STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2015AP1294-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

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

ON REVIEW OF THE COURT OF APPEALS' DECISION AFFIRMING 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-PETITIONER'S BRIEF AND APPENDIX

Respectfully submitted:

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ISSUES PRESENTED

I. Whether the deputy's warrantless pat-down search of Lewis Floyd was unconstitutional where: (a) the reasonable suspicion to justify the search was based on the presence of air fresheners Floyd's car, legally tinted windows on Floyd's car, and because the deputy initiated the stop in an alleged high-crime area; and (b) if there was a lack of reasonable suspicion, whether Floyd's consent to the pat-down was involuntary because the deputy impermissibly extended the traffic stop to request an invasive pat-down search?

The Court of Appeals concluded that: (a) the deputy's request for the pat-down occurred during a valid seizure, and even if it briefly prolonged the stop, the deputy had reasonable suspicion to investigate criminal activity; and (b) the circumstances of the stop did not otherwise render Floyd's consent involuntary. 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 Court of Appeals 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 in addition, the second officer's testimony was not helpful to Floyd because it simply corroborated the primary officer's testimony. Thus, the court answered the aforementioned question no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Where the instant case merits this Court's review, both oral argument and publication of the Court's opinion are warranted.

STATEMENT OF THE CASE

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. (1:1-3).

Motion to suppress evidence

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 rights guaranteed under the United States and Wisconsin Constitutions. (7:1-9); (8:1-6). The following facts were presented at that hearing.

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; App. 22-23, 32). Floyd stopped at the traffic light in the area of 16th and Racine. (25:3-4; App. 22-23). At the time of the stop, there was still daylight. (25:14; App. 33).

Deputy Ruffalo was stopped at the same intersection, which Ruffalo later described as near a "major intersection." (25:3; App. 22). Ruffalo had six years of experience as an officer. (25:7; App. 26). The majority of Ruffalo's duties at the time involved executing traffic stops. (25:7; App. 26).

While they were stopped at the intersection, Deputy Ruffalo, without observing any wrongdoing, "ran" the vehicle's plate through the computer in his squad car. (25:4; App. 23). Ruffalo noted that the registration for the car was suspended due to emissions. (25:4; App. 23). Ruffalo decided to stop the vehicle, and did so about one block later, by 15th and Racine. (25:4; App. 23).

Deputy Ruffalo approached Floyd and explained that the reason for the stop was due to the suspended registration on the car. (25:4-5; App. 23-24). Ruffalo asked for Floyd's license and insurance information. (25:5; App. 24). Floyd replied that he did not have either, but he did hand Ruffalo his Wisconsin State identification. (25:5, 14; App. 24, 33). Ruffalo told Floyd to stay in the car and that he would return shortly. (25:5; App. 24). Ruffalo testified that this interaction lasted about two to three minutes. (25:14; App. 33).

Although he did not mention it in his initial report regarding the stop, Deputy Ruffalo noticed that inside Floyd's car there were air fresheners "in every vent" and hanging from the rear view mirror. (25:6-7, 13; App. 25-26, 32). Ruffalo testified that in his experience the presence of multiple 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; App. 26). Ruffalo admitted that he did not take photographs of the air fresheners. (25:12; App. 31).

At the suppression hearing, Deputy Ruffalo agreed that he did not smell any controlled substances. (25:13; App. 32). He did not testify that he smelled any air fresheners either. He did not see any packaging materials in the car or any user paraphernalia. (25:13; App. 32). Ruffalo also agreed that he did not see Floyd make any furtive

movements. (25:13; App. 32). He also did not see any indication that Floyd had weapons. (25:18; App. 37).

In spite of this, Deputy Ruffalo went to his squad car and asked dispatch if a canine unit was available and if not, whether a "cover squad" could come. (25:5; App. 24). The dispatcher informed Ruffalo that a canine unit was not available and that a patrol officer would arrive instead as his cover. (25:6; App. 25).

Officer White arrived at the scene to serve as the requested "cover squad." (25:6; App. 25); (28:10). Deputy Ruffalo explained to White why he stopped Floyd's car. (25:6; App. 25). 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; App. 25). The traffic citations were for operating a car without insurance, operating a car after suspension, and non-registration of the car. (28:3; App. 22). Ruffalo entered information into his computer and created the citations. (25:5, 6, 17; App. 24, 25, 36).

After about five or six minutes, Deputy Ruffalo walked back to Floyd's car to explain the citations to Floyd. (25:5, 17; App. 24, 36). Ruffalo had Floyd to step out of the car. (25:15; App. 34). Floyd did. (25:15). Ruffalo asked Floyd if he had any weapons or anything that would hurt him (Ruffalo). (25:8, 15; App. 27, 34). Floyd said no. (25:8; App. 27).

Despite Floyd's answer, and although Deputy Ruffalo did not see Floyd do anything furtive, Ruffalo decided to ask if he could pat Floyd down. (25:8, 13; App. 27, 32). At the suppression hearing, Ruffalo declared that he "assume[s] everybody has a weapon, everyone I come in contact with." (25:18; App. 37). Therefore, he searches everyone he comes in contact with who steps out of their car. (25:17-18; App. 36-

37). In fact, Ruffalo testified that the first thing he does when he has someone exit a car is ask if he can search them. (25:17; App. 36). Ruffalo testified that he was not going to explain citations to Floyd and then ask if he can search him. (25:17; App. 36).

With Floyd's identification card and three citations still in Deputy Ruffalo's hand, Ruffalo asked Floyd if he could search him for Ruffalo's safety, and he testified that Floyd said "yes, go ahead." (25:8, 15; App. 27, 34). Ruffalo agreed that Floyd was not free to leave at that time because "the stop had not been finished yet." (25:15; App. 34).

Deputy 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; App. 27). Ruffalo believed that the item was possibly narcotics. (25:9; App. 28). After much difficulty, including multiple attempts by Ruffalo, a call to supervisor about what to do, and the assistance of a knife, the item was eventually dislodged. (25:9-11; App. 28-31). The item was a bag that contained a small amount of marijuana and 15 pills of Vicodin. (25:12; App. 31); (1:2).

At the hearing, when asked if the only thing that led Deputy Ruffalo to believe that Floyd could be involved in illegal activity was the air fresheners, Ruffalo said, "That was an indicator, yes." (25:23; App. 42).

The prosecutor asked Deputy Ruffalo to describe the area of the traffic stop. (25:20-21; App. 39-40). Ruffalo said the area was a block away was major intersection and the main business right there was S.C. Johnson Wax. (25:21; App. 40). The prosecutor then asked Ruffalo if large quantities of drug activity and gang activity take place there, and Ruffalo said "yes" to both questions. (25:21; App. 40).

Ruffalo also said that other factors were the time of day, that Floyd was in the car by himself, and he believed that Floyd's car had tinted windows. (25:23; App. 42). There was no indication or claim that the window tint exceeded legal levels.

Deputy Ruffalo agreed that although it was a "high- crime area," Floyd's identification indicated that he lived in Kenosha. (25:22; App. 41). 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; App. 41-42).

After hearing argument, the circuit court reasoned that Deputy Ruffalo had reasonable suspicion that there were drugs in the car, otherwise he would not have asked for the canine unit. (25:29; App. 48). The court concluded that Ruffalo had suspicion of drug activity based on fact that there were air fresheners that were all over the place, Floyd's car had tinted windows, the time of day, that Floyd was alone, that Floyd was from Kenosha, and "another one." (25:29, 30; App. 48, 49). The court held that the stop was not over when Ruffalo asked Floyd to get out of the car and for consent to search him, which Floyd gave. (25:30, 31-32; App. 49, 50-51). The court ultimately denied the motion to suppress. (25:32; App. 52).

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 the two bail jumping charges and the possession of marijuana with intent to deliver. (10:2); (27-A[1]:7). The circuit

[1] The record has two items labeled as #27. The first instance, corresponding to the transcript for proceedings on1/6/14, 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

court sentenced Floyd to three years initial confinement and three years extended supervision, but withheld that sentence pending three years of probation. (15:1-3; App. 53-55); (27-B[2]:15-16).

Postconviction proceedings

In his postconviction motion, Floyd argued that his counsel rendered ineffective assistance by not presenting certain evidence at the suppression hearing. (19:7-17). 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, as opposed to asking Floyd. (19:20-21). Trial counsel included this important fact in the motion to suppress but did not call White to testify at the hearing on the motion. (7:2-3).

Floyd argued that counsel was ineffective for not calling Officer White as a witness because it would have contradicted Deputy Ruffalo's testimony that he obtained consent from Floyd. (19:9-17). Of course, if the court had this evidence, which contradicted Ruffalo's testimony on the consent issue, there was a reasonable probability of a different outcome. (19:11-16).

At the hearing on Floyd's motion, trial counsel testified that he did not call Officer 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). Counsel did not explain why or how this damage might occur.

At the postconviction motion hearing, Officer White testified that he assisted Deputy Ruffalo with

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citation to either item, counsel decided it was easier to label them as 27-A and 27-B in this brief.

[2] See footnote 1.

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 Deputy Ruffalo go to Floyd's car and asked Floyd to exit the car. (28:11). Floyd complied. (28:11). Officer 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, written shortly after the incident, 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. 56-57). The court found that counsel chose not to call Officer White because he was satisfied with the testimony that he had from Deputy Ruffalo. (28:28; App. 57). Moreover, considering White's testimony, he corroborated Ruffalo's testimony anyway. (28:28-29; App. 57-58). The court denied the motion. (28:30; App. 59). Floyd appealed. (21:1-3).

Proceedings in the Court of Appeals

Floyd raised the same issues on appeal. *State v. Floyd*, 2016 WI App 64, ¶1, __ Wis.2d __, __ N.W.2d __ (App. 1-2) (hereinafter "*Opinion*").

Regarding the illegality of the stop and search, the court of appeals stated that Deputy Ruffalo did not extend the traffic stop by asking Floyd to exit the car. *Opinion* at ¶¶11-12 (App. 6). While describing it as "a very close call," the court nonetheless held that the deputy had a reasonable suspicion of criminal activity because the officer observed several air fresheners in the car, the car windows were tinted,

and the officer pulled Floyd over in a high-crime area. *Opinion* at ¶¶16-17 (App. 8-10). The court found that the officer had reasonable suspicion to ask and then search Floyd, all while the valid traffic stop was still ongoing. *Opinion* at ¶17 (App. 10). The court further found that while Floyd was lawfully detained, his consent to the search was voluntary. *Opinion* at ¶¶19-20 (App. 11-12).

The court also concluded that Floyd's counsel was not ineffective by failing to present the additional evidence concerning consent, adopting the reasons given by the circuit court. *Opinion* at ¶¶26-27 (App. 15).

In a powerful concurrence, Presiding Justice Reilly stated that "given the law we are obligated to follow" he supported the majority opinion, but concluded that the law followed in this case resulted in justifying "improper means" to accomplish the ends. *Opinion* at ¶28 (App. 17). The concurrence voiced the concern that Floyd was a young black male and that the judicial system has "tacitly accepted, condoned, and blessed the profiling of our citizens by taking age and color of skin into the 'objectively reasonable suspicion' test." *Opinion* at ¶¶30-31 (App. 17-18). The concurrence reasoned that the outcome would be different had this involved a "white, suburban, soccer mom from Kenosha." *Opinion* at ¶30 (App. 17).

After Floyd's motion for reconsideration was denied, he petitioned for review with this Court. (A. 19).

ARGUMENT

I. THE EVIDENCE AGAINST FLOYD SHOULD HAVE BEEN SUPPRESSED WHERE THE PAT-DOWN SEARCH BY THE DEPUTY WAS DONE IN THE ABSENCE OF AN OBJECTIVELY REASONABLE SUSPICION THAT FLOYD WAS ENGAGED IN CRIMINAL ACTIVITY, AND THAT ILLEGAL SEARCH WAS NOT CURED BY CONSENT WHERE THE DEPUTY ILLEGALLY PROLONGED AND EXPLOITED THE TRAFFIC STOP TO CONDUCT THAT SEARCH.

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. These fundamental protections for citizens from the government prohibit exactly the type of conduct that occurred in this case. Floyd was cooperative, did nothing suspicions, and answered the deputy he was not armed. (25:8, 13, 18; App. 27, 32, 37). Yet without reasonable suspicion the deputy deliberately disregarded Floyd's (honest) answer about weapons, and prolonged the end of an otherwise routine traffic stop by withholding Floyd's identification card and citations, to request an intrusive pat-down search. *See Rodriguez v. United States*, 575 U.S. __, 135 S.Ct. 1609, 1612, 1614 (2015); *and State v. Hogan*, 2015 WI 76, ¶¶34-37, 364 Wis.2d 167, 868 N.W.2d 124; *and State v. Luebeck*, 2006 WI App 87, ¶¶7, 16-17, 292 Wis.2d 748, 715 N.W.2d 639.

Moreover, the deputy candidly admitted that he searches everyone that steps out of their car during a traffic stop. (25:17-18; App. 36-37). The deputy's clearly unparticularized, blanket approach to searching people, which he acted upon when he asked if he could pat Floyd down, was not constitutional. *See Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968); *State v. Mohr*, 2000 WI App 111,

¶¶12, 15, 235 Wis.2d 220, 613 N.W.2d 186 (citations omitted).

The court of appeals concluded that, even if there was an extension of the stop, Deputy Ruffalo was entitled to do so because there was an objectively reasonable suspicion that Floyd was involved in criminal activity. *Opinion* at ¶¶12, 16-17 (App. 6, 8-10). But the combination of air fresheners, legally tinted windows, and because Ruffalo chose to stop Floyd in what the State referred to as a "high crime area," fall far below what courts consider an objectively reasonable suspicion, especially where Floyd was cooperative and did nothing suspicious. *Compare State v. Malone*, 2004 WI 108, ¶¶36-39, 274 Wis.2d 540, 683 N.W.2d 1; *and State v. Allen*, 226 Wis.2d 66, 68, 75, 593 N.W.2d 504 (Ct. App. 1999).

For these reasons, Floyd's appeals the denial of his motion to suppress. 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. *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182. 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.

A *de novo* review of this record shows Deputy Ruffalo's lacked the necessary reasonable suspicion to go beyond the mission of the traffic stop by requesting an invasive pat-down search when the

stop should have already ended. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1614. Moreover, the record shows that Floyd's consent was not voluntary, where in the absence of any suspicion, the deputy withheld Floyd's documents to prevent the stop from terminating in order to procure Floyd's agreement to the pat-down. *Luebeck*, 2006 WI App 87, ¶¶16-17. Consequently, this Court should reverse the court of appeals upholding of the circuit court's denial of Floyd's motion to suppress.

A. The totality of the circumstances show that any suspicion the Floyd was involved in criminal activity was not objectively reasonable, where it lacked the necessary individualized particularity.

A traffic stop is a seizure subject to the strictures of the Fourth Amendment. *Knowles v. Iowa*, 525 U.S. 113, 117, 119 S.Ct. 484 (1998). When an officer observes a traffic violation, the officer is justified in seizing the person to investigate that violation. *Rodriguez*, 575 U.S. __, 135 S.Ct. 1609, 1614. But during a traffic stop, an officer must adhere to the mission of the stop, and can prolong the stop to pursue an investigation into other matters only when that departure is supported by reasonable suspicion. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1614; *Hogan*, 2015 WI 76, ¶34.

A reasonable suspicion must be grounded in specific, articulable facts and reasonable inferences from those facts, that the individual is involved in illegal activity. *Malone*, 2004 WI 108, ¶35 (citations omitted). A suspicion may still be reasonable even if it does not rule out innocent behavior. *State v. Gordon*, 2014 WI App 44, ¶13, 353 Wis.2d 468, 846 N.W.2d 483. But suspicion is not reasonable when it amounts to nothing more than an inchoate and unparticularized suspicion or hunch. *Terry v. Ohio*,

392 U.S. 1, 21-22, 88 S.Ct. 1868 (1968); *State v. Kyles*, 2004 WI 15, ¶10, 269 Wis.2d 1, 675 N.W.2d 449. The suspicion must be individualized, and not general. *Gordon*, 2014 WI App 44, ¶13.

The test for what constitutes reasonable suspicion is objective. *Gordon*, 2014 WI App 44, ¶13. However, facts relating to an officer's subjective beliefs are relevant to the analysis of whether the officer's search was reasonable or not. *In re Refusal of Anagnos*, 2012 WI 64, ¶60, 341 Wis.2d 576, 815 N.W.2d 675, *citing Kyles*, 2004 WI 15, ¶¶23-30.

The circuit court found that Deputy Ruffalo had an objectively reasonable suspicion because there were air fresheners on every vent in the car, that Floyd's car had tinted windows, it was 6:45 p.m., that Floyd was alone, that Floyd was from Kenosha, and "another one." (25:29-30; App. 48-49). Not surprisingly, the court of appeals did not rely on many of these supposed justifications. *Opinion* at ¶15, fn.2. In the end, the court of appeals found an objectively reasonable suspicion of criminal activity because Floyd was stopped for a traffic violation in a high-crime area, Floyd's car had tinted windows, and there were air fresheners on the car's vents. *Id.* at ¶¶16-17.

These circumstances amount to nothing more than a hunch. What is present here are simply innocent factors, without a concrete basis to combine them into a suspicious conglomeration. *See United States v. Beck*, 140 F.3d 1129, 1137 (8th Cir. 1998) (citations omitted).

1. The absence of facts normally associated with reasonable suspicion.

First, there are several circumstances present in this case that undermine any suspicion that Floyd was involved in criminal activity. Floyd was stopped because for the car he was driving had its registration suspended. (25:4; App. 23). He was not operating the car erratically, recklessly, or in an otherwise suspicious manner.

Floyd's conduct was similarly non-suspicious. Deputy Ruffalo agreed that Floyd was cooperative and compliant with Ruffalo's requests. (25:5, 13-14; App. 24, 32-33). Floyd did not make furtive movements, act nervous, or do anything else that was suspicious. (25:5, 13-14; App. 24, 32-33). There was nothing at all from Ruffalo's testimony to indicate there were weapons present, and he did not smell or see any contraband materials. (25:4-5, 13-14, 18; App. 24, 32-33, 37). Before even considering the factors used to justify a suspicion, the presence of these factors puts this case outside the vast majority of those finding reasonable suspicion. *Compare Malone*, 2004 WI 108, ¶¶35-36, 274 Wis.2d 540, 683 N.W.2d 1 (occupants gave inconsistent travel plans, continually put their hands in their pockets contrary to the officer's instructions, they had drug-related offenses and appeared nervous); *and Allen*, 226 Wis.2d 66, 68, 75-77 (the suspect was observed having brief contact with a car late at night, consistent with drug activity).

2. The role of the high-crime-area factor in this case is vague and not particularized to Floyd at all.

The location where Ruffalo chose to pull Floyd over does not support reasonable suspicion. The only

connection between Floyd and the area which Ruffalo claimed was "high crime," was the simple fact that Ruffalo decided to stop Floyd at that spot. Ruffalo did not see Floyd doing anything there. Floyd was not parked in his car loitering around, or stopping briefly in the area. Floyd was simply travelling through 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 only watched him for one block as Floyd was traveling along. (25:4; App. 23). 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); *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."); *and compare Allen*, 226 Wis.2d at 74 (conduct of suspect in the high-crime area was observed late at night). Thus, the surrounding area where Ruffalo chose to stop Floyd means little.

Beyond the disconnect between Floyd and the specific location where the deputy chose to stop Floyd, the State failed to give any meaningful support to the claim that the area was "high crime." The relevance of a high crime area should depend upon limiting it to specific geographic defined locations, where particular crimes occur, with unusual regularity, and recently. *People v. Harris*, 2011 IL App (1st) 103382, ¶14, 957 N.E.2d 930 (collecting cases). The State offered no specific examples, or that any criminal activity occurred recently, to given form a reasonable suspicion that the area was "high crime." In fact, when the State invited Ruffalo to describe the area, he initially said, "the intersection just to the south is a major intersection of 16th Street and the main business right there is [S.C. Johnson Wax]." (25:21). It was not some alley or run-down abandoned part of town. It was near a "major intersection" and a major employer

in Racine. (25:21). Apparently unsatisfied by her witness's response, the State then asked the yes-or-no questions "are there large quantities of drug activity" and "gang activity" in the area, and the deputy responded "yes." (25:21). Ruffalo said nothing about specific instances or how recent any of the activity occurred. *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, and was under police surveillance).

Importantly, as the concurrence referenced in decision below, the element of race looms over this case. Courts have warned against invoking the label "high crime area," where it in effect serves as a proxy for race or ethnicity.[3] *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000). Our Wisconsin court of appeals has recognized this in other cases. *Gordon*, 2014 WI App 44, ¶15 ("the routine mantra of "high crime area" has the tendency to condemn a whole population to police intrusion that, with the same additional facts, would not happen in other parts of our community.").

For all these reasons, Ruffalo's decision to stop Floyd where he did, in a "high-crime" area that lacked any explanation about how recent any specific crime occurred, does not contribute to an objectively

[3] According to the U.S. Census Bureau, in 2013 Racine County was 81% white and 16% non-white (and the remaining percent being persons who identify as more than one race). But the specific area within Racine County where this stop took place (U.S. Census Bureau Tract 3) is racially segregated, with 36% white and 55% non-white (and the remaining percent being persons who identify as more than one race). *See* U.S. Census Bureau (a shortened url for the website is: https://goo.gl/qKQWvo).

reasonable suspicion that Floyd was involved in any alleged criminal activity.

3. The fact that Ruffalo believed Floyd's car had tinted windows lacks any connection to criminality in this case.

The fact that the vehicle Floyd drove had legally tinted windows does not support reasonable suspicion. As the court of appeals itself recognized, "a significant portion of the population purchases vehicles with tinted windows for completely lawful reasons, including a desire to protect the interior of the vehicle from the sun and for greater privacy of innocent occupants." *Opinion* at ¶15, fn.3; *see also United States v. Diaz*, 977 F.2d 163, 165, fn.5 (5th Cir. 1992) (reasoning that the fact the suspect's car had tinted windows should not be emphasized as a factor when weighing reasonable suspicion, considering "tinted windows are common."). This point is probably why the decision by the court below is the *only* published decision in Wisconsin to consider tinted windows in considering whether there was reasonable suspicion of criminal drug activity.

Beyond the fact that tinted windows are common, there is nothing in the record to show how it contributed to a reasonable suspicion. At the end of suppression hearing, when prompted by the State to offer other factors contributing to his suspicion, Deputy Ruffalo said, "I believe the car had tinted windows." (25:23; App. 42). Ruffalo never articulated why he thought tinted windows had any connection to drug dealing or other criminal activity. He never said that it obstructed his view of what was inside the car and testified unambiguously that he could see that Floyd was the only passenger, that he could see nothing indicating contraband, and could see air fresheners on every vent. The deputy never indicated

that he suspected the window had an illegal level of tint either.

In short, there was nothing to indicate how the tinted windows could increase a reasonable suspicion of criminal activity. When this factor is given any serious scrutiny, and not simply lumped in with other subpar factors, the fact that Ruffalo believed the windows on Floyd's car were tinted is meaningless.

4. Without other factors of significance, the presence of air fresheners in Floyd's car is insufficient to form objectively reasonable suspicion.

When considering the presence of air fresheners under the totality of the circumstances, where the weight of the other factors are minimal, and Floyd's behavior did not arouse suspicion, the fact Floyd had air fresheners fails to amount to an objectively reasonable suspicion that Floyd was involved in criminal activity.

In *State v. Malone*, this Court reasoned that air fresheners can be considered suspicious because they could be used to mask odors of contraband, and when considered in the presence of other factors, air fresheners can raise suspicion. *State v. Malone*, 2004 WI 108, ¶36, 274 Wis.2d 540, 683 N.W.2d 1. But this Court indicated in that air fresheners alone are not enough to meet the standard for a suspicion that is reasonable. *Malone*, 2004 WI 108, ¶36. Other courts agree. *See In re Prop. Seized from Robert Pardee*, 872 N.W.2d 384, 394 (Iowa 2015) ("While the strong odor of air freshener was certainly a relevant consideration, alone it would not support detention of the occupants beyond the time required for the traffic stop."); *and see Frazier v. State*, 2010 WY 107, ¶18, 236 P.3d 295 ("The presence of odor suppression agents, alone, does not give rise to reasonable

suspicion, but can be a factor contributing to the totality of the circumstances.").

Here, the presence of air fresheners in this case is not deserving of significant weight. Ruffalo testified that he observed air fresheners on every vent and hanging off the rear-view mirror, although he never said how many vents or air fresheners there were. (25:6-7; App. 25-26). In fact, in Ruffalo's initial police report, he never even mentioned that there were air fresheners in Floyd's car at all. (25: 13; App. 32). Only after the prosecutor asked for additional information in a supplemental report did Ruffalo mention the presence of air fresheners. (25:13; App. 32). Moreover, if the air freshener's purpose was to mask contraband, Ruffalo never indicated he smelled the air fresheners (or contraband). (25: 13; App. 32). Conveniently, Ruffalo never took any pictures of the purported air fresheners. (25:12; App. 31).

When comparing the facts of this case to those in *Malone* supports how little the air fresheners contribute to reasonable suspicion in this case. 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*. Beyond the location of the stop and the air fresheners, there were other individualized factors that led to an objectively reasonable suspicion. This 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. *Id.* at ¶¶7-10.

Likewise, courts of other jurisdictions that find reasonable suspicion when air fresheners are involved have additional factors well beyond what the deputy observed here. *See e.g. U.S. v. Branch*, 537 F.3d 328, 338-40 (4th Cir. 2008) (in addition to air fresheners, driver was speeding, driver provided inaccurate information, car had been seen before in an open air drug market, driver was "well known" to deal drugs); *U.S. v. Foreman*, 369 F.3d 776, 784-85, (4th Cir. 2004) (in addition to air fresheners, driver gave unusual travel plans, travelled along a known drug corridor, and officer observed specific signs of extreme nervousness including heavy breathing and heavy sweating); *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453, 459 (S.C. 2013) (in addition to air fresheners, extreme nervousness including shaking hands and accelerated breathing, car was registered to someone else, stated travel plans were contradictory and driver had no luggage despite multi-day trip).

Other jurisdictions find reasonable suspicion lacking despite the presence of air fresheners, even in circumstances where more factors were present than this case. *See e.g. In re Pardee*, 872 N.W.2d at 394 (no reasonable suspicion to prolong stop where officer observed air freshener can, smelled strong odor of air freshener, some nervousness by driver and passenger, out-of-state plates, and occupants failure to make eye contact); *Charity v. State*, 132 Md. App. 598, 753 A.2d 556, 567-69 (Md. App. 2000) (no reasonable suspicion despite presence of and overwhelming odor of 72 air fresheners, travel along known drug corridor, driver and passenger from different states, and lack of eye contact); *Lilley v. State*, 362 Ark. 436, 208 S.W.3d 785, 789-92 (Ark. 2005) (no reasonable suspicion despite strong odor of air freshener, where driver was also visibly nervous and had a one-way rental agreement in another person's name).

In sum, where the other factors of tinted windows and the high-crime are weak, and Floyd was compliant and did nothing unusual or nervous, the presence of an undisclosed amount of air fresheners cannot elevate what Deputy Ruffalo observed to a reasonable suspicion. At best, Ruffalo had an inchoate hunch. Contrary to the court of appeals, the question of reasonable was not close; it was well-below what is reasonable. Therefore, when considering *de novo* whether these factors amount to reasonable suspicion, the State failed to meet its burden in the circuit court that Ruffalo had a reasonable suspicion of drug activity.

5. Likewise, there was no reasonable suspicion that Floyd was armed or dangerous, or any other basis to support Deputy Ruffalo's stated belief that he had to search Floyd for his safety.

The eventual pat down by Ruffalo could be supported, regardless of any consent by Floyd, if the totality of the circumstances showed that there was an objectively reasonable suspicion that Floyd was armed and dangerous. During a lawful traffic stop, an officer may pat-down a suspect 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. But for all the reasons stated above, *supra* at 14-20, there was a lack of reasonable suspicion that Floyd was armed and dangerous too.

Deputy Ruffalo never stated at the hearing on the motion to suppress a particularized belief that Floyd was armed and dangerous. But, he did state at the hearing, and to Floyd during the traffic stop, that he wanted to pat him down for his (Ruffalo's) own

safety. (25:17; App. 36). In fact, Ruffalo made several assertions at the hearing that illustrate the lack of articulable facts that Ruffalo's safety was in any danger.

Specifically, Ruffalo 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; 37). Thus, Ruffalo subjectively believed he could search everyone he asks to step outside of the car, simply because they were stepping outside of the car. *Anagnos*, 2012 WI 64, ¶60 (the officer's beliefs are still part of the court's analysis of all the relevant circumstances concerning reasonable suspicion). But blanket suspicion and blanket protective searches are clearly prohibited. *Terry*, 392 U.S. at 21; *Mohr*, 2000 WI App 111, ¶¶12, 15 (protective search unreasonable where it is performed as a "general precautionary measure, not based on the conduct or attributes of [the defendant]").

Thus, Ruffalo's testimony about blanket suspicion illustrates that he believed he could perform searches for his safety without particularized suspicion, including when he asked Floyd if he could pat him down. But Ruffalo's testimony also illustrates that blanket suspicion is all that he had with Floyd, and he lacked the required particularized suspicion to form an objectively reasonable belief that Floyd was armed and dangerous to support a pat-down without Floyd's consent.

B. Without the requisite reasonable suspicion that Floyd was involved in criminal activity or was armed and dangerous, Floyd's consent was not valid where it was due only to Deputy Ruffalo's unsupported exploitation of the traffic stop.

When Deputy Ruffalo withheld Floyd's traffic citations and identification, and required Floyd to answer questions relating to weapons and safety, he unlawfully went beyond the original mission without any reasonable suspicion and thus, any consent Floyd gave to the intrusive body search was not voluntary. This is especially the case when Floyd told Ruffalo that he did not have any weapons, yet without ending the stop he endeavored to ask Floyd to consent to an intrusive pat-down search. (25:8, 13; App. 27, 32). In the absence of reasonable suspicion, and considering Ruffalo's testimony at the hearing, he deliberately exploited the stop in order gain Floyd's consent, rendering that consent involuntary. *Hogan*, 2015 WI 76, ¶¶6, 9.

1. Consent to a search is invalid if an officer procures consent by impermissibly prolonging a seizure.

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. *Hogan*, 2015 WI 76, ¶34; *Luebeck*, 2006 WI p 87, ¶7.

Whether an officer's decision to prolong a traffic stop constitutes an illegal seizure was recently addressed by the United States Supreme Court in *Rodriguez v. United States*. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1612. In *Rodriguez*, the case concerned whether an officer could prolong the stop for a brief period of time in order to conduct a dog sniff. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1612. The Court concluded that, unless there was reasonable suspicion to support it, the officer could not prolong the stop, even if the delay was *de minimis*. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1616.

The Court in *Rodriguez* reasoned that the tolerable duration of a traffic stop is determined by the mission of that traffic stop. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1612. When an officer stops a driver to address a traffic violation, the stop's mission is to address that traffic violation and attend to any related safety concerns. *Id.* at 1614. Accordingly, the

stop should last no longer than is necessary to effectuate that purpose, and the "authority for the seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1614. The officer can ask questions related to enforcement of the traffic code, such as checking the driver's license or insurance. *Id*. at 1615. But actions aimed at detecting criminal wrongdoing is not an ordinary incident of a traffic stop. *Id*. at 1615-16.

The Court recognized that officer safety is important and that an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. *Id*. at 1616. But the examples given by the Court involved criminal records or outstanding warrant checks. *Id*. The Court held that safety precautions taken in order to facilitate on-scene investigation into other crimes, including drug trafficking, is an impermissible detour. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1616; *and see State v. Jimenez*, 357 Or. 417, 429, 353 P.3d 1227 (2015) (holding that under its state constitution, police cannot make a weapons inquiry absent circumstance-specific concerns).

The Court rejected the government's argument that an officer should be granted "bonus time to pursue an unrelated criminal investigation," so long as the officer was reasonably diligent in pursuing the traffic related purpose of the stop. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1616. As opposed to focusing on time, the Court held that the focus remains on "what the officer actually did and how he did it." *Id*. If the time to complete a traffic-based inquiry can be accomplished expeditiously, then that is the reasonable amount of time to complete the mission. *Id*. A traffic stop prolonged beyond that point is unlawful. *Id*.

This Court recently addressed the issues in *Rodriguez* in the case of *State v. Hogan*. In *Hogan*, the court considered whether the officer prolonged the stop by engaging in field sobriety tests and then a search of the car. *Hogan*, 2015 WI 76, ¶6. This Court considered that where the officer lacked reasonable suspicion to detain the driver past the original mission, the officer's decision to ask for and conduct field sobriety tests was not permissible. *Id*. at ¶9.

However, the contraband in *Hogan* was not obtained due to the field sobriety tests, but during a search requested by the officer afterwards. *Id*. at ¶54. The Court considered whether the prior illegal extension to conduct field sobriety tests was sufficiently attenuated to permit the subsequent search. *Id*. at ¶¶57-58. This Court found it was attenuated because the officer had told the driver he was free to leave and returned to his squad car before re-engaging the driver to obtain consent for the search. *Id*. at ¶69. Consequently, with the traffic stop over, the officer could interact with the driver as they would with anyone else on the street. *Id*. at ¶67. Thus, the driver's consent was free and voluntary. *Id*. at ¶71.

In addition to *Rodriguez* or *Hogan*, the court of appeals has recognized in *State v. Luebeck* that consent during a traffic stop, in the absence of reasonable suspicion, is invalid where officers by words and actions convey that compliance with the requests is required. *Luebeck*, 2006 WI App 87, ¶10, *citing Florida v. Bostick*, 501 U.S. 429, 435-36, 111 S.Ct. 2382. Specifically, when an officer retains the person's key documents, like identification, it serves is a key factor in determining whether the person is seized "and, therefore, whether consent is voluntary." *Luebeck*, 2006 WI App 87, ¶17.

2. Deputy Ruffalo's request for an intrusive pat-down was outside the mission of the stop and the deputy exploited the end of the stop to procure Floyd's consent, rendering it involuntary.

The court of appeals held that the stop was not over that this was just a brief moment during the entirety of an otherwise legal stop for a traffic violation. *Opinion* at ¶17 (App. 10). But this reasoning is counter to the clear conclusions of the court in *Rodriguez*. It is also illogical. In the absence of reasonable suspicion that a person is engaged in criminal activity, the law should curtail the government's ability to exploit an otherwise legal stop to effectuate an search lacking in reasonable suspicion. Instead, the officer should, as in other cases (e.g. *Hogan*), end the traffic stop, then re-engage with the suspect if the officer wants to act on his hunch.

Unlike the facts in *Hogan*, Deputy Ruffalo made his request to search Floyd before the traffic stop ended. When asked directly at the suppression hearing if the stop "was not going to be finished until you had searched Mr. Floyd," and Ruffalo replied, "No." (25:17; App. 36). The circuit court and court of appeals both reached the legal conclusion that Ruffalo's request to pat Floyd down was made before the stop ended. *Opinion* at ¶11 (App. 6).

Consequently, where Floyd was seized at the time the request, Deputy Ruffalo's desire to investigate his unparticularized hunch of criminal activity was a clear deviation from the original mission – an expired vehicle registration. As warned against in *Rodriguez*, it was impermissible for Ruffalo to take actions meant to detect criminal wrongdoing because it was not an ordinary incident of a traffic stop. The traffic stop should have ended

when Ruffalo walked back to Floyd's car. Even if Floyd had to be asked to step out of the car because he could not drive away, nothing prevented Ruffalo from explaining the citations and allowing Floyd to be on his way. Instead, contrary to *Rodriguez*, Ruffalo was not going to end the stop, or lawfully end the seizure, before obtaining Floyd's consent. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1614.

As warned by this Court in *Hogan* and recognized in *Luebeck*, Deputy Ruffalo therefore exploited the traffic stop by withholding the tickets and Floyd's identification in one hand, and seeking to pat down Floyd with the other hand. *Hogan*, 2015 WI 76, ¶9, 364 Wis.2d 167, 868 N.W.2d 124; *Luebeck*, 2006 W. I App 87, ¶¶16-17. Ruffalo testified that he was not going to explain citations to Floyd and then ask if he can search him. (25:17; App. 36). Ruffalo clearly leveraged a situation to accomplish the search based on nothing more than a hunch.

Moreover, this case is not just about Ruffalo's decision to ask Floyd about weapons, but to perform a pat-down search. Ruffalo asked Floyd if he could search him, even though Floyd had just told him that he was not armed. A pat-down search by an officer is an intrusive process. "Even a limited search *** constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry*, 392 U.S. at 24-25. "[A frisk for weapons] is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly." *Id.* at 17. This case was no exception; it was particularly intrusive. (25:9-11; App. 28-31).

In sum, Deputy Ruffalo acted on his hunch of drug activity, and under the guise of a basis-less concern about his safety, he exploited the end of the

traffic stop to procure Floyd's consent to an intrusive pat-down. Protections of individuals against searches by the government cannot tolerate such a search under these circumstances, and this Court should accordingly make clear to the citizens and officers of this State that what Ruffalo did here violated citizens' right to be secure in their persons.

C. Where the only evidence supporting the charges against Floyd derived from the unconstitutional search, the reversal of the motion to suppress requires vacating Floyd's conviction.

For the reasons given above, this Court should reverse the trial court's order denying Floyd's motion to suppress, and accordingly 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. (1:1-3). 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 counsel failed to present should have resulted in suppression nonetheless.

Counsel failed to present significant evidence that Deputy 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 Officer 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 Deputy Ruffalo only advised Floyd he would be searched, as opposed to asking Floyd.

It was deficient performance when trial counsel failed to call Officer White during the suppression hearing because White's report clearly stated that

Ruffalo *told* Floyd he intended to search him. Failure to call a key witness is deficient. *See White*, 2004 WI App 78, ¶¶20-21 (trial counsel's performance was deficient for failure to call witnesses who would have brought in evidence that "went to the core of [the] defense.").

Here, 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, which would mean that Floyd did not even consent at all. (19:20-21; App. 37-38); (28:13-14).

While at the hearing on the postconviction motion, months after the stop, White testified that he could not recall exactly what Ruffalo told Floyd, he agreed that his report, written shortly after the stop, 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 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); (25:17-18; App. 36-37); (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).

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). 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); (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).

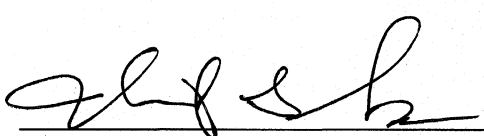
In sum, this Court should find that even with Ruffalo's testimony at the hearing on the motion to

suppress that Floyd did not give voluntary consent under the circumstances. (*See supra* Issue I). But if for some reason this Court does not find it consensual with Ruffalo's testimony alone, evidence derived from White's testimony bolsters the fact 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 24th day of February, 2017.



Michael G. Soukup
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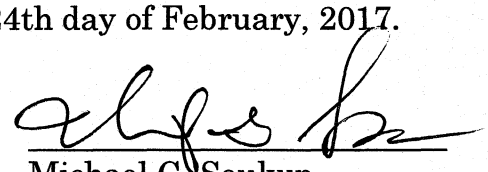
CERTIFICATION

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, 12 point text, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 9791 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 24th day of February, 2017.



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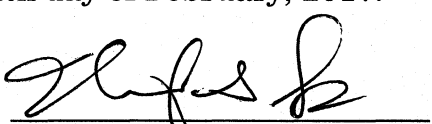
CERTIFICATION OF APPENDIX CONTENT

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.

Dated this 24th day of February, 2017.



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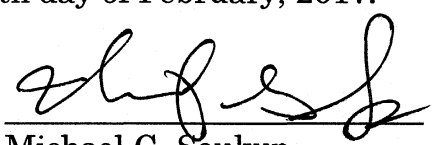
CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

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 24th day of February, 2017.



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