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 REPLY BRIEF

Respectfully submitted:

LAW OFFICE OF MATTHEW S. PINIX, LLC
1200 East Capitol Drive, Suite 220
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
michael@pinixlawoffice.com
www.pinixlawoffice.com

By: Michael G. Soukup
State Bar No. 1089707
Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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 State justifies Deputy Ruffalo's frisk because it occurred in a high-crime area and there were air fresheners in Floyd's car. (St. Br. 14-16). Focusing on those two facts, the State contends that Ruffalo had a reasonable suspicion that Floyd was armed and dangerous, and therefore the frisk was permissible regardless of whether Floyd consented or not. (St. Br. 14-17). Alternatively, the State argues that Ruffalo at least had a reasonable suspicion that Floyd was involved in criminal activity and he could prolong the traffic stop to investigate. (St. Br. 6-8). Therefore, Ruffalo's request for Floyd's consent to a search was valid. (St. Br. 8-13).

But the central problem with the State's argument is the absence of additional facts to elevate Ruffalo's hunches to a reasonable suspicion of anything. In the myriad of cases involving searches during traffic stops there are always facts relating to the suspect's behavior, actions, or statements that contributed to the suspicion. Without those additional facts here, the fact that the stop occurred in a high-crime area and the presence of air fresheners are mere hunches of criminal activity. Plus, Ruffalo's testimony and actions illustrate that the consent Floyd provided for the frisk was utterly involuntary. In sum, the State's response fails to show any justification Ruffalo's pat-down of Floyd.

A. Deputy Ruffalo's decision to pat-down of Floyd was not supported by any facts showing that Floyd did or said anything to arouse a reasonable suspicion that he was presently armed and dangerous.

The State contends that Deputy Ruffalo could have frisked Floyd regardless of Floyd's consent because Ruffalo had a reasonable suspicion that Floyd may be armed and dangerous. (St. Br. 14-16). The State focuses on only two facts to support that argument, which are that Ruffalo pulled Floyd over in a high-crime area and that Floyd had air fresheners in his car. (St. Br. 14-16). But where those facts are not tethered to any other facts concerning Floyd's actions or statements at the time, it falls far short of permitting Ruffalo to frisk Floyd.

The State's reliance on the fact that Ruffalo pulled Floyd over in a high-crime area has multiple problems. First, the assertion that this was in fact a high-crime area lacked specificity to give it relevance. The full extent of the facts cited to by the State to support that notion were the prosecutor's pointed question of whether there was drug and gang activity in that area, and Ruffalo's answer was simply yes. (25:21). There were no specifics at all to say how recent that activity occurred or the degree of dangerous associated with those instances. *Compare State v. Allen*, 226 Wis.2d 66, 68, 593 N.W.2d 504 (Ct. App. 1999) (the high-crime-area factor was supported with facts that a specific block received several complaints about drug activity, gangs, and weapons violations and gunshots that it was subject to police surveillance).

The relevance of this "high-crime area" is further diminished by the time of day. Ruffalo simply stated "time of day" as one of the "other indicators" in

second redirect examination. (25:23). But, this factor weighs in favor of showing the *absence* of any reasonable suspicion. The stop occurred while it was still daylight at 6:45 p.m., a completely typical time to travel, even if it were near a "high-crime area." (25:13-14); *compare Allen*, 226 Wis.2d at 74 (conduct of suspect in the high-crime area was observed late at night).

Most importantly, Ruffalo did not see Floyd doing anything there. Floyd was simply travelling through the area. Floyd was not parked in his car loitering around, or stopping briefly in the area. *Compare Allen*, 226 Wis.2d at 75-77 (the suspect was observed having brief contact with a car late at night in a recognized high-crime area). Ruffalo watched him for one block as Floyd was traveling along. (25:4). Thus, it means little to nothing that was Floyd was near a high-crime area when Ruffalo decided to stop him. *See State v. Morgan*, 197 Wis.2d 200, 212-13, 539 N.W.2d 887 (1995) ("The spectrum of legitimate human behavior occurs every day in so-called high crime areas.").

The other factor the State focuses upon in its response are the air fresheners observed by Ruffalo. (St. Br. 15-17). Air fresheners alone are not enough to justify a suspicion that the person driving the car is armed and dangerous. *State v. Malone*, 2004 WI 108, ¶¶17, 35-36, 274 Wis.2d 540, 683 N.W.2d 1 (noting that its significance increases when combined with other facts and cases from other jurisdictions where air fresheners alone were insufficient). Obviously, there is nothing dangerous about air fresheners. Instead, the State hopes to use this fact to convince this Court to jump to other conclusions, just as Ruffalo did.

The State cites cases about the relationship between drug activity and a reasonable suspicion that a person may be armed and dangerous. (St. Br.

15). But the facts necessary to connect the suspicion of being armed and dangerous to drug activity, is the presence of drug *activity*. *Allen*, 226 Wis.2d at 71 (a valid investigatory stop requires a reasonable suspicion that criminal *activity* has taken or taking place) (emphasis added). Here, Ruffalo did not observe Floyd do anything to even remotely suggest there was any activity. (25:13, 18).

Moreover, the State conveniently ignores all the facts that undermine any hunch that Floyd was presently armed or dangerous. Floyd was pulled over for a simple suspended car registration and not anything reckless or suspicious, he was cooperative, he provided identification to Ruffalo, he made no furtive movements, and he was not nervous or upset. (25:4-5, 13-14). Thus, like the State's attempt to use the "high-crime area" factor, the fact there were air fresheners in the car means little in the absence of other specific facts to support Ruffalo's suspicions and where there were many facts undermining any suspicion.

The only published case in Wisconsin involving air fresheners in this context is *State v. Malone*. In *Malone*, an officer pulled a car over for speeding along the highway. *Malone*, 2004 WI 108, ¶5. During the initial encounter with the driver and two passengers, he noticed that there were many air fresheners in the car. *Id*. at ¶6. He also noted that highway I-43 was a primary area for drug interdiction. *Id*.

But, the Court in *Malone* concluded there were facts beyond the location and the air fresheners to support an objectively reasonable suspicion. The Court noted that: the occupants gave inconsistent accounts of their travel plans, including plans to go to a rave party; the driver and passenger continually put their hands in their pockets during the field interview contrary to the officer's instructions; the

occupants had drug-related offenses; and all three occupants appeared nervous. *Malone*, 2004 WI 108, ¶¶7-10.

Beyond location and air fresheners in this case, the State's response offers up no support for its assertion that Ruffalo had a reasonable suspicion that Floyd was armed and dangerous. Thus, unlike the officer in *Malone*, Ruffalo lacked reasonable suspicion that Floyd was armed and dangerous.

The State contends that this case is like *State v. Williams*, 2001 WI 21, 241 Wis.2d 631, 623 N.W.2d 106. (St. Br. 16). But the crucial distinguishing factor is that the officer in that case had received a citizen complaining of a drug dealing in progress. *Williams*, 2001 WI 21, ¶19. Thus, the officer in *Williams* had the facts about actual *activity* going on, unlike Ruffalo.

In sum, the State failed to meet its burden that there was a reasonable suspicion that Floyd was armed and dangerous where it chiefly relies on the fact the stop occurred in an alleged high-crime area and Floyd had air fresheners in his car. Thus, Ruffalo was left with hunches, which is far below what is necessary to establish a reasonable suspicion that Floyd was armed and dangerous.

B. 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.

The State contends that *State v. Luebeck*, 2006 WI App 87, 292 Wis.2d 748, 715 N.W.2d 639, and *State v. Jones*, 2005 WI App 26, 278 Wis.2d 774, 693

N.W.2d 104, are distinguishable. (St. Br. 9-12). Specifically, the State argues that the consent in those cases was found invalid only because continued detention was illegal in the absence of reasonable suspicion. (St. Br. 11-12).

But the problem with the State's argument is that the consent here was involuntary regardless of the illegality of Floyd's seizure. In other words, the consent relied upon by the State in this case was so utterly lacking that it does not matter whether Ruffalo had reasonable suspicion or not.

Ruffalo testified that he believes everyone might be armed and dangerous. (25:18). He testified that he searches everyone who exits the car. (25:18). He testified that that the stop was not over and Floyd was not free to leave until the search was done. (25:15, 17). Ruffalo put those unconstitutional beliefs into action when, in absence of other facts beyond a hunch, he requested to search Floyd for his safety and Floyd said "yes, go ahead." (25:8).

There is no meaningful difference between Ruffalo's actions and those of the officers in *State v. Johnson*, which the State notably fails to respond to in its brief on the issue of consent. The officers in *Johnson* did not ask the suspect whether they could frisk him. *State v. Johnson*, 2007 WI 32, ¶¶17-19, 299 Wis.2d 675, 729 N.W.2d 182. They testified that they only advised the suspect that they were going to search him and they were going to conduct the pat-down no matter what. *Id. at* ¶¶17-19.

While Ruffalo technically did ask Floyd,[1] Ruffalo's testimony makes clear that Floyd's answer meant little to him, just like the officers in *Johnson*.

[1] While concededly not found by the judge, facts at the contested evidentiary hearing indicated that Officer White reported that Ruffalo merely advised Floyd about the pat-down. (28:12-14).

The search was going to happen no matter what. Moreover, like the factual scenario *Luebeck*, Ruffalo was able to leverage his "request" by withholding the information that Floyd would need to terminate the encounter. (Opening Br. 18). No matter how it is viewed, Ruffalo was going to conduct the search no matter what, which renders any "consent" meaningless.

The State argues that the consent in this case is justifiable as it was in *State v. Bons,* 2007 WI App 124, 301 Wis.2d 227, 731 N.W.2d 367. (St. Br. 12-13). But it differs in significant ways. In *Bons*, the officer made observations that directly related to actual criminal activity, not the mere suspicion of activity. *Bons*, 2007 WI App 124, ¶15. When the officer asked to search Bons' car, he did so *after* ending the traffic stop and while informing the driver that he could say no. *Id.* at ¶¶6, 18. Thus, the driver could have or should have felt free to say no. *Id. at* ¶18.

But for Floyd, the encounter was clearly not over. Like the officer in *Luebeck*, Ruffalo leveraged his request by withholding his identification and the citations even though the stop was otherwise complete. Along with Ruffalo's testimony that the search was practically certain anyway, the voluntariness of the consent cannot be saved by Floyd's answer "yes, go ahead."

C. Even if it were applicable, Deputy Ruffalo lacked reasonable suspicion to suspect that Floyd was engaged in illegal activity to justifiably prolong the stop beyond issuing the traffic citations.

If this court does not agree that the consent was involuntary, it is still invalid under *Luebeck* and *Jones* because Ruffalo lacked a reasonable suspicion that Floyd was engaged in illegal activity. A traffic

stop cannot be prolonged beyond the purpose of its initial mission. *State v. Hogan*, 2015 WI 76, ¶¶ 34-35, __ N.E.2d __ (citations omitted). However, if during a valid traffic stop the officer becomes aware of facts that raise an objectively reasonable suspicion based on articulable facts that criminal activity is afoot, he may prolong the stop to investigate. *Id*.

For the reasons argued above, Ruffalo lacked not only reasonable suspicion that Floyd was armed and dangerous, but also that Floyd was engaged in criminal activity. *See supra* at 2-5. The State only emphasizes the fact that Ruffalo pulled Floyd over in a high-crime area and there were air fresheners. The facts that Floyd was alone and the car had tinted windows are not discussed in any detail by the State, and for good reason. (St. Br. 7-8). Those facts are practically meaningless in the absence of any facts about Floyd's actions, behavior, or statements to indicate he was doing anything illegal. (Opening Br. 15-16).

The absence of the essential facts necessary to form an objectively reasonable suspicion is illustrated by the State's cited case *State v. Allen*. (St. Br. 8). In *Allen*, the suspect was observed in well-recognized high-crime area that was under police surveillance. *Allen*, 226 Wis.2d at 68. Unlike Floyd, the suspect was observed having brief contact with a car late at night in that area, consistent with drug activity. *Id.* at 68, 75-77. The Court in *Allen* concluded that when those facts were combined they amounted to reasonable suspicion to justify investigation. *Id.* at 75-77. But the stop here occurred in the early evening, in an area that the State failed to show was a high-crime area like the one in *Allen*, and importantly, there was an absence of any suspicious actions by Floyd. *See also Malone*, 2004 WI 108, ¶¶5-10 (factors besides location and air fresheners led the court to find reasonable suspicion).

Thus, even if Floyd's consent was not involuntary on its face, *see supra* at 5-7, it was invalid nonetheless, where Ruffalo lacked the reasonable suspicion to prolong this routine traffic stop to investigate illegal activity by asking to search Floyd. *See Luebeck*, 2006 WI App 87, ¶¶7-15. Therefore, under the arguments raised above, Floyd's consent was involuntary and Ruffalo lacked a reasonable suspicion that Floyd was armed or dangerous, or even that he was involved in illegal activity. Consequently, the circuit court should have granted the motion to suppress.

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.

The State argues that Floyd's trial attorney acted reasonably by declining to call Officer White because of a fear that White might not testify favorably. (St. Br. 18). The State contends that the testimony at the evidentiary on the postconviction motion hearing bears this out. (St. Br. 20-21). To the contrary, the testimony at the hearing undermined Deputy Ruffalo's testimony about consent and illustrates further that he was going to frisk Floyd no matter what.

The State argues that it was reasonable strategy not to call Officer White because he: (1) corroborated in part Officer Ruffalo's testimony about consent; and (2), White corroborated Ruffalo's testimony that it was a high-drug-activity area with weapons violations. (St. Br. 21). But as the State implicitly concedes, White's testimony only partially

corroborated Ruffalo about Floyd's consent. (St. Br. 21).

White admitted that he wrote accurate police reports and he reported at the time that Ruffalo advised Floyd that he was going pat Floyd down. (28:13-14). He also initially testified at the hearing that Ruffalo said he was going to pat Floyd down, as opposed to asking Floyd. (28:13-14). Besides not fully corroborating Ruffalo's testimony that he did make a request, White's testimony about the high-crime area means little. As argued above, the fact that this might have occurred near a high-crime area is insignificant. *See supra* at 2-3.

Trial counsel should not have had any reasonable fears about White's testimony. White was an officer with a written report, so what he said was not going to be any mystery. While White ultimately testified that Ruffalo asked Floyd if he could frisk him, counsel would have known that he and Ruffalo could be impeached by White's report. Counsel clearly understood the importance of White's report by including it in his motion. (7:2-3; App. 2-3). White's report adds to the bottom of line of this case, which is that Ruffalo was acting on hunches alone, and was determined to frisk Floyd with or without Floyd's consent.

If anything, counsel was correct when he testified that Ruffalo's testimony was sufficient to grant Floyd's motion to suppress. (28:5-6). But White's testimony was helpful, and so the State's argument fails to show that it was reasonable not to pursue it. *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). Consequently, where White's testimony would effectively undermine the State's

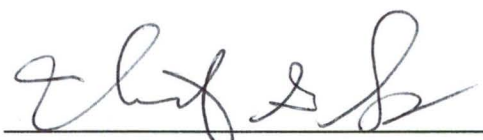
reliance on consent, it was prejudicial not to present that testimony. (Opening Br. 21-23).

Therefore, this Court should reverse the denial of the motion to suppress pursuant to Argument I, but if not, counsel's failure to further demonstrate the lack of consent should warrant reversal as well.

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 14th day of December, 2015.



Michael G. Soukup
Attorney for Defendant-Appellant

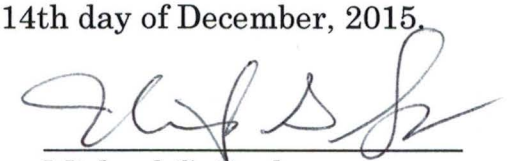
CERTIFICATION

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 2982 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 14th day of December, 2015.

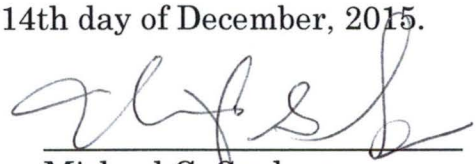


Michael G. Soukup
Attorney for Defendant-Appellant

CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Wis. Stat. § 809.80(4)(a), that this Appellant's Brief will be delivered to a FedEx, a third-party commercial carrier, on December 14, 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 14th day of December, 2015.



Michael G. Soukup
Attorney for Defendant-Appellant