STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1294-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEWIS O. FLOYD, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE ALLAN TORHORST, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary as the arguments are fully developed in the parties' brief and the issues presented involve the application of well-settled legal principles.

ARGUMENT

I. The trial court correctly denied Floyd's motion to suppress.

A. Summary of argument.

Floyd argues that Officer Ruffalo violated the Fourth Amendment when he searched Floyd after initiating a traffic stop for suspended registration. Floyd contends that the search was unlawful because Officer Ruffalo lacked reasonable suspicion that Floyd was armed and dangerous. Floyd's brief at 10-17. Floyd also argues that any consent on his part could not have been voluntary as a matter of law because, among other reasons, he was not free to leave when his consent was obtained. Floyd's brief at 17-19.

The State proved that Floyd voluntarily consented to the search and that, as a result, the search was wholly valid under the Fourth Amendment. A traffic stop can be extended and a new investigation can begin if the police officer objectively believes that there is a reasonable suspicion that a person is engaged in illegal activity separate and distinct from the behavior that prompted the stop. Once he made contact with Floyd, the totality of the circumstances known to Officer Ruffalo provided objectively reasonable suspicion that Floyd was involved in drug activity. As a result, Officer Ruffalo had lawful authority to detain Floyd for the purpose of investigation when Floyd consented to the search.

The fact that Floyd was detained at the time of consent does not render his consent involuntary as a matter of law. Nor was his consent rendered involuntary through coercion, threats, or other improper influences. For these reasons alone, this court should affirm the trial court's denial of Floyd's motion to suppress.

Even if the police searched Floyd without his consent, the search did not violate the Fourth Amendment. The totality of the circumstances demonstrates reasonable suspicion that Floyd might be armed and dangerous. Although the trial court did not deny Floyd's motion on this ground, it easily could have. *See Milton v. Washburn Cty.*, 2011 WI App 48, ¶ 8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924 ("if a circuit court reaches the right result for the wrong reason, we will nevertheless affirm"). This court can and should affirm on this ground alone.

B. The facts.

Officer Ruffalo testified at the suppression hearing that he pulled over Floyd for suspended registration at about 6:45 p.m. on July 23, 2013 (25:3-4, 13). The stop occurred one block from a high-crime intersection known to the officer for the prevalence of drug and gang activity (25:3-4, 20-21). Floyd's vehicle had tinted windows (25:23).

When Officer Ruffalo made contact with Floyd, he observed an unusual number of air fresheners in Floyd's vehicle (25:7). Air fresheners were "in every vent of the vehicle as well as hanging off the rear view mirror" (25:6-7). Officer Ruffalo testified that, based on his experience, persons involved in drug-related activity use air fresheners to mask the smell of narcotics (25:7). Officer Ruffalo returned to his squad and requested a canine unit or a backup squad (25:5). A patrol officer arrived within two minutes (25:20).

After the patrol officer arrived, Officer Ruffalo asked Floyd to exit the vehicle (25:6, 8). At that point, which was within five or six minutes of his initial contact with Floyd, Officer Ruffalo asked Floyd whether he had any weapons (25:8). Floyd said that he did not (25:8). Officer Ruffalo then asked Floyd if the officer could search him for the officer's safety (25:8). Floyd said, "[Y]es, go ahead" (25:8).

Floyd moved to suppress all evidence derived from Officer's Ruffalo's search (7). At the suppression hearing, the prosecutor opposed the suppression motion on the ground that Floyd consented to the search:

> First of all, I would note that there are -- there's two kinds of consent. There is the consent when the officer has no reasonable suspicion that the person inside is involved in any type of criminal activity. And for that type of consent, you have to finish the traffic stop, give the defendant their citations and tell them that they are free to leave before you can ask for consent. But when you have reasonable suspicion you look at whether the questions unreasonably expanded the scope of the stop. And based upon the officer's observations, he simply asked Mr. Floyd if he had any weapons, Mr. Floyd said no and he asked for consent to search Mr. Floyd. Mr. Floyd said yes. And everything else flows from a search that was done with Mr. Floyd's consent. Therefore, I would ask that the motion be denied.

(25:25).

The trial court found that, once the officer made initial contact with Floyd, the officer had reasonable suspicion that Floyd was involved in drug activity (25:29-30). The court further found that the officer asked to search Floyd and that Floyd gave his consent (25:30, 32). The court denied the suppression motion accordingly and without deciding whether the circumstances provided reasonable suspicion that Floyd was armed and dangerous (25:32).

C. Floyd voluntarily consented to the search while he was lawfully detained based on reasonable suspicion of drug activity.

1. Applicable law and standard of review.

One well-established exception to the warrant requirement of the Fourth Amendment is a search conducted pursuant to consent:

> Warrantless searches are per se unreasonable under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 357 (1967). But there are certain "specifically established and well-delineated" exceptions to the Fourth Amendment's warrant requirement. *Id*. Included among these exceptions are searches conducted pursuant to voluntarily given consent. *Id*. at 358; *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998).
>
> 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.

State v. Williams, 2002 WI 94, ¶¶ 18-19, 255 Wis. 2d 1, 646 N.W.2d 834 (footnote omitted).

"When the purported legality of a warrantless search is based on the consent of the defendant, that consent must be freely and voluntarily given." *See State v. Johnson*, 2007 WI 32, ¶ 16, 299 Wis. 2d 675, 729 N.W.2d 182, citing *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). The State has the burden to prove by clear and convincing evidence that the defendant voluntarily consented. *Id*.

Unless a person is illegally seized when he gives consent, a search authorized by voluntary consent is wholly valid. *State v. Jones*, 2005 WI App 26, ¶ 9, 278 Wis. 2d 774, 693 N.W.2d 104, citing *Williams*, 255 Wis. 2d 1, ¶¶ 19-20.

A law enforcement officer is justified in detaining an individual if the officer has suspicions grounded in specific articulable facts and reasonable inferences from those facts that the individual is engaged in criminal activity. *State v. Guzy*, 139 Wis. 2d 663, 675-76, 407 N.W.2d 548 (1987). If the police officer has reasonable suspicion that a person is engaged in illegal activity separate and distinct from the behavior that prompted a traffic stop, the stop can be extended and a new investigation can begin. *State v. Colstad*, 2003 WI App 25, ¶¶ 11, 13, 260 Wis. 2d 406, 659 N.W.2d 394.

Voluntariness of consent is a question of constitutional fact. *Phillips*, 218 Wis. 2d at 195. Whether consent was given and the scope of the consent are questions of fact that an appellate court will not overturn unless clearly erroneous. *Id.*; *see also State v. Garcia*, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995). However, an appellate court will independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met. *Phillips*, 218 Wis. 2d at 195.

2. Floyd was lawfully detained at the time he consented to the search.

a. Officer Ruffalo had reasonable suspicion that Floyd was involved in drug activity.

The totality of the facts known to Officer Ruffalo at the time of the consent search provide objectively reasonable suspicion that Floyd was involved in illegal activity separate

and distinct from the traffic violation that prompted the stop. In evaluating reasonable suspicion, the court must examine whether all the facts, when taken together, could constitute reasonable suspicion. *State v. Allen,* 226 Wis. 2d 66, 75-76, 593 N.W.2d 504 (Ct. App 1999). What constitutes reasonable suspicion is a common-sense test under all the facts and circumstances present. *State v. Waldner,* 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Although a hunch is insufficient to justify a reasonable suspicion detention, the detention can be justified if a reasonable inference of unlawful conduct can be objectively discerned by observing lawful, but suspicious conduct, notwithstanding other innocent inferences that can be drawn. *Id.* at 60.

While the trial court's findings of facts are upheld unless clearly erroneous, the circumstances as to whether a detention meets constitutional standards is a question of law this court reviews de novo. *State v. Gammons,* 2001 WI App 36, ¶ 6, 241 Wis. 2d 296, 625 N.W.2d 623.

Here, Officer Ruffalo observed an unusual number of air fresheners in Floyd's vehicle. Ruffalo testified that there were air fresheners "in every vent of the vehicle as well as hanging off the rear view mirror" (25:6). He stated that, based upon his experience, air fresheners in that amount are used by people involved in drug-related activity to mask the smell of narcotics (25:7).

Officer Ruffalo also testified that the stop occurred at the intersection of 15th Street and Racine Street (25:4), within one block of an intersection known for high levels of drug and gang activity (25:21). He testified that the number of air fresheners that he observed in Floyd's vehicle was an indicator that Floyd might be involved in illegal activity (25:23). He testified that other factors indicating possible involvement in illegal activity

were the time of day, that Floyd was traveling alone, and that Floyd's car had tinted windows (25:23).

The trial court correctly found that all of these factors provided reasonable suspicion that Floyd may have been involved in drug activity (25:30). *See Allen*, 226 Wis. 2d at 74-75. The trial court noted that Officer Ruffalo suspected that Floyd was involved with drugs because, in Ruffalo's experience, air fresheners are used by people involved with drugs to mask odors that the drugs may emit in a closed space (25:29). Indeed, Floyd does not dispute the court's conclusion that Officer Ruffalo had reasonable suspicion of possible drug activity when he asked for Floyd's consent to search. Floyd's brief at 10-19.

Given that Officer Ruffalo had reasonable suspicion on the basis of which to detain Floyd at the time of his consent, this court should affirm the trial court's denial of Floyd's motion to suppress so long as it determines that Floyd's consent was voluntary as a matter of law. For the reasons explained below, Floyd's consent was voluntary.

b. Floyd voluntarily consented to the search.

Floyd claims that he did not voluntarily consent to the search because Officer Ruffalo had not ended the traffic stop and, thus, Floyd was not free to leave when the officer requested consent. Floyd's brief at 17-19. He argues that Officer Ruffalo "was going to perform the search no matter what" and that Floyd was not free to leave "until Ruffalo did the search that he wanted to do." Floyd's brief at 18. According to Floyd, his consent "was not valid because the circumstances show that a person in Floyd's position would not have felt free to decline the search." Floyd's brief at 18.

The State met its burden to show that Floyd voluntarily consented to the search. Whether consent to search is voluntary hinges on whether the consent was given in the absence of duress or coercion, either express or implied. *Phillips,* 218 Wis. 2d at 197. Factors relevant to the voluntariness analysis include whether any misrepresentation, deception, or trickery was used to persuade the defendant to consent; whether the defendant was threatened or physically intimidated; the condition at the time the search was made; the defendant's response to the officer's request; the defendant's physical and emotional condition and prior experience with police; and whether the officers informed the individual that consent could be withheld. *Id.* at 198-203. The state must prove by clear and convincing evidence that consent is freely and voluntarily given. *Id.* at 197. There is no presumption that consent to search given by an arrested person is involuntary and coerced as a matter of law. *Gautreaux v. State,* 52 Wis. 2d 489, 492-93, 190 N.W.2d 542 (1971).

There is no suggestion of deception, threats, or physical intimidation in this case. *See State v. Bermudez*, 221 Wis. 2d 338, 349, 585 N.W.2d 628 (Ct. App. 1998). There is nothing in the record to suggest that Officer Ruffalo brandished weapons or threatened or coerced Floyd in any manner into consenting to the search. Officer Ruffalo clearly asked Floyd for permission to search, and Floyd clearly gave that permission without any qualification (25:8).

Floyd incorrectly claims that his consent was not valid because, under the circumstances of his case, a reasonable person would not feel free to leave or to decline the request to search. Floyd's brief at 17-19. To support his argument, Floyd relies on *State v. Luebeck*, 2006 WI App 87, 292 Wis. 2d 748, 715 N.W.2d 639, and *Jones,* 278 Wis. 2d 774. Floyd's brief at 18-19.

Neither *Luebeck* nor *Jones* applies. In both cases, the defendants had been *illegally* seized when asked for consent to search and, thus, their consent was invalid. *Luebeck*, 292 Wis. 2d 748, ¶ 17; *Jones*, 278 Wis. 2d 774, ¶¶ 18-22. In the present case, Floyd was *legally* detained when asked whether he would consent to be searched. Neither *Jones* nor *Luebeck* stands for the proposition that a defendant who has been legally detained is incapable as a matter of law of giving voluntary consent to search.

Jones involved a police procedure colloquially known as a Badger Stop—"a police interdiction technique by which the officer attempts to obtain the person's consent to a search even though the officer has no legal basis to further detain the person." *Jones,* 278 Wis. 2d 774, ¶ 4; *see also Williams,* 255 Wis. 2d 1, ¶ 7.

> The "Badger" technique occurs when a law enforcement officer concludes a traffic stop and essentially releases the driver, indicating in some manner that the driver may leave. However, nearly immediately after indicating to the driver that the stop is concluded and before the driver can leave the scene, the officer asks a follow-up question, normally about contraband, then asks the driver for consent to search the vehicle. Our chief justice opined that such a stop "obviously takes advantage of the fact that motorists think that they are obliged to answer questions and not leave the scene." The terminology is no longer in use.

State v. Hartwig, 2007 WI App 160, n.4, 302 Wis. 2d 678, 735 N.W.2d 597 (citations omitted).

In a Badger Stop, the officer attempts to get consent to search the vehicle after the purpose of the stop has been effected and *without* any reasonable suspicion that further illegal activity is afoot. Here, Officer Ruffalo had reasonable suspicion to detain Floyd to investigate suspected drug activity.

Thus, at the time the officer asked Floyd whether he would voluntarily consent to be searched, Floyd continued to be legally detained.

This court's decision in *Hartwig* is more closely applicable to this case than *Jones* and *Luebeck.* In *Hartwig,* this court confirmed that a defendant could voluntarily give consent to law enforcement even while in custody. *Hartwig*, 302 Wis. 2d 678, ¶¶ 13-14. The court clarified that the issue in *Jones* was whether the defendant had been legally seized; not whether the consent to search was voluntary.

> Read alone, this paragraph [in *Jones*] seems to suggest one cannot give valid consent if one is seized by or in custody of law enforcement at the time of granting consent. However, such a reading ignores the remainder of the *Jones* opinion and runs afoul of long-standing precedent that "the fact of custody alone has never been enough in itself to demonstrate a coerced . . . consent to search."
>
> The question in *Jones* was not about voluntariness of consent, but whether the defendant was lawfully seized under the Fourth Amendment when he consented to a search. Lawful seizure is necessary because "a search authorized by consent is wholly valid *unless* that consent is given while an individual is illegally seized."

Hartwig, 302 Wis. 2d 678, ¶¶ 10-11 (citations omitted).

Floyd's argument fails because he was not held beyond the legal justification of the investigatory detention. *Cf. State v. Kolk,* 2006 WI App 261, ¶ 1, 298 Wis. 2d 99, 726 N.W.2d 337. For an investigatory stop to pass constitutional muster, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983). Thus, a brief investigatory stop based on

reasonable suspicion is permitted when the length and scope of the detention are reasonable under the totality of the circumstances. *State v. Wilkens*, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (Ct. App. 1990). The length of Floyd's detention was certainly reasonable under the circumstances. Floyd's detention was, therefore, lawful and his consent valid.

This case also is like *State v. Bons,* 2007 WI App 124, 301 Wis. 2d 227, 731 N.W.2d 367, in which this court found consent to search a vehicle to be voluntary. In *Bons*, the police stopped a vehicle for speeding and encountered Bons who was nervous and very fidgety. *Id.* ¶ 2. The officer advised Bons that he was going to give him a citation and then discovered that Bons had a suspended driver's license. *Id.* ¶ 3. The officer then called for backup. *Id.*

The officer then had Bons exit the vehicle so that he could explain the citations. The officer asked Bons if he had anything inside the vehicle he should not have and Bons replied, "'No.'" *Id.* ¶ 6. The officer then asked Bons for consent to search the vehicle, and Bons said, "'Yes.'" *Id.*

There was no suggestion of misrepresentation, deception, trickery, or intimidation, and the officer did not use weapons or force or take custody of Bons. *Id*. ¶ 18.

The trial court determined that Bons voluntarily consented to the search and denied the motion to suppress. *Id*. ¶ 11. On appeal, Bons argued that his consent was involuntary since he was being unlawfully detained after the completion of the traffic stop. *Id*. ¶ 12. Bons also argued that even if his detention was lawful, his consent was involuntary. *Id*. This court concluded that Bons voluntarily consented to the search. *Id*. ¶¶ 16-18.

Like in *Bons,* the officer in Floyd's case did not use misrepresentation, deception, trickery, or intimidation to coerce consent. Like the officer in *Bons*, Officer Ruffalo did not use weapons or force or take Floyd into custody. Here, as in *Bons*, the State met is burden to prove that the subject voluntarily consented to the search.

D. Even if Floyd did not voluntarily consent, the search was lawful because it was based on reasonable suspicion that Floyd was armed and dangerous.

1. Applicable law and standard of review.

In the context of a traffic stop, officers may conduct a frisk when two conditions are met:

> "First, the investigatory stop must be lawful." *Arizona v. Johnson*, 555 U.S. 323, 326 (2009). This condition is satisfied when an officer "reasonably suspects that the person apprehended is committing or has committed a criminal offense." *Id*. Second, to proceed from a stop to a frisk, the officer "must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Id*. at 327.

Huff v. Reichert, 744 F.3d 999, 1009 (7th Cir. 2014); *see also Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

The test for reasonable suspicion to justify a frisk is an objective standard. *State v. McGill*, 2000 WI 38, ¶ 23, 234 Wis. 2d 560, 609 N.W.2d 795; and *State v. Morgan*, 197 Wis. 2d 200, 209, 539 N.W.2d 887 (1995). "That standard is 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger.'" *McGill*, 234 Wis. 2d 560, ¶ 23 (quoting *Terry*, 392 U.S. at 27). "[T]he determination of reasonableness is made in light of the totality

of the circumstances known to the searching officer." *Morgan*, 197 Wis. 2d at 209.

"The officer's reasonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Morgan*, 197 Wis. 2d at 209 (citation omitted). In deciding whether a protective patdown is warranted, the police officer can consider the area's reputation for drug dealing, gangs, criminal activity, and gunshots; along with time of day. *Allen*, 226 Wis. 2d at 75-76; *State v. Mata*, 230 Wis. 2d 567, 574-75, 602 N.W.2d 158 (Ct. App. 1999).

When reviewing the denial of a motion to suppress evidence, the court will uphold the circuit court's factual findings unless they are clearly erroneous. *State v. Patton*, 2006 WI App 235, ¶ 7, 297 Wis. 2d 415, 724 N.W.2d 347. This court reviews de novo whether the facts establish reasonable suspicion. *State v. Young*, 2006 WI 98, ¶ 17, 294 Wis. 2d 1, 717 N.W.2d 729.

2. The totality of the circumstances provided reasonable suspicion that Floyd was armed and dangerous.

Depending on the circumstances, "many of the facts that justify the investigative detention of [the suspect] also justify the pat-down search." *In re Kelsey C.R.*, 2001 WI 54, ¶ 38, 243 Wis. 2d 422, 626 N.W.2d 777. That is precisely the case here.

First, the fact that a frisk occurs in a high crime area contributes to the reasonable suspicion that the suspect is armed. *McGill*, 234 Wis. 2d 560, ¶ 25 (frisk occurred in a "'fairly high-crime area'"); *Morgan*, 197 Wis. 2d at 211 ("Like the court of appeals, we find that an officer's perception of an area as 'high-crime' can be a factor justifying a search."); and *Allen*, 226

Wis. 2d at 77 (citing the "high-crime reputation of the area" as contributing to reasonable suspicion justifying frisk). The supreme court explained in *Morgan*:

> [A]n officer's perception of an area as "high-crime" can be a factor justifying a search. Professor LaFave notes that "the area in which the suspect is found is itself a highly relevant consideration" in justifying a search, and that the cases "most frequently stress that the observed circumstances occurred in a high-crime area."

Morgan, 197 Wis. 2d at 211 (quoting 3 Wayne R. LaFave, *Search and Seizure* § 9.3(c), at 456 (2d ed. 1987)). Here, the stop occurred in a high-crime area (25:21). The location of the stop thus supports the reasonableness of Ruffalo's frisk.

Second, there is a recognized link between dangerous weapons and the drug trade. *Johnson*, 299 Wis. 2d 675, ¶ 29. "Drug dealing is a 'crime infused with violence.'" *United States v. Brown*, 188 F.3d 860, 865 (7th Cir. 1999). "[I]t is an unfortunate fact of life that trade in controlled substances is dangerous for all involved. Dealers may arm themselves for protection against competitors, addicts, and the police. In fact, a rational drug dealer may well carry a gun, given these same realities and expectations." *United States. v. Kenerson*, 585 F.3d 389, 392 (7th Cir. 2009).

Officer Ruffalo observed an unusual number of air fresheners in Floyd's vehicle. In his experience, air fresheners are used by people involved in drug-related activity to mask the smell of narcotics (25:7). Officer Ruffalo also was aware that weapons are commonly associated with drug and gang activity (25:21). In *State v. Guy*, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992), the court said one reason the police officer would be justified in believing her safety was in danger was that weapons are often the tools of the trade of drug dealers. Floyd's suspected involvement with drugs, together with the location

of the stop, gave Officer Ruffalo ample reason to be concerned for his safety.

Floyd relies on two cases in which the Wisconsin Supreme Court invalidated a patdown search because reasonable suspicion was absent, namely *Johnson*, 299 Wis. 2d 675, and *State v. Kyles*, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449. Floyd's brief at 14-17. *Johnson* is readily distinguishable since it involved a traffic stop that, unlike here, was not accompanied by reason to suspect that a crime had occurred or was in progress. *Johnson*, 299 Wis. 2d 675, ¶ 40.

In *Johnson*, the court invalidated a patdown search of a motorist who, when stopped for vehicle and traffic violations, "'ma[d]e a strong furtive movement bending down as if he was reaching . . . underneath the seat.'" *Johnson*, 299 Wis. 2d 675, ¶ 3. The supreme court found this insufficient explanation to establish reasonable suspicion that the driver could be armed, under all the circumstances. *Id.* ¶ 48.

In explaining its ruling, the court emphasized that "Johnson was only suspected of driving a vehicle with a suspended registration for an emissions violation and failing to signal for a turn, violations in no way linked to criminal activity or weapons possession." *Id.* ¶ 40. The court contrasted these facts with those in *State v. Williams*, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, in which it had upheld a protective patdown search by officers "responding to a complaint involving suspected drug activity, a crime known by law enforcement to be associated with weapons possession." *Johnson*, 299 Wis. 2d 675, ¶¶ 29, 38.

The facts here align with *Williams* than rather *Johnson*. As shown above, Officer Ruffalo had reasonable grounds to suspect that Floyd was involved in drug activity; it follows that Floyd might well be armed.

The other case Floyd cites, *Kyles*, is distinguishable for the same reason. There, the justification for the patdown rested on "two crucial and determinative facts," namely "the defendant's inserting his hands into and removing his hands from the pockets of his coat and the defendant's wearing a large, fluffy coat." *Kyles*, 269 Wis. 2d 1, ¶ 60. Notably, in *Kyles*, unlike here, "[n]o one in the vehicle was suspected of a crime." *Johnson*, 299 Wis. 2d 675, ¶ 32.

Moreover, in *Kyles*, the State specifically conceded that neither the time nor the location of the stop were significant factors upon which the frisk was based. *Kyles*, 269 Wis. 2d 1, ¶¶ 60, 65. By contrast, those factors are significant here (25:23).

In short, this was no mere traffic stop with no reason to believe that the person was engaged in illegal activity separate and distinct from the purpose of the stop. Here, Officer Ruffalo had reason to suspect that criminal activity might be afoot, which justified Floyd's detainer as well as the weapons frisk.

II. Floyd failed to demonstrate that trial counsel was ineffective for not calling Officer White as a witness at the suppression hearing.

A. The facts.

Floyd filed a motion for postconviction relief on the ground that his trial counsel, Attorney Carl Johnson, was ineffective for failing to introduce evidence at the suppression hearing that Floyd did not consent to the search of his person by Officer Ruffalo (19). Floyd alleged that the report of backup officer, Officer Aaron White, indicates that Officer Ruffalo did not ask Floyd for consent to search, but instead told Floyd that he would be searched (19:9-11). According to the motion, if trial counsel had called Officer White as a witness, the trial court would have granted the suppression motion on the ground that

Floyd did not validly consent to the search given that he was not asked for consent (19:7).

Both Officer White and Floyd's trial counsel, Attorney Carl Johnson, testified at the *Machner*[1] hearing on Floyd's motion (29:3-16). Officer White testified that he responded to Officer Ruffalo's request for backup (29:9-11). White testified that, after arriving at the scene of the stop, White observed Ruffalo ask Floyd to exit the vehicle (29:11). White testified that Ruffalo "asked [Floyd] if he could do an external pat down for weapons" (29:11-12). White testified that Floyd consented (29:12). In response to further questioning, White testified that Officer Ruffalo asked Floyd to exit the vehicle and then "said he was going to pat him -- asked him to pat him down for weapons" (29:13-14). White acknowledged that his report says that Ruffalo "advised [Floyd] that he's gonna pat him down" (29:14). White testified that it was his recollection that Floyd consented (29:16).

Officer White also testified that the traffic stop occurred in a high-crime area with a high incidence of drug trafficking and weapons violations (29:15). Officer White testified that if he had been the primary officer on this call he absolutely would have patted down Mr. Floyd for safety (29:15).

Attorney Johnson testified that he subpoenaed Officer White for the suppression hearing and that, at the outset of the hearing, he intended to call Officer White as a witness (29:6). Attorney Johnson testified that he decided during the course of the hearing not to call Officer White because he felt that Officer Ruffalo's testimony had gone well and that Officer White might give potentially damaging testimony (29:5-6).

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Based on the testimony of Officer White and Attorney Johnson, the trial court found that Attorney Johnson's decision not to call White as a witness was a reasonable, tactical decision and not deficient performance (29:30). The court noted that Officer Ruffalo's testimony was to some extent corroborated by Officer White's testimony at the *Machner* hearing (29:28-30). The court again found that, at the time of the stop, Officer Ruffalo "asked Floyd to get out of the car [and] asked him to -- if he could search him for officer safety, for weapons" (29:29). The trial court found "no basis" for the ineffectiveness claim and denied the postconviction motion accordingly (29:29-30).

B. Applicable law and standard of review.

The ineffective assistance of counsel analysis is straightforward. A criminal defendant alleging ineffective assistance of trial counsel must prove that his trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Koller*, 2001 WI App 253, ¶ 7, 248 Wis. 2d 259, 635 N.W.2d 838.

The standard for assessing a claim of deficient performance is whether counsel's alleged act or omission was objectively reasonable. The question is whether, under the circumstances of the case as they existed at the time of trial, the challenged conduct or failure to act could have been justified by an attorney exercising reasonable professional judgment. *Koller*, 248 Wis. 2d 259, ¶ 8; *State v. Kimbrough*, 2001 WI App 138, ¶¶ 31-34, 246 Wis. 2d 648, 630 N.W.2d 752. Thus, the court may rely on reasoning or a strategy or tactical decision that was never actually considered, or was even disavowed, by trial counsel. *See Id.* ¶¶ 24, 31. To prove deficient performance, the defendant must show that counsel's act or omission was "objectively unreasonable." *State v. Oswald*, 2000 WI App 2, ¶ 63, 232 Wis. 2d 62, 606 N.W.2d 207.

To prove prejudice, the defendant must show that counsel's alleged errors actually had an adverse effect on the defense such that the proper functioning of the adversarial process was undermined and the trial cannot be relied upon as having produced a just result. To make this showing, the defendant must prove there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Koller*, 248 Wis. 2d 259, ¶ 9.

On appeal, the reviewing court is bound by the circuit court's factual findings unless they are clearly erroneous. The reviewing court determines de novo whether, under those facts, the defendant has proven deficient performance and prejudice. *Id.* ¶ 10.

The court need not address both prongs if the defendant fails to prove either one of the prongs. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

C. Attorney Johnson was not ineffective for failing to call Officer White as a witness.

Floyd did not demonstrate that Attorney Johnson's failure to call Officer White as a witness was prejudicially deficient performance. The test for deficient performance is not whether counsel defended his client in the manner the client desired, or even whether, in hindsight, a different defense strategy might have better served the defendant. Counsel's strategic decisions do not constitute deficient performance if they were reasonably founded on the facts and law under the circumstances existing at the time the decisions were made. *See State v. Hubanks*, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992).

Attorney Johnson's decision meets this standard. Attorney's Johnson stated concern about calling White was

borne out by White's testimony at the *Machner* hearing. Officer White's testimony in part corroborated Officer Ruffalo's testimony that Ruffalo asked Floyd for consent to search and that Floyd consented (29:11-12). Officer White also corroborated Ruffalo's testimony that the location of the stop was a high-drug-activity area with a high incidence of weapons violations (29:15).

Reviewing the case from counsel's perspective at the time of trial, Attorney Johnson made a reasonable strategic choice not to use Officer White as a witness. Floyd has failed to overcome the presumption that counsel's decision reflects a reasonable exercise of judgment. The trial court correctly denied Floyd's claim on this ground alone (29:29-30). *See Johnson*, 153 Wis. 2d at 128.

Even if Attorney Johnson performed deficiently by not eliciting White's testimony at the suppression hearing, counsel's performance did not prejudice the defense. As the trial court found, Officer White's testimony at the *Machner* hearing corroborated at least in part Ruffalo's version of events (28:27-30). White's testimony did not prove that Floyd was not asked for consent to be searched. Indeed, the trial court found no basis to change its original determination that Officer Ruffalo asked for Floyd's consent to search (29:29). Floyd has not shown or attempted to show that the court's determination in this regard is clearly erroneous. *Koller*, 248 Wis. 2d 259, ¶ 10.

Finally, even if White's testimony proved a lack of voluntary consent to the search, Floyd cannot show prejudice in the *Strickland* sense. The State need not prove consent where the officer conducts the search pursuant to reasonable suspicion that the suspect is armed and dangerous. *Huff*, 744 F.3d at 1009. Here, the State proved that Officer Ruffalo had the requisite reasonable suspicion to conduct the search with or without Floyd's consent. *See supra* at 13-17. As a result, Floyd

cannot show a reasonable probability that, but for Attorney Johnson's failure to introduce additional testimony on the subject of consent, the outcome of the suppression motion would have been different. Floyd's ineffective assistance of counsel claim fails on this ground alone. *Johnson*, 153 Wis. 2d at 128.

CONCLUSION

For the above reasons, the State asks this court to affirm the judgment of conviction and the denial of Floyd's postconviction motion below.

Dated this 25th day of November, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,900 words.

Dated this 25th day of November, 2015.

_____
Sandra L. Tarver
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 25th day of November, 2015.

_____
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