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 REPLY BRIEF

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ARGUMENT

I. DEPUTY RUFFALO'S INTRUSIVE FRISK OF FLOYD VIOLATED THE FOURTH AMENDMENT BECAUSE IT LACKED OBJECTIVELY REASONABLE SUSPICION AND WAS NOT CURED BY FLOYD'S CONSENT WHERE THE REQUEST WAS CONVEYED UNDER CIRCUMSTANCES THAT CONVEYED COMPLIANCE WAS REQUIRED.

The touchstone of the Fourth Amendment is reasonableness. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (citation omitted). The State continues to maintain in this Court that *even without consent*, Deputy Ruffalo's intrusive frisk under the facts of this case was reasonable. (St. Br. 28 fn.8, 38-39). The State makes this argument by contending that evidence at the hearing established by clear and convincing evidence that air fresheners, tinted windows, and the stop occurring in a "high-crime" area was sufficient to create a reasonable suspicion that Floyd was armed and dangerous. (St. Br. 28 fn.8, 38-39). Alternatively, the State argues that these factors were at least sufficient to create reasonable suspicion of criminal activity to allow Ruffalo to extend the otherwise routine traffic stop. (St. Br. 26-31, 38-39). But it fails to cite any case finding an objectively reasonable suspicion with the paucity of factors in this case.

The real heart of the State's argument lies in its points about consent. (St. Br. 14-26). It argues that even without any reasonable suspicion whatsoever, an officer is justified in requesting an occupant of a vehicle to relinquish his or her fundamental right to be secure his or her person by requesting an intensive frisk. (St. Br. 15-18). The State justifies that request by arguing it is a safety-related concern that is a core part of the mission of any traffic stop and is a "negligibly burdensome" request. (St. Br. 15-18).

What the State entirely ignores is that unlike questions seeking information, a request to conduct a frisk involves "a severe, though brief, intrusion upon cherished personal security…[that] must surely be an annoying, frightening, and perhaps humiliating experience." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Moreover, the State practically ignores the fact that Deputy Ruffalo was going to be completely done with the stop but withheld Floyd's identification and citations to make his suspicionless request to frisk Floyd. *See State v. Luebeck*, 2006 WI App 87, ¶¶7, 16-17, 292 Wis.2d 748, 715 N.W.2d 639. This fact removes this case from those where an objectively reasonable person would feel free to decline the request. *See State v. Hogan*, 2015 WI 76, ¶¶57-58, 69, 364 Wis.2d 167, 868 N.W.2d 124; *compare Robinette*, 519 U.S. at 35 (officer completed all steps of the stop, including returning his license, then asked for consent). These two points, the intrusive request and because Ruffalo conveyed compliance was required by withholding Floyd's identification and citations before ending the stop, render the intensive frisk that ensued unreasonable under the Fourth Amendment.

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

As for reasonable suspicion, the State argues that the factors of air fresheners, high-crime area, and tinted windows are relevant when determining reasonable suspicion. (St. Br. 26-32). Floyd does not dispute this non-controversial position. The question is whether those factors amount to reasonable suspicion, and in this case they do not.

The State cites to *U.S. v. Arvizu* to accuse Floyd of engaging in an improper divide-and-conquer

analysis to attack reasonable suspicion. (St. Br. 29). But, unlike the three factors in this case, the Court in *Arvizu* involved an amalgam of seven potentially suspicious factors. *U.S. v. Arvizu*, 534 U.S. 266, 274 (2002). The larger point is that aside from the small the number of factors, it the character of the factors that render it insufficient to form an objective reasonable suspicion. When given meaningful consideration to the factors here, it results in nothing more than otherwise innocent factors lacking a concrete basis to combine them into the necessary objectively reasonable suspicion. *See U.S. v. Beck*, 140 F.3d 1129, 1137 (8th Cir. 1998) (citations omitted).

The State focuses its response on Floyd's attack on the high-crime area and reliance upon tinted windows. (St. Br. 26-31). The State complains that Floyd is not consistent to argue a lack of connection with a high-crime area because he was merely passing through, yet cite to *State v. Malone*, 2004 WI 108, 274 Wis.2d 540, 683 N.W.2d 1, and *U.S. v. Foreman*, 369 F.3d 776 (4th Cir. 2004), where reasonable suspicion was found and had the same fact. Notably, the State does not dispute the premise that regardless of the area's character, it logically matters less for suspicion when there the person has less of a connection to it. *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.").

Moreover, the lack of connection between the suspects and the area in those cases should be given the same minimal weight as it should here. The difference between this case and those is the existence of other factors that led to an objective reasonable suspicion. *Malone*, 2004 WI 108, ¶¶7-10 (occupants appeared nervous and gave inconsistent accounts of their travel plans; occupants continually put their hands in their pockets contrary to the officer's instructions; occupants had drug-related

offenses); *Foreman*, 369 F.3d at 784-85 (driver gave unusual travel plans and officer observed specific signs of extreme nervousness, including heavy breathing and heavy sweating).

Likewise, the State contends that specificity is not required in order to rely upon a high-crime area as a factor. (St. Br. 30). But logically, specificity does matter when considering how much weight to give this factor, otherwise, "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." *State v. Gordon*, 2014 WI App 44, ¶15, 353 Wis.2d 468, 846 N.W.2d 483. While Deputy Ruffalo agreed there was "large quantities" of drug and gang activity, that was the extent of his specificity. (25:21; App. 40). He never said how recent that activity occurred. Most significantly Ruffalo observed nothing during his traffic stop that individualized Floyd to the "high-crime" area factor, i.e. Floyd was not *doing* anything there. Plus, this stop did not occur late at night in an alley or open-air drug market. It occurred during daylight hours, at a typical time for traffic (6:45 p.m.), in a location that Ruffalo himself described as a block away from a major intersection and next to S.C. Johnson Wax. (25:3-4, 14, 21; App. 22-23, 33, 40); *compare State v. Allen*, 226 Wis.2d 66, 68, 593 N.W.2d 504 (Ct. App. 1999) (the specific block received several complaints and was under police surveillance at the time when suspect was observed having brief contact with a car late at night).

The State complains that Floyd's only position about tinted windows is that the court of appeals decision is the first to consider it for that purpose, a point which the State does not dispute. (St. Br. 31). The State does not respond to the point underlying the absence of cases, which is that the ubiquity of tinted windows contributed little to an objectively

reasonable suspicion. The cases cited by the State involved much more than what was present in this case. *See U.S. v. Quintana-Garcia*, 343 F.3d 1266, 1273 (10th Cir. 2003) (along the U.S./Mexico border, tinted windows where were a common feature to *recent* instances of drug smuggling, at the time of day common for smuggling, and observed it engage in a suspicious "bailout" maneuver); *U.S. v. Torres-Ramos*, 536 F.2d 542, 546-47 (6th Cir. 2008) (driver and occupant were nervous and could not answer basic questions, and officer learned that had prior criminal activity); *U.S. v. Bowman*, 660 F.3d 338, 345 (8th Cir. 2011) (occupants were palpably nervous, their stories were not credible and were inconsistent, there were three visible cell phones in the car, and occupant had criminal history involving drugs).

Noticeably absent from its brief is any response to the fact that unlike almost any other reasonable suspicion case, there were facts that were consistent with innocence. From the start of the stop to the point where Deputy Ruffalo requested the frisk Floyd was cooperative, did not act nervous, and did nothing suspicious or furtive. (25:5, 13-14; App. 24, 32-33). He did not give inconsistent or incredulous information to Deputy Ruffalo. These facts weigh against the State's the insignificant weight of the other three factors. Thus, when considered in the totality, any suspicion of criminal activity, much less that Floyd armed and dangerous, amounts to nothing more than a hunch.

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.

The State argues that Ruffalo's request to frisk was either core to the stop's mission, or did not measurably extend the stop. (St. Br. 16-17). Thus, the State asks this Court to conclude that an officer may withhold the very last point of an otherwise routine traffic stop to request a "negligibly burdensome" frisk, even if the stop could otherwise end, and the preceding minutes aroused no reasonable suspicion at all.

The State's characterization of what happened here as merely two questions is disingenuous. (St. Br. 18). One question asked Floyd if he had anything that could hurt him. (25:8, 15; App. 27, 34). Floyd answered no. (25:8; App. 27). Floyd does not ask this Court to find that this question is burdensome or could measurably extend the duration of the stop. Officers can ask questions, which are almost always brief to answer and not particularly intrusive.

But what happened next was not merely a question. It was a request, without any reasonable suspicion, to relinquish a fundamental personal right that all citizens share, which is to be secure in his or her person from the government. "[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." *Terry*, 392 U.S. at 17.

The State boldly claims that Deputy Ruffalo's request to frisk Floyd is within the core mission of a

traffic stop. (St. Br. 17-18). However, when the Court in *Rodriguez v. United States* mentioned safety concerns as permissible activity during the traffic stop, it referred to far less intrusive examples, such as taking time to do criminal record and outstanding warrant checks. *Rodriguez v. United States*, 575 U.S. __, 135 S.Ct. 1609, 1616 (2015). It also cited a case from the 10th Circuit, which upheld a question about guns, which Floyd does not argue here as impermissible. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1616, *citing U.S. v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001) (en banc).

In addition, not only was Deputy Ruffalo's request to frisk outside the core mission of the stop, it was an extension of the stop that should have ended. Ruffalo specifically testified that he was not going to allow Floyd to explain the citations, and therefore end the stop, and then ask to frisk Floyd. (25:17; App. 36). Notably, he admitted that even though Floyd could not drive away, he could have explained the citations before Floyd exited the car. (25:16; App. 35). In other words, he could have ended the mission of the traffic stop, and then if he wanted to, re-engage Floyd if he so chose. By not doing so, Ruffalo extended the stop beyond the time it should have ended, which rendered the continued detention of Floyd illegal. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1612, 1614; *Luebeck*, 2006 WI App 87, ¶¶7, 16-17. Plus, by choosing to withhold of Floyd's documents when it was made at the time the stop should have ended, it conveyed compliance was required, which invalidated his consent. *Luebeck*, 2006 WI App 87, ¶¶7, 16-17.

The State asks this Court to overrule *Luebeck* because it is irreconcilable with the cases it cites. The State might be surprised to find out that this is entirely consistent with a case it relies upon heavily,

which *State v. Gaulrapp*, 207 Wis.2d 600, 588 N.W.2d 696 (Ct. App. 1996). The court of appeals in *Gaulrapp* noted that those facts were distinguishable from cases relied upon by the defendant in that case, including *U.S. v. Lee*, 73 F.3d 1034, 1040 (10th Cir. 1996) (overruled on other grounds by *United States v. Holt*, 264 F.3d 1215, 1226 n.6 (10th Cir. 2001)), because the officers did not return documents relating to the initial justification for the stop before asking for consent to search. *Gaulrapp*, 207 Wis.2d at 700. Floyd relies on *Luebeck* for its holding, recognized in *Gaulrapp* and given renewed support by *Rodriguez*, that when an officer withholds documents at the time a stop should have ended, the detention is no longer valid and neither is the consent that flows from it.

In addition, when Deputy Ruffalo asked if there was anything on Floyd that would hurt him, Floyd told Ruffalo no. (25:8, 15; App. 27, 34). A reasonable person would not feel that compliance with Ruffalo was optional any more when despite that response, and with identification still in his hand, Ruffalo nonetheless asked if he could search him anyway. The State claims that this was merely an "incremental intrusion." (St. Br. 18). It might be merely incremental had Floyd answered yes, but he told Ruffalo no. A reasonable person would expect, if there was any real possibility of a free and voluntary choice in the matter, that if he or she told an officer during a traffic stop that they had no weapons, such an answer would be honored. At that point, with Floyd's identification and citations in Deputy Ruffalo's hand, an objective reasonable person would understand that compliance was required, rendering that consent invalid. *Luebeck*, 2006 WI App 87, ¶¶7, 16-17.

Finally, the State argues that the subjective views of Deputy Ruffalo have no place in this case. (St. Br. 32-34). But Floyd does not refer to Ruffalo's beliefs to argue that the basis of the stop was a pretext or that officer safety was just a front for his hunch, although they may have been. The problem is that Ruffalo's statements confirm what is objectively present in this case; namely, choosing to prevent the end of a traffic stop in order to specifically request an intrusive frisk, without any objectively reasonable suspicion to do so. Ruffalo's testimony shows that he acts on the assumption that everyone is armed, and therefore he makes the request every time a driver exits his or her vehicle. (5:17-18; App. 36-37). He testified that he was not going to let Floyd until he frisked him. (25:17; App. 36).

In addition, this Court is the final say on what the law says for this State, which includes not just what officers can and cannot do, but what protections its citizens have against government overreach. Deputy Ruffalo's statements about how he treats the citizens of this State is consistent with the State's position, but it is not consistent with the law.

Instead, contrary to the views of the State or Deputy Ruffalo, this Court should uphold the principles in *Luebeck* and follow the direction of *Rodriguez*, which reflect a protection of individuals' core liberty rights and limit government's infringement upon that liberty only to the extent justified by the circumstances. *Rodriguez*, 575 U.S. __, 135 S.Ct. at 1612, 1614; *and Luebeck*, 2006 WI App 87, ¶¶7. Accordingly, this Court should find the Ruffalo's intrusive frisk unconstitutional.

II. COUNSEL'S FAILURE TO PRESENT ADDITIONAL EVIDENCE WOULD HAVE ALTERED THE OUTCOME WHERE IT WOULD HAVE CLEARLY SHOWN THERE WAS A LACK OF VOLUNTARY CONSENT.

The State does not make any significant argument that Floyd's counsel was deficient, but only that the failure to call Officer White as a witness was not prejudicial. (St. Br. 36-38). The State argues that that White's use of the term "advise" is not inconsistent with Deputy Ruffalo's testimony that he asked Floyd. (St. Br. 37-38). The State contends that White is not a lawyer, and refers to his testimony at the postconviction motion hearing to show that he did not mean that Ruffalo failed to ask. (St. Br. 37-38).

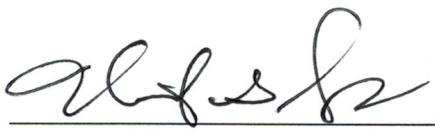
Floyd understands that the circuit court ultimately concluded that Officer White supported Deputy Ruffalo's testimony that he asked. (Opening Br. 32-33). However, the fact remains that Officer White did not deny that he completes his reports accurately and wrote "advise" in this report, and that he did so closer in time to the stop. (28:12-16). Those reasons weigh against his testimony, and the circuit court's factual finding.

More importantly, despite Officer White's testimony at the hearing that Deputy Ruffalo asked Floyd, it is White's statement in his report is consistent with the character of Ruffalo's handling of the traffic stop. As Ruffalo boldly declared at the hearing, he assumes everyone has a weapon, he requests a search every time someone exits the car, and most tellingly, he was not going to let Floyd leave without frisking him first. Floyd maintains that had counsel presented the fact from White's report that Ruffalo advised, as opposed to asked, it would have defeated the State's burden to show by clear and convincing evidence that Floyd's consent was free and voluntary. (Opening Br. 32-34).

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 12th day of April, 2017.



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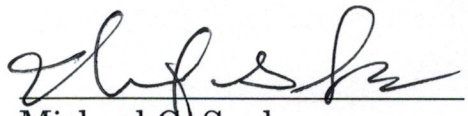
CERTIFICATION

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, 13 point text, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2936 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 12th day of April, 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 April 12th, 2017, 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.

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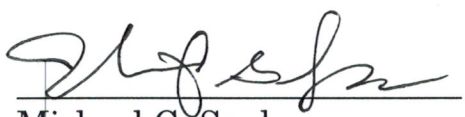

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