officer Reed returned to his vehicle and confirmed the information with Rock Co. dispatch. At that point, Officer Reed was advised that the vehicle he had pulled over was not the suspect vehicle and that dispatch did not wish the vehicle to be held. (Doc. 34:24; Appendix A:24).

As he indicated at the motion hearing, when Officer Reed returned to Mr. Griffin's vehicle he intended to do more than simply hand him his license back and conclude the stop. Officer Reed stated that he "wanted to ask the driver if there was any weapons in the vehicle and if I could search for weapons in the

vehicle." (Doc. 34:11; Appendix A:11). Officer Reed further explained why he wanted to ask about weapons and search the vehicle. Despite the information received from dispatch, Officer Reed believed that "it very well could have been the vehicle" (Doc. 34:65; Appendix A:65) because "there's a lot going on in the parking lot of a bar especially after a shooting," (Doc. 34:30; Appendix A:30), and "I believed there was possibly confusion on the description of the vehicle." (Doc. 34:65; Appendix A:65). Based on this belief, Officer Reed stated that "I just wanted to go up and make sure there was no weapons in the car, and I was going to ask the driver for consent to search." (Doc. 34:30; Appendix A:30).

At this point, as an objective matter, the original purpose of the stop – investigate the vehicle's potential involvement in the Beloit shooting – had been accomplished; dispatch had advised to let the vehicle go because it was not the vehicle from the shooting.

Although Officer Reed's hunch to further detain the vehicle and its occupants turned out to be correct, subjective hunches or beliefs are not sufficient to extend an investigatory stop beyond its initial purpose. Instead, the officer must have reasonable suspicion that arises from facts. Officer Reed stated at the motion hearing that he had no facts to support his belief. (Doc. 34:61; Appendix A:61).

In its brief (see state brief at page 12), the state asserts that Officer Reed intended to return Mr. Griffin's license and ask for consent to search, and based on State v. Williams, 2002 WI 94, ¶19, 225 Wis.2d 1, 646 N.W.2d 834 (2002), describes that as "*a procedure* that the Wisconsin Supreme Court recognizes as standard, accepted, law enforcement devices and are not in any general sense constitutionally suspect." (Emphasis added).

Mr. Griffin would respectfully submit that the Wisconsin Supreme Court was referring to consent

searches themselves rather than any law enforcement procedure utilized to obtain that consent:

> A "search authorized by consent is wholly valid" under the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Consent searches are standard, accepted investigative devices used in law enforcement, and are not in any general sense constitutionally suspect. *Id.* at 231-32, 243.

See State v. Williams, 2002 WI 94, ¶19, 225 Wis.2d 1, 646 N.W.2d 834 (2002).

The validity of consent searches themselves is a question distinct from whether an officer, in any given situation, has a legal basis to make a request for consent to search. The Wisconsin Supreme Court recently addressed this question in State v. Hogan, 2015 WI 76 (2015).

The court noted in Hogan that "after a traffic stop has ended, police may interact with the driver as they would with any citizen on the street." State v. Hogan, 2015 WI 76, ¶67 (2015). The court went on, "that is, if a person is not seized, police may request consent to

search even absent reasonable suspicion." State v. Hogan, 2015 WI 76, ¶67 (2015). However, if the encounter functions as a constructive seizure, law enforcement must have reasonable suspicion before requesting consent to search. State v. Hogan, 2015 WI 76, ¶72 (2015).

Officer Reed indicated that he intended to ask Mr. Griffin about weapons and request consent to search, and that he had Mr. Griffin step out of the vehicle for safety reasons (the tinted windows made it difficult to observe the vehicle's other occupants). (Doc. 34:11-12; Appendix A:11-12). Officer Reed stated that "I asked him to step out of the vehicle so I could speak to him." (Doc. 34:11; Appendix A:11). Mr. Griffin did exit the vehicle and walked to the rear of the vehicle with Officer Reed. (Doc. 34:11-12; Appendix A:11-12). At that point, Officer Reed heard Officer Sanders indicate his observance of a gun in the vehicle. (Doc. 34:11; Appendix A:11). Officer Reed indicated that he

did not have a chance to ask Mr. Griffin for consent to search prior to the gun being observed. (Doc. 34:62; Appendix A:62).

Given the totality of the circumstances and the timeline in which they occurred, Mr. Griffin was being subjected to a Fourth Amendment seizure when he was asked to exit his vehicle so that Officer Reed could ask his consent to search the vehicle. In contrast to both Hogan and Williams, there is no indication in the record of this case that Mr. Griffin was free to leave. Officer Reed did not testify that he ever told Mr. Griffin that the stop was concluded or terminated. As the Wisconsin Supreme Court recently stated, "we have held that a traffic stop ends when a reasonable person, under the totality of the circumstances, would feel free to leave." State v. Hogan, 2015 WI 76, ¶63 (2015).

Mr. Griffin had earlier been present when Officer Reed drew his weapon in order to emphasize his instruction for the exited passenger to get back into the

vehicle. Even without that factual context, no reasonable person would have felt free to leave when Officer Reed asked Mr. Griffin to step out of the vehicle. No reasonable person in that circumstance would have felt that compliance with Officer Reed's request was optional.

Certainly Officer Reed or any law enforcement officer may take reasonable steps to protect himself or herself. However, the reasonable justification for protection of law enforcement is not equivalent to the reasonable suspicion needed to justify the underlying conduct. That law enforcement may take steps to protect themselves while asking for consent to search a vehicle does not obviate the requirement that such a request be supported by reasonable suspicion.

Officer Reed had no basis for requesting consent to search the Griffin vehicle for weapons. The original purpose of the stop – to determine the Griffin vehicle's involvement in the Beloit shooting – had been

concluded. Dispatch had advised to let the vehicle go because it was not the suspect vehicle.

Accordingly, if Officer Reed wanted to extend the investigatory stop with a new, modified purpose – to determine whether weapons were present in the vehicle – he would have needed some factual information to support that new investigative purpose. See State v. Colstad, 2003 WI App 25, 260 Wis. 2d 406, ¶19, 659 N.W.2d 394 (Ct.App.2003). Officer Reed would have needed factual information to create reasonable suspicion that weapons were present in the vehicle in order to justify a request to search the vehicle for weapons. Officer Reed himself testified that he had no such factual information.

Accordingly, without new circumstances or facts that would, when taken together, create reasonable suspicion for the presence of weapons in the Griffin vehicle, Officer Reed had no basis to extend the stop for the purpose of asking for consent to search the vehicle

for weapons. When Officer Reed decided to pursue a new investigation for that purpose, he extended the initial investigatory stop in a manner inconsistent with the requirements of the Fourth Amendment.

Based on the foregoing discussion, Mr. Griffin submits that the court erred in denying his motion. During the oral ruling hearing, the court did not specifically address the issue of whether Officer Reed had a basis for extending the stop for the purpose of asking for consent to search the vehicle for weapons. (Doc. 35:5-8; Appendix B:5-8). The court did not discuss the fact that reports from both Beloit PD and Rock Co. dispatch indicated that the Griffin vehicle was not the suspect vehicle, or how those reports changed the context of the circumstances the court found to be suspicious (i.e. the movement of the passenger, the time of night, the description of the vehicle). (Doc. 35:5-8; Appendix B:5-8). Mr. Griffin respectfully submits that

the court erred in its reasoning in denying his motion to suppress.

CONCLUSION TO BRIEF AND ARGUMENT

Mr. Griffin respectfully requests that this court reverse the denial of his Motion to Suppress, vacate the judgment of conviction and permit the withdrawal of the plea, and remand for further proceedings.

Dated this 26th day of October, 2015.

Respectfully submitted,

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Certification of Brief Complaince with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2794 words.

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Certification of Appendix Complaince with Wis. Stats. § Wis. Stats. 809.19(2)(a).

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an Appendix that complies with Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the understanding of the issues raised, including oral or

written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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