

**RECEIVED**

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I**

**12-01-2015**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

**Appeal No. 2015AP001537**

---

**JERRY D. BUTLER,**

**Defendant-Appellant,**

**v.**

**Milwaukee County Case  
No. 2014FO000465**

**CITY OF MILWAUKEE,**

**Plaintiff-Respondent.**

---

**BRIEF OF PLAINTIFF-RESPONDENT**

---

**APPEAL FROM A JUDGMENT ENTERED ON MAY 28, 2015  
IN THE CIRCUIT COURT OF MILWAUKEE COUNTY,  
THE HONORABLE MICHAEL G. MALMSTADT, PRESIDING**

---

GRANT F. LANGLEY  
City Attorney

KURT A. BEHLING  
Assistant City Attorney  
State Bar No. 1000618  
Attorneys for Plaintiff-Respondent  
City of Milwaukee

**ADDRESS:**

749 West State Street, Rm. 205  
Milwaukee, WI 53233  
Telephone: (414) 286-2676  
Fax: (414) 286-2128

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
STATEMENT OF ISSUE PRESENTED FOR REVIEW .....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF CASE .....	1
STATEMENT OF THE FACTS .....	2
ARGUMENT.....	2
I.    STANDARD OF REVIEW .....	2
II.   THE FACTS FOUND BY THE TRIAL COURT WERE NOT CLEARLY ERRONEOUS, THEREFORE THE TRIAL COURT’S DECISION MUST BE UPHELD .....	2
CONCLUSION.....	3
FORM AND LENGTH CERTIFICATION .....	5
ELECTRONIC BRIEF CERTIFICATION.....	6
CERTIFICATION OF MAILING.....	7

## TABLE OF AUTHORITIES

Page(s)

### STATE CASES

<i>Fiumefreddo v. Mclean</i> , 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) .....	2, 3
<i>Kushman v. State ex rel. Panzer</i> , 240 Wis. 134, 140, N.W.2d 862 (1942).....	3
<i>State v. Flynn</i> , 190 Wis. 2d 131, 527 N.W.2d 343 (Ct. App. 1994).....	3
<i>State v. Walli</i> , 334 Wis. 2d 402, 334 N.W.2d 898 (Ct. App. 2011).....	2

### STATE STATUTES

Wis. Stats. 800.14(4) .....	1
-----------------------------	---

### MILWAUKEE MUNICIPAL ORDINANCES

Section 106-38-2.....	1, 2
-----------------------	------

## **STATEMENT OF ISSUE PRESENTED FOR REVIEW**

Did the City establish the necessary evidence to sustain a finding of guilty by the circuit court judge?

Trial Court Answered: Yes.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The City of Milwaukee is of the opinion that oral argument is not necessary to decide the issues raised by this appeal. The City does not believe publication is warranted.

## **STATEMENT OF THE CASE**

This is an appeal from a circuit court decision by the Honorable Michael G. Malmstadt, Branch 46 of the Milwaukee County Circuit Court issued May 28, 2015, which upheld the decision of Milwaukee Municipal Court, Judge Phillip M. Chavez, on April 21, 2015. Judge Chavez' decision was appealed De Novo, pursuant to Wis. Stats. § 800.14(4) by defendant-appellant, Jerry D. Butler. As part of his appeal process, Mr. Butler has filed a Statement on Transcript which states that a transcript is not necessary.

The City of Milwaukee issued a municipal citation on February 26, 2013 to Mr. Butler for Possession of Marijuana in violation of Milwaukee Code of Ordinances Chapter 106-38-2. Judge Chavez found Mr. Butler guilty and assessed a \$386.00 forfeiture.

## **STATEMENT OF THE FACTS**

Mr. Butler was issued a municipal citation for a violation of Milwaukee Code of Ordinance (MCO) Chapter 106-38-2, which prohibits individuals from possessing Marijuana.

The evidentiary facts in this case are as follows: On February 26, 2013 at 4:30 p.m., while being arrested for a Disorderly Conduct charge, Marijuana was found in Mr. Butler's apartment and on his person during the booking process.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The standard of review for the Court of Appeals for this Circuit Court decision is the clearly erroneous standard. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *State v. Walli*, 334 Wis.2d 402, 412, 334 N.W.2d 898 (Ct. App. 2011). We will apply the clearly erroneous standard of review when we are reviewing the trial court's findings of fact. *Id. at 414*.

### **II. THE FACTS FOUND BY THE TRIAL COURT WERE NOT CLEARLY ERRONEOUS, THEREFORE THE TRIAL COURT'S DECISION MUST BE UPHELD**

In this instance, Mr. Butler did not provide the Court of Appeals with a copy of the transcript of the Circuit Court trial. It is the appellant's responsibility to ensure that the appellate record is complete. *Fiumefreddo v. Mclean* 174 Wis.2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). When an appellate record is

incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *Id. at 27*. The appellate court is "limited to the record as it comes to us from the trial court". *State v. Flynn*, 190 Wis.2d, 31, 527 N.W.2d 343 (Ct. App. 1994). "We can only consider the record upon which the circuit judge made his decision." *Kushman v. State ex rel. Panzer*, 240 Wis 134, 140, N.W.2d 862 (1942).

Mr. Butler has filed a "Brief in Support of Motion to Suppress Statement" which the Court of Appeals has accepted as his Appellate brief. Mr. Butler's argument appears to be that his rights were violated and any evidence from this incident should be suppressed. The transcript of the trial in circuit court has not been provided, and Mr. Butler cannot support his argument with references to the testimony provided at the trial.

### **CONCLUSION**

Mr. Butler sets forth no basis in fact or law to support a finding that the court's decision was clearly erroneous. Therefore, the City of Milwaukee respectfully requests that this court affirm the judgment of conviction entered by the Milwaukee County Circuit Court, the Honorable Michael G. Malmstadt presiding, whereby the defendant was convicted of a violation of the Milwaukee Code of Ordinances for Possession of Marijuana.

Dated at Milwaukee, Wisconsin this 1<sup>st</sup> of December, 2015.

GRANT F. LANGLEY  
City Attorney

---

s/KURT A. BEHLING  
Assistant City Attorney  
Attorneys for Plaintiff-Respondent  
City of Milwaukee

P.O. ADDRESS:  
Police Administration Building  
Room 205  
749 West State Street  
Milwaukee, WI 53233

## **FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stat., for a brief and appendix produced with a proportional serif font. The length of this brief is 653 words.

---

s/KURT A. BEHLING  
Assistant City Attorney  
State Bar No. 1000618  
Attorneys for the Plaintiff-Respondent  
City of Milwaukee



## **ELECTRONIC BRIEF CERTIFICATION**

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of § 809.19(12).

I further certify that:

The electronic brief is identical in text, content and format to the printed form of the brief filed as of this date.

Dated and signed at Milwaukee, Wisconsin this 1<sup>st</sup> day of December, 2015.

---

s/KURT A. BEHLING  
Assistant City Attorney  
State Bar No. 1000618  
Attorneys for the Plaintiff-Respondent  
City of Milwaukee

ADDRESS:  
749 West State Street, Room 205  
Milwaukee, WI 53233  
Telephone: (414) 286-2676  
Fax: (414) 286-2128  
kbehli@milwaukee.gov

## **CERTIFICATE OF MAILING**

Patricia Schmidt herein certifies that she is employed by the City of Milwaukee as a Legal Office Assistant, assigned to duty in the office of the City Attorney, which is located at 841 North Broadway, Suite 716, Milwaukee, Wisconsin 53202; that on the 1<sup>st</sup> day of December, 2015 she filed ten copies of the Plaintiff-Respondent's Brief in the above-entitled case, via U.S. Mail, addressed to: Diane M. Fremgen, Clerk of Court of Appeals, Wisconsin Court of Appeals, 110 East Main Street, Suite 215, P.O. Box 1688, Madison, WI 53701-1688 and three copies of Plaintiff-Respondent's Brief via U.S. Mail to Mr. Jerry D. Butler, 6307 West Hampton Avenue, #4, Milwaukee, Wisconsin 53218.

---

s/PATRICIA SCHMIDT