STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2015AP1294-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

LEWIS O. FLOYD, JR.,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON MARCH 19, 2014, AND THE ORDER DENYING POSTCONVICTION RELIEF FILED ON JUNE 11, 2015, IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE ALLAN TORHORST, PRESIDING. RACINE COUNTY CASE NO. 2013-CF-982

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

Respectfully submitted:

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STATEMENT OF THE ISSUES

I. Whether Lewis Floyd's motion to suppress evidence obtained by a pat-down during a traffic stop should have been granted where: (a) the reasonable suspicion that Floyd was armed and dangerous to was based primarily on the presence of air fresheners in his car and that the officer pulled Floyd over in a high-crime area; and (b) if the pat-down was not justified, whether Floyd voluntarily consented to the search where the officer withheld Floyd's identification and traffic tickets when he asked Floyd if he could pat him down?

The circuit court concluded that: (a) the officer had reasonable suspicion to justify the pat-down; and (b) the officer asked Floyd if he could search him and Floyd said yes, so the pat-down was also consensual. Thus, the court answered the aforementioned question no.

II. Whether trial counsel rendered ineffective assistance by failing to present additional evidence concerning the lack of consent, specifically that another officer at the scene agreed that his report accurately indicated that the primary officer who interacted with Floyd had "advised" Floyd that he would be searched, as opposed to the primary officer's testimony that he asked Floyd if he could pat him down?

The circuit court concluded that counsel was not ineffective where counsel testified he was satisfied with the record as it was and feared additional evidence might be damaging, and regardless, the counter found the other officer's testimony ultimately corroborated the primary officer's testimony. Thus, the court answered the aforementioned question no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Lewis Floyd would welcome oral argument if it would assist the panel to understand the issues presented or answer any questions that may arise, unbeknownst to counsel, during the panel's review of the briefing.

Floyd does not believe the Court's opinion in the instant case will meet the criteria for publication because resolution of the issues will involve no more than the application of well-settled rules of law and controlling precedent, with no call to question or qualify said precedent.

STATEMENT OF THE CASE

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW

On August 1, 2013, the State charged Lewis Floyd with a second and subsequent offense of possession with intent to deliver a controlled substance, a second and subsequent offense of possession with intent to deliver marijuana, and two related counts of misdemeanor bail jumping. (5:1-2). The charges were based on evidence obtained from Floyd during a traffic stop that occurred on July 23, 2013. (1:1-3).

Trial counsel filed a motion to suppress the evidence, which contended that the evidence obtained was the result of a search that violated Floyd's Fourth Amendment rights. (7:1-9; App. 1-9); (8:1-6). After an evidentiary hearing, the circuit court denied the motion. (25:28-32; App. 10-14).

Subsequently, Floyd entered a no-contest plea to the charge of second and subsequent offense of

possession with intent to deliver a controlled substance, with the remaining charges dismissed and read-in to the court. (10:2); (27-A[1]:7). The circuit court later imposed a sentence of six years imprisonment, but withheld the sentence for a term of three years of probation. (15:1-3); (27-B[2]:15-16).

Floyd filed a notice of intent to pursue postconviction relief. (18:1). In his subsequent, postconviction motion, Floyd argued that his trial counsel rendered ineffective assistance at the motion hearing by failing to present additional evidence to support his argument, and had he done so, it should have altered the court's decision. (19:1-21; App. 18-38). An evidentiary hearing was held and the circuit court ultimately denied the motion. (28:27-30; App. 39-42). Floyd appealed. (21:1-3).

II. STATEMENT OF RELEVANT FACTS

Facts presented at the hearing on the motion to suppress

On July 23, 2013, around 6:45 p.m., Lewis Floyd was driving along Racine Street in the city of Racine. (25:3-4, 13). Floyd stopped at the traffic light in the area of 16th and Racine. (25:3-4).

Deputy Ruffalo was stopped at the same intersection. (25:3). Ruffalo had six years of

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[1] The record has two items labeled as #27. The first instance, corresponding to the transcript for proceedings on 1/6/14, is labeled by counsel as 27-A. The second instance, corresponding to the transcript for proceedings on 3/18/14, is label by counsel as 27-B. Given the minimal citation to either item, counsel decided it was easier to label them as 27-A and 27-B in this brief, as opposed to consuming additional time before filing the brief to have the clerk correct this insignificant error.

[2] See above.

experience as an officer. (25:7). The majority of Ruffalo's duties at the time involved executing traffic stops. (25:7).

While they were stopped at the intersection, Ruffalo observed the plate on the Floyd's car and "ran" it through the computer in his squad car. (25:4). Ruffalo noted that the registration for the car was suspended due to emissions. (25:4). Ruffalo decided to stop Floyd's vehicle, and did so about one block later, by 15th and Racine. (25:4).

Ruffalo approached Floyd and explained that the reason for the stop was due to the suspended registration on the car. (25:4-5). Ruffalo asked for Floyd's license and insurance information. (25:5). Floyd replied that he did not have either, but he did hand Ruffalo his Wisconsin State identification. (25:5, 14). Ruffalo told Floyd to stay in the car and that he would return shortly. (25:5).

At the time of the stop, there was still daylight. (25:14). Ruffalo noticed that inside Floyd's car there were air fresheners in every vent and hanging from the rear view mirror. (25:6-7). Ruffalo testified that in his experience the presence of many air fresheners was an indicator that a person was involved in drug-related activity because it is used to mask the smell of narcotics. (25:7). Ruffalo admitted that he did not take photographs of the air fresheners. (25:12). Ruffalo did not mention the air fresheners in his initial police report either. (25:13).

Ruffalo agreed that he did not smell any controlled substances. (25:13). He did not see any packaging materials in the car or any user paraphernalia. (25:13). Ruffalo also agreed that he did not see Floyd make any furtive movements. (25:13). He also did not see any indication that Floyd had weapons. (25:18).

Ruffalo went to the squad car and asked dispatch if a canine unit was available and if not, whether a "cover squad" could come. (25:5). The dispatcher informed Ruffalo that a canine unit was not available and that a patrol officer would arrive instead as his cover. (25:6).

Officer White arrived at the scene to serve as the requested "cover squad." (25:6); (28:10). Ruffalo explained to White why he stopped Floyd's car. (25:6). Ruffalo also explained that he wanted to have Floyd exit the car because he "had some indications that there might be some criminal activity going on in the vehicle as well as explain the citations to him." (25:6). The citations were for operating a car without insurance, operating a car after suspension, and non-registration of the car. (28:3; App. 20).

Ruffalo entered information into his computer to create the traffic citations, and returned to Floyd's car within five or six minutes to explain the citations to Floyd. (25:5, 6, 17). Ruffalo asked Floyd to step out of the car. (25:15). Floyd did. (25:15).

Ruffalo admitted that he "assume[s] everybody has a weapon, everyone I come in contact with." (25:18). Therefore, Ruffalo explained, he searches everyone that steps out of the car. (25:18). Ruffalo testified that the first thing he does when he has someone exit a car is ask if he can search them. (25:17). Ruffalo testified that he was not going to explain citations to Floyd and then ask if he can search him. (25:17).

When Floyd exited the car, Ruffalo asked him if he had any weapons or anything on him. (25:8). Floyd said no. (25:8). Ruffalo testified that he asked Floyd if he could search him for Ruffalo's safety, and that Floyd said "yes, go ahead." (25:8). Ruffalo still had in his hand Floyd's identification, as well as the three citations. (25:15). Ruffalo testified that Floyd was not

free to leave at that time because "the stop had not been finished yet." (25:15).

Ruffalo testified that he patted Floyd down "just over his outer clothing," and when he reached his groin area he felt something that resembled a bag wedged between his legs. (25:8). Ruffalo believed that the item was possibly narcotics. (25:9). After much difficulty, Ruffalo eventually dislodged the item. (25:11). It was a bag that contained a green leafy substance, which was later determined to be marijuana. (25:12); (1:2). The bag also contained Vicodin. (1:2).

At the hearing, when asked if the only thing that led Ruffalo to believe that Floyd could be involved in illegal activity was the air fresheners, Ruffalo said, "That was an indicator, yes." (25:23). During redirect examination the prosecutor asked Ruffalo if there were other factors. (25:23). Ruffalo said that it was a high crime area, that Floyd's car had tinted windows, the time of day, and that Floyd was in the car by himself. (25:23).

On re-cross, counsel asked Ruffalo to confirm that he said that a factor to suggest criminal activity was that Floyd was by himself, and Ruffalo said "it could be in those areas, yes." (25:23-24). Ruffalo testified that despite the presence of the company S.C. Johnson Wax by the location of the stop, he thought it was a high crime area. (25:21, 23). Ruffalo was asked whether large quantities of drug activity and gang activity occurred in that area, and Ruffalo agreed. (25:21). The prosecutor also asked if weapons are common with the drug activity, and Ruffalo agreed. (25:21).

Ruffalo also agreed that although it was a high-crime area, Floyd's identification indicated that his address was in Kenosha. (25:22). Ruffalo admitted that he had no way of knowing whether Floyd was

associated at all with any of the alleged criminal activity in the area. (25:22-23).

After hearing argument, the circuit court held that Ruffalo had suspicion that there were drugs in the car, otherwise he would not have asked for the canine unit. (25:29). Ruffalo had his suspicion based on fact that there were air fresheners that were all over the place, the time of day, that Floyd was alone, that Floyd was from Kenosha, and "another one." (25:29, 30). The court held that the stop was not over when Ruffalo asked to Floyd to get out of the car and for consent to search him, which Floyd gave. (25:30, 31-32). The court ultimately denied the motion to suppress. (25:32).

Plea and sentencing

Floyd entered a plea of no-contest to possession of non-narcotics with intent to deliver, and in exchange the State agreed to dismiss two bail jumping charges and possession of marijuana with intent to deliver. (10:2); (27-A:7). The circuit court sentenced Floyd to three years initial confinement and three years extended supervision, but stayed that sentence pending three years of probation. (15:1-3); (27-B:15-16).

Postconviction proceedings

In a postconviction motion, Floyd argued that his counsel rendered ineffective assistance by not presenting certain evidence at the motion to suppress hearing. (19:7-17; App. 24-34). In his police report, the cover officer, Officer White, wrote that Deputy Ruffalo "advised" Floyd he was going to search him when he exited the vehicle. (19:20-21; App. 37-38). Trial counsel had included this fact in his motion to suppress to contend that White's report indicated that instead of asking for Floyd's consent, he simply told Floyd that he was going to search him anyway. (7:2-3; App. 2-3). But counsel did not call White to testify.

In the postconviction motion, Floyd argued that counsel was ineffective for not presenting evidence that White indicated in his report that Ruffalo advised Floyd that he would be search, instead of indicating that Ruffalo asked Floyd. (19:9-17; App. 26-34). Floyd argued that if counsel had included the evidence, it would have contradicted Ruffalo's testimony that he obtained consent from Floyd. (19:9-10; App. 26-27). Moreover, if the court had evidence that contradicted Ruffalo's testimony on the consent issue, there was a reasonable probability of a different outcome. (19:11-16; App. 28-33).

At the hearing on Floyd's motion, trial counsel testified that he did not call White because he was content with the record that he already had without White's testimony. (28:5-6). Moreover, he was afraid it would damage his case if he called White to testify. (28:5-6).

White testified that he assisted Ruffalo with his traffic stop of Floyd. (28:10). White testified that when he arrived, Ruffalo told him that he had stopped Floyd because of traffic citations. (28:10). He did not recall Ruffalo saying anything about a suspicion of drug activity. (28:11).

White testified that he observed Ruffalo go to Floyd's car and asked Floyd to exit the car. (28:11). Floyd complied. (28:11). White testified that he did not have a clear recollection of what Ruffalo said exactly. (28:14). He testified that Ruffalo asked him if he could perform an external pat-down. (28:13-14). But White also testified that his report, indicating that Ruffalo "advised" Floyd about the consent, was accurate. (28:14).

The circuit court concluded that trial counsel was not ineffective regarding his representation at the hearing on the motion to suppress. (28:27-28;

App. 39-40). The court found that counsel chose not to call White because he was satisfied with the testimony that he had from Ruffalo. (28:28; App. 40). Moreover, considering White's testimony, he corroborated Ruffalo's testimony anyway. (28:28-29; App. 40-41). The court denied the motion. (28:30; App. 42). Floyd appealed. (21:1-3).

ARGUMENT

I. THE EVIDENCE AGAINST FLOYD SHOULD HAVE BEEN SUPPRESSED BECAUSE IT WAS OBTAINED BASED ON A PAT-DOWN SEARCH THAT LACKED AN OBJECTIVELY REASONABLE SUSPICION THAT FLOYD WAS ARMED OR DANGEROUS, AND THE ILLEGAL SEARCH WAS NOT CURED BY VOLUNTARY CONSENT WHERE THE OFFICER MADE CLEAR THAT THE MINOR TRAFFIC STOP WAS NOT GOING TO END UNTIL THE SEARCH WAS PERFORMED.

The Fourth Amendment prohibits exactly the type of conduct that occurred in this case. It prohibits officers from stopping people on the street and patting them down, unless there is a reasonable suspicion that the person was presently armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 27-28, 88 S.Ct. 1868 (1968). The officer in this case candidly admitted that he assumes everybody has a weapon, and that he searches everyone that steps out of the car during a traffic stop. (25:18). The officer's clearly unconstitutional blanket approach to searching people, which he exercised in this case with Floyd, required suppression of the fruits of that illegal search.

Initially at the hearing, the officer gave a single reason for the search: there were a lot of air fresheners in the car. The court also found the suspicion reasonable because it occurred in a high-crime area. But there is no connection between air fresheners and a reasonable suspicion that Floyd was presently armed or dangerous. In addition, the location of the traffic stop was not specific to Floyd and is outweighed by the facts that were specific to him, including that: Floyd was pulled over for a routine traffic violation, he was cooperative, he provided information to the officer, he made no furtive movements, and he was not nervous or upset.

Under those facts, the officer lacked a reasonable suspicion that Floyd was presently armed and dangerous. *See State v. Johnson*, 2007 WI 32, ¶¶21-22, 299 Wis. 2d 675, 729 N.W.2d 182.

Besides the lack of reasonable suspicion, Floyd did not voluntarily consent either. The officer testified that he asked Floyd if he could be pat him down, and that Floyd agreed. (25:8). However, the officer also testified that he was not going to let Floyd go until he searched him and he withheld Floyd's identification and tickets until he did. (25:15). Under those circumstances, a person in Floyd's position would not feel free to say no, and therefore Floyd's agreement was not voluntary and the unconstitutional pat-down was not cured. *See State v. Luebeck*, 2006 WI App 87, ¶7, 292 Wis.2d 748, 715 N.W.2d 639. Therefore, this Court should reverse the denial of Floyd's motion to suppress statements and vacate his conviction.

A. On the motion to suppress evidence based on violation of the Fourth Amendment, the State had the burden to show by clear and convincing evidence that the circumstances surrounding the pat-down demonstrated an objectively reasonable suspicion that Floyd was presently armed and dangerous, and if not, that Floyd gave his voluntary consent instead.

The Wisconsin Constitution and United States' Constitution both guarantee the right of persons to be free from unreasonable searches and seizures. U.S. Const. Amend. IV; Wis. Const. Art. I, § 11. It is presumptively unreasonable for officers to search a person without a warrant. *State v. Denk*, 2008 WI 130, ¶36, 315 Wis.2d 5, 758 N.W.2d 775.

There is exception for a so-called "protective search" or frisk for weapons. Under *Terry v. Ohio*, 392 U.S. 1 (1968), a brief detention and pat-down without a warrant is permissible if a reasonably prudent officer in the circumstances presented could believe that his safety was at risk because the individual may be armed or dangerous. *Terry*, 392 U.S. at 27-28; *State v. Kyles*, 2004 WI 15, ¶9, 269 Wis.2d 1, 675 N.W.2d 449.

The totality of the circumstances must show that the officer's suspicion that the individual is armed or dangerous was objectively reasonable, and not merely a personal hunch. *Terry*, 392 U.S. at 21-22; *Kyles*, 269 Wis. 2d 1, ¶10. In the context of a lawful traffic stop, an officer may pat-down the driver for weapons under *Terry*, if the circumstances viewed objectively support a reasonable belief that the driver is armed and presently dangerous. *Arizona v. Johnson*, 555 U.S. 323, 330-32, 129 S.Ct. 781 (2009); *Johnson*, 2007 WI 32, ¶¶21-22.

When the defendant seeks to suppress evidence taken during a warrantless search, the State bears the burden in the trial court to show by clear and convincing evidence that the search was nonetheless reasonable and constitutional. *State v. Kieffer*, 217 Wis.2d 531, 541-42, 577 N.W.2d 352 (1998). On appeal, whether the trial court properly upheld a warrantless search is a question of constitutional fact. *Johnson*, 2007 WI 32, ¶13. The trial court's factual findings are upheld unless they are clearly erroneous. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. The trial court's decision over whether the State met its burden that the search was constitutionally justified is a legal determination that is reviewed *de novo*. *Williams*, 2001 WI 21, ¶18.

Here, the record shows that the State failed to show by clear and convincing evidence that Deputy

Ruffalo's pat-down was supported by an objectively reasonable suspicion that Floyd was presently armed and dangerous. Further, while the court found that Ruffalo asked Floyd if he could pat him down and Floyd agreed, the circumstances surrounding Floyd's "agreement" show that his consent was nonetheless involuntary.

1. Deputy Ruffalo's pat-down of Floyd was not supported by a reasonable suspicion, where the circumstances show that Floyd did nothing to arouse a suspicion that he was presently armed and dangerous.

Courts will only find a protective search reasonable when there are multiple facts present that when viewed objectively tend to indicate that the person may be armed and dangerous. *See e.g. State v. Buchanan*, 2011 WI 49, ¶10, 334 Wis.2d 379, 799 N.W.2d 775 (car stopped for speeding, the officer noticed the driver made furtive movements, appeared unusually nervous with hands shaking, and the officer knew the driver had recent contacts with the police that involved violence); *and State v. Sumner*, 2008 WI 94, ¶¶5-10, 312 Wis.2d 292, 752 N.W.2d 783 (defendant reached to the passenger side of the car, appeared unusually nervous, repeatedly put his hands in his pockets, had no identification, waved to the officers, and told them to hurry up); *and State v. McGill*, 2000 WI 38, ¶¶27-32, 234 Wis. 2d 560, 609 N.W.2d 795 (officer smelled drugs and alcohol when he approached the driver in a darkly lit location, defendant had driven on a closed road, did not stop when the officer activated the lights on his squad car, initially walked away from the scene, and appeared unusually nervous).

But when there are few to no facts present that when viewed objectively suggest the person is armed

or dangerous, courts find a protective search unconstitutional. *See e.g. State v. Mohr*, 2000 WI App 111, ¶¶2, 6-7, 16, 235 Wis.2d 220, 613 N.W.2d 186 (car stopped for crossing center line and speeding, officer smell odor of intoxicants, defendant acted nervous and refused to put his hands in his pockets, but twenty minutes passed without anything suspicious occurring); *Kyles*, 2004 WI 15, ¶¶11, 13-14, 68-72 (stopped for traffic violation, driver appeared unusually nervous, repeatedly put took his hands in and out of his pockets, and wore a large puffy coat, but nothing to suggest he was armed and dangerous); *Johnson*, 2007 WI 32, ¶¶2-3, 40-47 (stopped for minor traffic violation in well-let area, defendant made a furtive movement in the car, but defendant was cooperative and there was nothing else to suggest he was dangerous).

Here, the objective circumstances show that Ruffalo's decision to search Floyd lacked the required reasonable belief that Floyd was armed and presently dangerous. Ruffalo never said that the circumstances led him to believe that Floyd was armed and dangerous. Instead, he testified to the following: air fresheners in every vent of the car, tinted windows, high-crime area, travelling alone, and the time of day. (25:23). For several reasons, there is simply no articulable basis specific to Floyd that explains how those assertions objectively demonstrate a reasonable belief that Floyd was armed and dangerous.

First, there are several circumstances that show Floyd was anything but armed or dangerous, unlike cases finding a protective search justified. *Compare Buchanan*, 2011 WI 49, ¶10; *Sumner*, 2008 WI 94, ¶¶5-10, 13-14, 68-72; *and McGill*, 2000 WI 38, ¶¶27-32. Floyd was stopped because of suspended registration, not erratic or suspicious driving. (25:4). Floyd was cooperative, compliant, did not make furtive movements, or do anything suspicious. (25:5, 13, 14). There was nothing at all from Ruffalo's

testimony to indicate there was weapon present at all. (25:18).

Second, some of the factors Ruffalo did give were entirely non-specific to Floyd and fail to connect Floyd to a reasonable suspicion showing he was armed and dangerous. Ruffalo claimed that the stop occurred in a high crime area. (25:23). The State failed to support that conclusory claim with any specific examples, recently or otherwise. Moreover, Ruffalo made this claim despite the fact that it was located near the parking lot of the S.C. Johnson Wax company. (25:21, 23). It was not an alley or darkened area. There was still sunlight at the time of the stop. (25:14).

Moreover, Floyd's identification indicated he lived elsewhere, in Kenosha, and not that area or Racine generally. (25:22-23). The only connection between Floyd and the specific area, which Ruffalo claimed was "high crime," was the simple fact that Ruffalo decided to stop Floyd at that spot, as Floyd was travelling through it.

Third, the fact that Floyd was travelling alone, the car had tinted windows, and the presence of several air fresheners are not enough to show that Floyd was armed and dangerous. Ruffalo's claim about travelling alone to show that Floyd was armed and dangerous is entirely baseless. The number of people in car has no connection whatsoever to whether a person is armed or dangerous. If anything, the presence of more people who the officer must observe during a traffic stop would make the issue of maintaining safety more difficult.

Ruffalo claimed that the windows were tinted, although he only mentioned this fact at very end of the hearing, after he was given other opportunities to explain why he wanted to search Floyd. (25:23).

Instead, the presence of air fresheners was the factor Ruffalo emphasized. (25:6-7).

At most, Ruffalo's belief that air fresheners could be related to drug activity might be one factor to consider for whether drug activity was afoot. *See State v. Malone*, 2004 WI 108, ¶¶17, 35-36, 274 Wis.2d 540, 683 N.W.2d 1 (in addressing whether the officer could merely ask the occupants of a car questions, not pat them down, the presence of air fresheners are just one factor to justify inquiry, but not probable cause to search the car). But, Ruffalo did not merely suspect or ask questions; he wanted to search Floyd. (25:15-18). His testimony and actions make that clear. Even the circuit court concluded the Ruffalo's goal was to search Floyd before the stop was over. (25:29-30; App. 11-12). But a pat-down search based on air fresheners is simply not grounded in a reasonable belief that Floyd was armed and dangerous.

Fourth, Ruffalo's testimony makes clear that the search was not specific to Floyd, but as Ruffalo himself testified, it is something he does for *everyone* who steps of the car during a traffic stop. (25:18). Ruffalo even admitted that he assumes *everyone* has a weapon. (25:18). Blanket suspicion and blanket protective searches are clearly prohibited. *Mohr*, 2000 WI App 111, ¶16 (protective search unreasonable where it is performed as a "general precautionary measure, not based on the conduct or attributes of [the defendant]"). In this case, Ruffalo's testimony about blanket suspicion illustrates that he lacked the required particularized suspicion to form an objectively reasonable belief that Floyd was armed and dangerous.

Like other cases where some factors might lead an officer to a hunch about criminal activity, if there is nonetheless nothing to indicate that the person is armed and dangerous, a protective search is illegal.

See Mohr, 2000 WI App 111, ¶2; *Kyles*, 2004 WI 15, ¶11; *Johnson*, 2007 WI 32, ¶¶2-3, 40-47. For these reasons, Ruffalo's pat-down of Floyd for weapons was illegal.

2. Deputy Ruffalo's illegal pat-down of Floyd was not cured by consent, where a person in Floyd's position would have not feel free to decline the search because Ruffalo withheld Floyd's documents and did not otherwise end the traffic stop when he made his request.

A search can be reasonable despite the absence of a warrant if an officer obtains the person's consent to search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041 (1973); *State v. Phillips*, 218 Wis.2d 180, 196, 577 N.W.2d 794 (1998). But consent, whether by words or conduct, must always be free and voluntary. *Phillips*, 218 Wis.2d at 196-97. More specifically, consent is valid only where it is "an essentially free and unconstrained choice," and not, "the product of duress or coercion, express or implied." *State v. Artic*, 2010 WI 83, ¶32, 327 Wis.2d 392, 786 N.W.2d 420, *citing Schneckloth*, 412 U.S. at 225.

The validity of a person's consent for a search depends on the totality of the circumstances. *State v. Vorburger*, 2002 WI 105, ¶88, 225 Wis.2d 537, 648 N.W.2d 829. Relevant circumstances include: whether the police were deceptive, threatening, or intimidating; whether the conditions were congenial; the defendant's response; and whether the defendant knew he could refuse. *Phillips*, 218 Wis.2d at 197. Consent is not valid when officers tell an individual they are going to conduct a search and the facts show that they were going to perform the search no matter what. *Johnson*, 2007 WI 32, ¶¶16-17. Similarly,

consent is not valid even when a request is made while the person is illegally seized, if the person would not feel free to leave or terminate the encounter. *State v. Luebeck*, 2006 WI App 87, ¶7, 292 Wis.2d 748, 715 N.W.2d 639.

Here, the trial court found that Deputy Ruffalo asked Floyd if he could pat him down for Ruffalo's safety, and that Floyd agreed. But Floyd's consent was not valid because the circumstances show that a person in Floyd's position would not have felt free to decline the search.

Ruffalo's testimony clearly indicates that he was going to perform the search no matter what. Ruffalo testified clearly, and the trial court found, that the traffic stop had not ended when Ruffalo allegedly asked to search Floyd. (25:15, 31-32; App. 13-14). Ruffalo testified that while he had prepared the tickets, he still needed to explain them to him. (25:17). Ruffalo was clear at the hearing that he was not going explain the tickets and then search Floyd. (25:17). Ruffalo even testified that he assumed *everybody* he comes in contact with has a weapon, including *everyone* he asks to step out of the car. (25:18). Thus, the stop was not going to end, Floyd was not going to get his identification back, and Floyd was not otherwise free to leave, until Ruffalo did the search that he wanted to do.

Under these facts, a reasonable person in Floyd's position would not feel free to leave or decline Ruffalo's request to pat him down. *See Luebeck*, 2006 WI App 87, ¶15 (during a routine traffic stop, the consent to search was invalid because driver had been detained for twenty minutes, his license was still held by the officer, and the officer had not issued the tickets yet); *and State v. Jones*, 2005 WI App 26, ¶¶21-22, 278 Wis.2d 774, 693 N.W.2d 104 (during a routine traffic stop with backup officer present, consent invalid where officer's request to search was

made just after issuing the ticket and returning identification because a reasonable person would still not feel free to leave at that time).

Consequently, the record shows that the State failed to show by clear and convincing evidence that Floyd's consent was free and voluntarily given, and the evidence taken by Ruffalo's illegal search should have been suppressed.

B. Where the only evidence supporting the charges against Floyd derived from the unconstitutional pat-down that lacked voluntary consent, the reversal of the motion to suppress requires vacating Floyd's conviction.

In sum, this Court should reverse the trial court's order denying Floyd's motion to suppress, and vacate his conviction. Floyd's charges, including bail jumping, all stemmed from the contraband items that Ruffalo obtained as a result of the illegal and non-consensual pat-down. With those items suppressed, the State would have no evidence to prosecute Floyd. Therefore, where the trial court should have suppressed the only evidence that could support his conviction, it should be vacated. *See State v. Pugh*, 2013 WI App 12, ¶13, 345 Wis. 2d 832, 826 N.W.2d 418 (upon reversal of the trial court's denial of defendant's motion to suppress contraband, the court reversed defendant's conviction).

II. COUNSEL'S FAILURE TO PRESENT ADDITIONAL EVIDENCE CONSTITUTES INEFFECTIVE ASSISTANCE WHERE THERE WAS NO REASONABLE STRATEGIC REASON FOR NOT BRINGING UP THE EVIDENCE AND IT WOULD HAVE ALTERED THE OUTCOME WHERE IT WOULD HAVE CLEARLY SHOWN THERE WAS A LACK OF VOLUNTARY CONSENT.

This Court should find that Deputy Ruffalo's pat-down search was unconstitutional and was non-consensual based on what was presented at the hearing on the motion to suppress, as argued above. (*See* Issue I). But if this Court finds that while the search was illegal, consent was given based on what was presented at the suppression hearing, this Court should conclude that the evidence should have been suppressed nonetheless. Counsel failed to present evidence that Ruffalo did not ask Floyd if he could be patted down, but that he told Floyd he was going to do so. (7:2-3; App. 2-3). Thus, even if Floyd had acquiesced to the pat-down, it was not free and voluntary consent if Ruffalo indicated that he is going to search absent legal authority to do so, as opposed to asking for permission. *See State v. Johnson*, 2007 WI 32, ¶16, 299 Wis. 2d 675, 729 N.W.2d 182. Therefore, due to the ineffective assistance of counsel, this Court should reverse the denial of Floyd's motion to suppress.

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. U.S. Const. Amend. VI; Wis. Const. Art. I, § 7; *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052 (1984); *and State v. Thiel*, 2003 WI 111, ¶11, 264 Wis.2d 595, 665 N.W.2d 305. The rules governing ineffective assistance are well settled. *See State v. McDowell*, 2004 WI 70, ¶30, 272 Wis.2d 488, 681 N.W.2d 500 ("A claim of ineffective assistance of counsel invokes the analysis set forth in *Strickland*…"). A defendant seeking to prove

ineffective assistance must show both that counsel's performance was deficient and that the defendant was prejudiced by such deficiency. *Strickland*, 466 U.S. at 687, *McDowell*, 2004 WI 70, ¶30.

To satisfy the first prong of the analysis, it must be shown that counsel's performance fell below "an objective standard of reasonableness." *State v. Franklin*, 2001 WI 104, ¶13, 245 Wis.2d 582, 629 N.W.2d 289 (quotation and quoted authority omitted). An attorney can render deficient performance by failing to present evidence core to the defense, including the failure to a call a witness. *State v. Jenkins*, 2014 WI 59, ¶19, 355 Wis.2d 180, 848 N.W.2d 786; *State v. White*, 2004 WI App 78, ¶¶20-21, 271 Wis.2d 742, 680 N.W.2d 362.

The second prong requires proof of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Franklin*, 2001 WI 104, ¶14 (quotation and quoted authority omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694.

A. The absence of White's testimony should have altered the outcome of the hearing on Floyd's motion to suppress where White testified that he accurately reported that Ruffalo only advised Floyd he would be searched, as opposed to asking Floyd.

In this case, trial counsel failed to present Officer White's testimony at the hearing to suppress the evidence against Floyd, and it undermined confidence in the outcome of the suppression hearing. White was called to the scene to serve as a "cover" officer. (28:10). According to White's police report,

Ruffalo did not ask Floyd if he could be searched, but instead, Ruffalo advised Floyd he was going to be searched before the tickets would be explained to him. (19:20-21; App. 37-38); (28:13-14).

At the hearing on the postconviction motion, White testified that he could not recall exactly what Ruffalo told Floyd. (28:14). He agreed though that his report was accurate. (28:13-14). He also testified that Ruffalo "said he was going to pat him down - - asked him to pat him down for weapons, then explain the citations." (28:13-14). White tried to clarify by saying, "he asked him for the most part." (28:14). But again, White agreed that he wrote it down as saying that Ruffalo advised Floyd "he's gonna pat him down before explaining the citations." (28:14).

In the end, the circuit court concluded that while "[t]here is some dichotomy from White's report," ultimately White testified that he didn't really hear what Ruffalo said and White would have corroborated Ruffalo's testimony. (28:28-29; App. 40-41). But, the circuit court's conclusion is clearly erroneous. White's testimony was that he could not really hear what Ruffalo said and that "for the most part" Ruffalo asked Floyd. (28:14, 16). But White also agreed that he accurately reported what occurred when he had a clear recollection. (28:12-14). He also did not correct the report's indication that Ruffalo "advised" Floyd that he would be searched, and even stated it when White at one point testified at the postconviction motion hearing that Ruffalo "said he was going to pat him," before saying "asked him." (28:13-14). White's testimony, coupled with Ruffalo's admission that he was not going to let Floyd go until he searched Floyd, show that Ruffalo did not ask Floyd if he could be searched, but that he was going to do so. (19:20-21; App. 37-38); (25:17-18); (28:13-14).

Where the alleged "consent" is nothing more than acquiescence to an assertion of lawful authority,

as opposed to a request, the consent is not valid. *State v. Artic*, 2010 WI 83, ¶32, 327 Wis.2d 392, 786 N.W.2d 430, *citing Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788 (1968). For example, when an officer informs an individual that he will conduct a search, without a lawful basis to do so, it cannot be supported by consent. *Johnson*, 2007 WI 32, ¶16.

Officer White's testimony shows that he accurately reported that Ruffalo advised Floyd he was going to be searched, instead of asking Floyd if he could search. Coupled with Ruffalo's testimony that he was not going to allow Floyd to leave until the search was done, the trial court should have found that Ruffalo did not obtain voluntary consent where he did not ask for it. *See Johnson*, 2007 WI 32, ¶16 (court's conclusion that defendant consented reversed on appeal as clearly erroneous where the officers "advised" the defendant they were going to search him). Instead, due to the failure of trial counsel to present White's testimony, the circuit court should have concluded that White's testimony shows that Ruffalo did not even ask for Floyd's consent. Therefore, but for counsel's failure to present White's testimony, the evidence against Floyd would have been suppressed.

B. Counsel's decision to not present additional evidence that Floyd's consent was involuntary was unreasonable performance where there was no risk in presenting it, but only a benefit.

Trial counsel testified that he was satisfied that Ruffalo's testimony was enough and he chose not to call White because he might damage his case. (28:5-6). But as the postconviction motion hearing shows, there would have been no damage if White had been called as a witness. The court found that

White corroborated parts of Ruffalo's testimony, but as counsel stated, he was satisfied that Ruffalo's testimony supported his position. (28:5-6, 28-29; App. 40-41).

Counsel should have known this going into the hearing too. Counsel had White's police report, and even referred to it in his motion. (7:2-3; App. 2-3). Nothing in the report indicated anything damaging that was not included in Ruffalo's report or Ruffalo's testimony. Clearly, White was there only as a "cover officer," and was not involved in the circumstances of the stop or what was the basis of Ruffalo's decisions. (19:20-21; App. 37-38); (28:10-11). The only difference between White and Ruffalo's versions was that White reported that Ruffalo "advised" Floyd that he would be patted down. It was that difference that would have altered the outcome, and counsel's failure to present that evidence constitutes deficient performance. *See State v. Jeannie M.P.,* 2005 WI App 183, ¶¶11, 35, 286 Wis.2d 721, 703 N.W.2d 694 (failure to investigate and present evidence supportive to defendant's defense at trial constituted deficient performance).

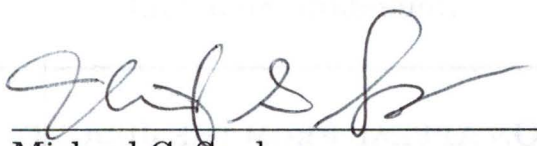
In sum, this Court should find that even with Ruffalo's testimony at the hearing on the motion to suppress that Floyd did not give voluntary consent under the circumstances. (*See supra* Issue I at 17-19). But if for some reason this Court does not find it consensual with Ruffalo's testimony alone, evidence derived from White's testimony illustrates that Floyd's "consent" was merely submission to authority. *See Johnson*, 2007 WI 32, ¶16. Counsel's fear of damage was unfounded where White had a limited role in the traffic stop and he had White's report to understand what his testimony would show. (19:20-21; App. 37-38); (28:10-11). Consequently, counsel was ineffective by failing to present additional evidence that the pat down was not consensual, and this Court should find that counsel's failure should

have altered the outcome of the suppression hearing, reverse the order denying the motion to suppress, and vacate Floyd's conviction.

CONCLUSION

For the aforementioned reasons, Floyd asks this Court, whether based the arguments in issue I or II, to reverse the circuit court's denial of Floyd's motion to suppress and vacate Floyd's conviction.

Dated this 21st day of September, 2015.



Michael G. Soukup
Attorney for Defendant-Appellant

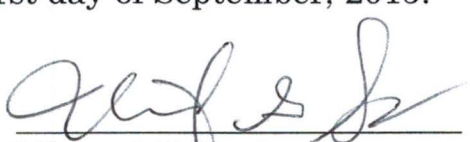
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a 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, maximum of 60 characters per full line of body text. The length of this brief is 6608 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the 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. 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 21st day of September, 2015.



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CERTIFICATION OF APPENDIX CONTENT

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 Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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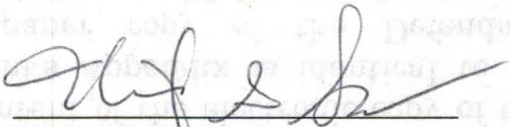

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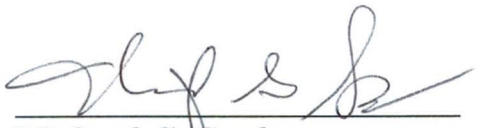
CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Wis. Stat. § 809.80(4)(a), that this Appellant's Brief and Appendix will be delivered to a FedEx, a third-party commercial carrier, on September 21, 2015, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 21st day of September, 2015.



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