STATE OF WISCONSIN

C O U R T OF APPEALS

DISTRICT II

Case No. 2015AP1540-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARTURO LUIZ-LORENZO,

Defendant-Appellant.

On Appeal From the Judgment of Conviction Entered in the Kenosha County Circuit Court, the Honorable Mary K. Wagner, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Mr. Luiz-Lorenzo's Presence in an Alley at 3 a.m., and an Act of Walking Away From a Squad Car, Did Not Create Reasonable Suspicion to Justify the ***Terry*** Stop.

A. Introduction and summary.

Mr. Luiz-Lorenzo agrees that as long as an officer does not convey a message that compliance is required, not all encounters between law enforcement and a citizen will constitute a seizure under the Fourth Amendment. ***Florida v. Bostick***, 501 U.S. 429, 434-435 (1991). The parties also agree that a restraint of movement either by physical force, or by a show of authority, triggers the Fourth Amendment's protection against unreasonable searches and seizures. ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980). (State's Brief at 6). Finally, the parties agree that whether an officer had reasonable suspicion to stop an individual, this court conducts an objective analysis of the totality of the circumstances. ***Ohio v. Robinette***, 519 U.S. 33, 34 (1996); ***State v. Richardson***, 156 Wis. 2d 128, 139-140, 456 N.W.2d 830 (1990).

Before replying to the state's arguments, it is necessary to clarify some issues of fact. In its summary of the facts, the state indicates that Officer Hancock was "dispatched to the vicinity of La Frontera bar in Kenosha to investigate a group of people causing a disturbance." (State's Brief at 2). Similarly, in the argument, the state discusses facts related to the initial call, stating that that "[w]hen Officer Hancock responded to the location, he observed the defendant standing against the wall . . ." (State's Brief at 17). It further indicates

that "Officer Hancock initially responded to the defendant's vicinity for a [d]isorderly conduct call and he was the only person present, behind a closed business . . . ." (State's Brief at 20). The presentation of these facts suggests that La Frontera Bar was subject of, or at least mentioned by the caller. Moreover, the manner in which these facts are presented imply that Mr. Luiz-Lorenzo was found in the location described by the caller. The record establishes that La Frontera Bar was not mentioned in the call and that Officer Hancock was not dispatched to the bar. (61:18). As the state acknowledges, Officer Hancock did not have any description of the individuals in the group of people reportedly causing a disturbance and he did not see anyone in the *immediate* area where he was notified that there were subjects being loud. (State's Brief at 2); (61:18) (emphasis added). The circuit court found that the officer *happened* to pull into the alley where he saw Mr. Luiz-Lorenzo, rather than being finding Mr. Luiz-Lorenzo in the location to which he was dispatched. (61:70) (emphasis added). To imply otherwise is contrary to the record and findings of the circuit court.

B. Officer Hancock seized Mr. Luiz-Lorenzo within the meaning of the Fourth Amendment when he ordered him to "stop."

Circumstances such as the presence of several officers, some physical touching, a drawn weapon, or the use of tone or language indicating compliance with a command is required might indicate a seizure, and therefore invoke the protections of the Fourth Amendment. ***Mendenhall***, 446 U.S. at 554; (State's Brief at 6).[1] The state focuses its argument on

[1] The state's pin cite to this quote, ***Mendenhall***, 446 U.S. at 254, seems to be a typographical error. The quote is found at ***Mendenhall***, 446 U.S. at 554.

the absence of a siren or drawn weapon, and the fact that initially Officer Hancock was acting alone. (State's Brief at 7).

Absent from its analysis, however, are crucial facts: (1) Officer Hancock *ordered* Mr. Luiz-Lorenzo *to stop*, and (2) Mr. Luiz-Lorenzo *complied*. (61:20); *See* ***Mendenall***, 446 U.S. at 554 (language or tone that implies compliance is required is a show of authority); ***California v. Hodari D.***, 499 U.S. 621, 626 (1991). (A person must yield to law enforcement's show of authority in order to be seized within the meaning of the Fourth Amendment.) It is remarkable that although the state acknowledged these crucial details of how the encounter was initiated in its statement of the facts, (State's Brief at 3), it makes no mention of them when discussing the point at which Mr. Luiz-Lorenzo was stopped. (State's Brief at 6-8).

Also remarkable is the state's failure to address the case law in which Wisconsin courts have found that an order from an officer to do some action, even absent a uniform, flashing lights, a siren, drawn weapons, or physical restraint is show of authority. *See e.g.* ***State v. Washington***, 2005 WI App 123, ¶15, 284 Wis. 2d 456, 700 N.W.2d 305. (Where the defendant was seized when he stopped after an officer in plain clothes and unmarked squad car commanded him to do so); *See also* ***In re Kelsey C.R.***, 2001 WI 54, ¶33, 242 Wis. 2d 422, 626 N.W.2d 777. (Where the officer made a show of authority when he told the defendant to "stay put" because doing so was the equivalent of telling a citizen to "stop, in the name of the law"). [2]

[2] The defendant was not seized for purposes of the Fourth Amendment because she fled when the officers told her to "stay put." ***Kelsey C.R.***, 242 Wis. 2d 422, ¶ 33. Relevant to this case is that the order from the officer to "stay put" was a show of authority.

Furthermore, the state offers no explanation as to why orders to "stop" or "stay put" were shows of authority in ***Washington*** and ***In re Kelsey C.R***. (triggering the Fourth Amendment in ***Washington***), but Officer Hancock's order to "stop" was not a show of authority constituting a seizure in this case.

Finally, the state seems to argue that there was no seizure because Officer Hancock was free to approach Mr. Luiz-Lorenzo and ask questions. (State's Brief at 8). While it is true that not all encounters are seizures under the Fourth Amendment, not surprisingly, the state cannot establish that what occurred here was anything other than a seizure under the Fourth Amendment because the record unequivocally demonstrates that Officer Hancock *commanded* Mr. Luiz-Lorenzo to stop, and that Mr. Luiz-Lorenzo complied. (61:20); (State's Brief at 3). What occurred here was not Officer Hancock merely approaching Mr. Luiz-Lorenzo to ask questions; what occurred was a seizure under the Fourth Amendment. ***Washington***, 284 Wis. 2d 456, ¶15.

The state cannot simply disregard facts and case law integral to the analysis of the issue before the court because they contradict their position that Mr. Luiz-Lorenzo was not stopped until physically restrained. The state's conclusion about when the stop occurred is wrong because it fails to consider essential facts and precedent that compliance with an officer's order to stop is a seizure under the Fourth Amendment. ***Id***.

In addition to ignoring clear case law that a citizen's compliance with an officer's command to stop constitutes a seizure under the Fourth Amendment; the state's position is contrary to public policy. Adopting a position that the Fourth Amendment does not apply to citizens who obey the

commands of a law enforcement officer to "stop" or "stay put" would result in offering additional protections to those who disobey the commands, and encourage physical confrontation – all of which is contrary to the interest and safety of the public and law enforcement.

This court should reject the state's contention that Mr. Luiz-Lorenzo was not stopped until physically restrained, and hold that his Fourth Amendment rights were triggered at the moment Officer Hancock ordered him to stop and he complied.

C. The facts known to Officer Hancock at the moment he ordered Mr. Luiz-Lorenzo to stop were insufficient to justify the ***Terry*** stop.

The state attempts to blur the line about when Mr. Luiz-Lorenzo was seized in order to include additional facts into its analysis of the reasonableness of the stop. Further, in its discussion of the reasonableness of the stop, it again attempts to cast the initial order to stop and Mr. Luiz-Lorenzo's compliance as him "opt[ing] to speak with Officer Hancock," and as a voluntary interaction. (State's Brief at 9-10). However, as argued above, Mr. Luiz-Lorenzo was seized the moment he complied with Officer Hancock's unequivocal command to stop. *See* ***Washington***, 284 Wis. 2d 456, ¶ 15; ***Kelsey C.R.***, 242 Wis. 2d 422, ¶ 33.

Accordingly, at the moment he ordered Mr. Luiz-Lorenzo to stop, Officer Hancock must have had sufficient specific and articulable facts that, taken together with rational inferences from those facts, permitted him to conduct the stop. ***State v. Young***, 212 Wis. 2d 417, 423-424, 569 N.W.2d 84 (Ct. App. 1997); ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). Therefore, facts that occurred after Officer Hancock ordered

Mr. Luiz-Lorenzo to stop are not a part of the determination as to whether or not reasonable suspicion existed.

First, the state asserts that:

> the time of night at 3:00 [a.m.], the knowledge in the past that police have received calls regarding the area, specifically an area that Officer Hancock has had prior contact with people who have 'been back there doing illegal activity,' the area being poorly lit, the defendant standing against the wall of a closed business, after seeing the squad car walking away into bushes . . . .

(State's Brief at 12)[3] are sufficient facts to support reasonable suspicion; thus justifying the stop. The facts cited by the state are remarkable not because of what they *tell* us about specific observations about Mr. Luiz-Lorenzo or his activities, but because of what they *fail* to establish. Facts about prior experience with the area, Officer Hancock's beliefs about people in poorly-lighted areas, and time of day support nothing more than an "inchoate and unparticularized suspicion or 'hunch,'" ***Terry*** 392 U.S. at 27.

The state makes no attempt to relate any specific observations about Mr. Luiz-Lorenzo that would justify the officer's actions in light of his general suspicions about the poorly-lighted areas or that alley. The state instead makes a conclusory allegation that these facts are specific and articulable. (State's Brief at 12). Such a characterization is troubling because not only is it patently contrary to ***Terry*** and its progeny, which requires sufficient specific and articulable facts, 392 U.S. 1, 21-22, it disregards Officer Hancock's admission that he did not observe Mr. Luiz-Lorenzo do

[3] The state also notes Mr. Luiz-Lorenzo keeping his hand in his pocket. This occurred after the initial stop, and therefore is not part of the totality of the facts available to the officer at the time of the stop.

anything that in his prior experience would have lead him to believe he was breaking into one of the closed businesses or doing anything illegal. (61:26).

Second, the state fails to establish that Mr. Luiz-Lorenzo was connected to the initial call that dispatched Officer Hancock to the general area, or that there is reasonable suspicion for Officer Hancock to stop Mr. Luiz-Lorenzo on the basis of the call. [4] The caller provided no physical description of any of the people in the group causing the noise disturbance, so Officer Hancock would have had no way of knowing whether Mr. Luiz-Lorenzo was in that group of people. (61:18). The mere fact that Mr. Luiz-Lorenzo was standing in an alley within a block of the location that was subject of the vague call (61:18), does not establish that he was part of the group of people causing the noise disturbance. Likewise, his mere presence in an area where Officer Hancock expected there to be crime, by itself, does not justify the stop. ***Pugh***, Wis. 2d 832, ¶ 12. (internal citations omitted).

The logic then of the state is that reasonable suspicion exists because "there is nothing to indicate that a group of subjects would remain together throughout the time from the initial call to response from police[,]" (State's Brief at 13). Therefore, it is asking this court to condone the police stopping *every* citizen in the general vicinity of *every* vague complaint, even where there is no physical description.

Finally, despite its concession that an individual has the right to ignore police presence and walk away without it giving rise to reasonable suspicion, *See* ***Florida v. Royer***, 460

[4] As noted in the introduction, contrary to the state's portrayal of the facts, La Frontera bar was not the subject of the noise complaint, and Mr. Luiz-Lorenzo was not at the location to which Officer Hancock was dispatched.

U.S. 491, 497–498 (1983);*See also* ***State v. Young***, 2006 WI 98, ¶ 73, 294 Wis. 2d 1, 717 N.W.2d 729; (*citing* ***Illinois v. Wardlow***, 528 U.S. 119 (2000)); (State's Brief at 8), the state argues that Mr. Luiz-Lorenzo's act of walking away justified the stop[5].

It contends that Mr. Luiz-Lorenzo's act of walking away was similar to the actions of the defendants in ***Wardlow*** and ***United States v. Dykes***, 406 F.3d 717 (D.C. Cir. 2005). In ***Wardlow***, the officer observed the defendant standing against a building hold an opaque bag. ***Wardlow***, 528 U.S. at 121-122. Upon seeing the officers, the defendant fled and the officer chased him in their squad as he ran through a gangway and alley. ***Id***. The Court held that the stop was justified, and that "flight, by its very nature, is not 'going about one's business[.]'" ***Id***. at 125.

In ***Dykes***, the officers were responding to complaints of drug trafficking in the area when they observed several people in the area, including the defendant, who was standing right next to someone. 406 F.3d at 718. When the police pulled into the lot, the person standing next to the defendant threw a bag and ran away, while the defendant walked away. ***Id***. As officers got out of their cars, the defendant began to run away at a fast pace. ***Id***. The court held that the stop was justified due to the high drug-trafficking area, the specific call

[5] Interestingly, the state also seems to suggest that Mr. Luiz-Lorenzo had some duty to aid Officer Hancock. (State's Brief at 9). The case relied on by the state, ***Stelloh v. Liban***, 21 Wis. 2d 119, 125, 124 N.W.2d 101, is entirely inapplicable to this case, as that case related to protecting the identity of confidential informants in order to encourage citizen participation in law enforcement. Moreover, nothing in the record suggests that Mr. Luiz-Lorenzo was called on in any way to aid the officer, or that the officer was seeking any assistance.

complaining of drug trafficking that the police were responding to, and the flight upon officers exiting their cars. ***Id***. at 720.

The state argues that the facts of this case are similar to both ***Wardlow*** and ***Dykes***, and therefore the stop is justified. (State's Brief at 18-20). The facts of this case, however, are not at all comparable to the facts in those cases. An "area known for frequent calls" (State's Brief at 18) is not the same as an area known for heavy narcotics trafficking, *See* ***Wardlow***, 528 U.S. at 121. Furthermore, Officer Hancock was not responding to complaints of drug trafficking. *See* ***Dykes***, 406 F.3d at 718. Most importantly, presence in an area where an officer expects criminal activity to take place, standing alone, is not enough to support a reasonable and particularized suspicion that the person is committing a crime. ***Pugh***, 345 Wis. 2d 832, ¶ 12. (internal citations omitted).

Next, there was neither testimony, nor a finding from the circuit court that Mr. Luiz-Lorenzo's act of walking away upon seeing Officer Hancock constituted *flight*. The state's characterization of walking away as being similar to the unprovoked flight in ***Wardlow*** and ***Dykes*** contradicts its acknowledgment that people are free to walk away and ignore police. (States' Brief at 8). It goes without saying that running away and running through gangways and alleys is remarkably different than walking away – even into bushes. And, while the record indicates that Mr. Luiz-Lorenzo walked into bushes, that fact is undeveloped. There is no indication that the bushes were so large as to conceal Mr. Luiz-Lorenzo, or that he was even trying to hide.[6] Moreover, the court did not conclude that his walking into bushes was what raised

[6] Mr. Luiz-Lorenzo testified that he walked away to get away from the bright headlights shining in his eyes. (61:53).

suspicion, but rather that his act of walking away upon seeing the officer exiting his vehicle is what was sufficient to justify the stop. (61:70-71).

Upholding the stop in this case, which was based on generalized suspicions, would contravene well-established case law under ***Terry*** and its progeny that an investigative stop cannot be justified unless there are particularized facts and reasonable inferences. Because there were no particularized observations, Officer Hancock's stop violated Mr. Luiz-Lorenzo's Fourth Amendment rights, and the fruits of the illegal stop must be suppressed.

CONCLUSION

For all the reasons stated in this brief and his brief-in chief, Mr. Luiz-Lorenzo respectfully requests that the court reverse the circuit court's decision denying his motion to suppress the evidence resulting from an illegal stop of his person. He asks that this court find that there was a stop within the meaning of the Fourth Amendment when he complied with the officer's command, and that it was not supported by reasonable suspicion.

Dated this 17th day of March, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,852 words.

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This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 17th day of March, 2016.

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