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

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DAMION L.BROWN,**

**Defendant-Appellant.**

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# REPLY BRIEF OF DEFENDANT-APPELLANT

**Appeal No. 2015AP002029 CR**

**Trial Case No. 2012CF3142 (Milwaukee Co.)**

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**APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE FILED JANUARYY 2, 2015 THE HONORABLE CLARE L. FIORENZA, PRESIDING**

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## ARGUMENT

The defendant argues that the warrantless search of his residence violated his Fourth Amendment rights. The State did not establish that Mr. Williams' consent to search the home he shared with Mr. Brown was voluntary.

### I. THE DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

Because the State failed to satisfy its burden, the defendant's motion to suppress should have been granted.

#### A. The State failed to establish that consent to search was freely and voluntarily given.

The State argues that the trial court properly exercised its discretion when it denied the defendant's motion to suppress. In so arguing the State relies on very limited facts and ignores the established facts in the case.

##### 1. Mr. Williams was in custody

The facts show that upon the stop of Mr. Williams' vehicle he and Mr. Brown were immediately separated and arrested. A number of squads were on hand. Mr. Williams' car was thoroughly searched. Even though nothing was found, a probation and parole supervisor took information from Mr. Williams and indicated that he would be contacting his agent.

The State does not deny that any of the above occurred nor does it deny that Mr. Williams was arrested and in handcuffs when he purportedly gave consent. The State does not address the coercive nature of the arrest of Mr. Williams; rather, it argues that both Officer Gajevic and Mr. Williams were polite and civil. The fact that neither Mr. Williams nor Officer Grajevic raised their voices or became combative does not lessen the coercive nature of the situation.

The State also cites testimony that Officer Gajevic did not "threaten" Mr. Williams. The State does not explain what it means when it argues that Mr. Williams was not "threatened"; however, the facts certainly show that the atmosphere surrounding the giving of consent was coercive. Also, as we discuss in another section of this brief, we view the so called option given to Mr. Williams that he either give voluntary consent to search, or a search warrant would be applied for, as a "threat", or more to the point, we view it as coercive.

It is our contention that the totality of the circumstances surrounding the arrest and detention of Mr. Williams show that Mr. Williams' consent was not the result of a free, intelligent, unequivocal and specific consent without ***any duress or coercion, actual or implied,*** as required by law. The totality of the circumstances indicates that Williams' consent to search was not

the product of a free and unconstrained choice, regardless of whether any overt threats were made.

### 2. There was no probable cause to arrest Williams

Not only had Mr. Williams been arrested, the record does not show that there was probable cause to arrest him. As we argued, that alone invalidates the consent. Consent given while a defendant is illegally detained is invalid. **United States v. Johnson** 427 F.3d 1053(7th Cir. 2005).

Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that a defendant committed a crime. **State v. Mitchell**, 167 Wis. 2d 672, 681, 482 N.W. 2d 364 (1992).

The State argues that our argument in this respect is undeveloped. In our brief we laid out the facts surrounding the arrest, and argued that they did not amount to probable cause to arrest. The State on the other hand merely argues in support of Mr. Williams' arrest that " ... the circuit court found credible Officer Gajevic's testimony that when he began talking to Williams, 'he identified himself and explained the exact nature of the investigation, including what transpired the day before and that day, and that he was currently under arrest for party to a crime with dealing heroin on two occasions' and 'after advising Mr. Williams of basically everything,' Officer Gajevic

asked for his willing consent to search the apartment." (Page 19 State's brief.) The State repeats at page 20 of its brief that Officer Gajevic's telling Mr. Williams that he was under arrest for party to a crime of dealing heroin somehow establishes probable cause to arrest. It clearly does no such thing. No facts were adduced at the hearing to justify the arrest of Mr. Williams.

The state also argues that the defendant has forfeited his right to raise this issue. We disagree.

The State cites to **State v. Peters**, 166 Wis.2d 168,479 N.W. 198 (Ct. App. 1991), for the proposition that the issue is forfeited. **Peters** involved a ruling on the admissibility of evidence. Specifically, **Peters** addressed whether an objection that certain evidence was inadmissible on the basis that the witness had no personal knowledge preserved the defendant's right to appeal on hearsay grounds. It did. The defendant's right to appeal was upheld. If anything, **Peters** supports the defendant's right to argue the legality of Mr. Williams' arrest. This is because case law makes clear that the State has the burden of proof on the question of voluntariness, and that it is a totality of the circumstances test that is applied. Courts are required to examine the record to apply the totality of the circumstances test. **State v. Kiekhefer**, 212 Wis. 2d 460,470, 569 N.W. 2d 316 (Ct. App. 1997.

Furthermore, the parties, at the time the motion was litigated, were aware that the legality of the arrest was a consideration for the court. In the defendant's memorandum to the court filed on March 4, 2013, as part of his totality of the circumstances argument, the defendant argued that "(t)he police had no grounds, probable cause of a crime by Williams, to otherwise take him in." (R.17:5). The state also argued, in its Supplemental Brief to the trial court, that Mr. Williams' fear of revocation was unwarranted because Officer Gajevic had probable cause to arrest him. (R.19:8). It is clear that the State thought probable cause to arrest was a factor to be considered by the court in its analysis.

### 3. Officer Gajevic's expressed intention to obtain a warrant unless Mr. Williams agreed to the search of his residence was coercive.

As we argued in our brief, the testimony of Officer Gajevic indicates that the officer had threatened to get a search warrant if he could not obtain Mr. Williams' consent. We argued that this also weighed against a finding of consent. We noted that police may not threaten to get a warrant when there are no grounds for a valid warrant. See **Kiekhefer** at 473.

The State responds that the State need not show that there were actually grounds to obtain a warrant, it only need show that the officer believed there were grounds to obtain a warrant. The State quotes **Kiekhefer**, which in turn was quoting a

7th circuit case, **United states v. Evans**, 27 F. 3d 1219, 1231 (7th Cir. 1994). We believe case law shows that to the extent the State is relying on the quoted cases for the proposition that the court need not determine whether there actually were grounds for a warrant, the State is incorrect.

In **United States v. Hicks**, 539 F.3d 566 (7th Cir. 2008), the Seventh Circuit determined that in order to determine whether a consent to search by a co-occupant was coerced, it needed to be determined whether there was a factual basis for the police to believe they had probable cause to get a search warrant, rather than simply determine whether the officer who made the statement believed that a search warrant could be obtained. In **Hicks** the defendant's girlfriend gave permission to search their apartment after being told by the police that they could otherwise obtain a warrant. The trial court determined that the officer's expressed intention to get a warrant was genuine and not a pretext to induce submission. Therefore it was not coercive. The Court of Appeals for the Seventh Circuit stated:

> We disagree. The district court did not err in its fact finding per se, but rather took an incorrect view of the law. The district court interpreted our case law to mean that if Brown's statement reflected a legitimate belief, then the stated intention to get a warrant did not create a problem with the consent. We do not question the district court's determination that Brown personally believed what he said. But we find that it was error to evaluate whether the stated intention to get a warrant was genuine or pretextual without considering whether

the police actually had the underlying probable cause for the search.

**Hicks** at 571.

In this case, as well, it must be determined whether the State established that there was probable cause to obtain a search warrant of the residence. The State argues that there was probable cause. We do not believe the State's argument is persuasive.

In arguing that there was probable cause to obtain a search warrant for Mr. Williams' home, the State relies on facts relative to Mr. Brown. However, the State ignores the officer's testimony that he did not believe that Mr. Brown lived at the residence. Indeed, a great deal of the evidence introduced at the suppression hearing was introduced to attempt to show that Brown had a reasonable expectation of privacy in the residence. The State contended that he did not. (R.73:74-99).

Furthermore, the State relies on information, apparently relayed to Officer Gajevic, that there had been a drug transaction the previous day, and another buy was arranged. The State, however, ignores the fact that upon the stopping of the vehicle containing Mr. Williams and Mr. Brown, no drugs were found. Mr. Williams informed the officers that he was going to the courthouse (R.73:25). Nothing was uncovered to contradict

his claim. The stop of the vehicle did not produce any basis to search Mr. Williams' residence.

It must be remembered, this was a search of a residence. In **United States v. McPhearson**, 469 F. 3d 518 (6th Cir. 2006), it was determined that the suspect's arrest outside his own home, with drugs on his person, was not sufficient to establish that his residence would contain evidence of wrongdoing. Here, Mr. Williams' arrest in his car, where drugs were not even found, did not give rise to probable cause to search his residence.

The State's brief essentially concedes that the officer was acting on nothing more than a hunch. The State quotes the officer as having said to Mr. Williams after his arrest that "based upon the investigation that's been conducted so far I think there *might* be heroin contained within 3776 North 52nd Street." (State's brief at page 17).That in essence sums up the situation. The officer suspected there might be heroin at Mr. Williams' home. That would not justify a warrant.

The State also does not address the entirety of the officer's stated rationale for obtaining a search warrant. Officer Gajevic testified that the information he had about Mr. Brown, "coupled" with a dog sniff (that did not occur), would have justified the granting of a search warrant for Mr. Williams' residence (R.73:211). It is not surprising the State did not attempt to defend the officer's stated rationale for

obtaining a warrant. His stated rationale is absurd. It is indefensible to argue that a dog sniff, that never occurred, would have provided grounds for a warrant.

Perhaps because of the paucity of facts that would have justified the search of Mr. Williams' residence, the State argues that the officer was not attempting to "induce" Mr. Williams into giving consent, but only giving him some "options." The attempt by the State to distinguish between giving Mr. Williams "options", as opposed to inducing him to give consent, is unconvincing. To a lay person under arrest, handcuffed, separated from the other occupant of the car, walked down an alley, and who has observed his car being searched by a number of officers, the power of the police to do what they intended to do would be evident. Under these circumstances, the option presented to Mr. Williams was to have his residence searched now, or have it searched later. Nevertheless, the message was, it was going to be searched.

The officer's intent was clear. The officer testified that he told Mr. Williams that he wanted him to give consent; otherwise he was going to apply for a warrant. (R.73:161). This was confirmed by Mr. Isaacson, the field supervisor with the State of Wisconsin Department of Corrections. He heard the officer give Mr. Williams a couple of options, i.e. number one, the officer could get consent from Williams to search the

residence, or he would apply through the court system to get a search warrant for the residence (R.73:113). Mr. Isaacson was asked: "(w)ell, the option would be that Bodo would apply for a search warrant to the court; so he could give consent right now?" Mr. Isaacson responded: That's correct." (R.73:131,132).

The officer's stated intent to obtain a warrant was clearly coercive. The significance of the officer's stated intent to obtain a warrant is evident in the State's brief. At page 16 the State quotes the officer's testimony. His testimony indicates that it was during the discussion of the officer's intent to "apply" for a warrant that Mr. Williams gave consent to search.

The State also makes much of the officer's testimony that he was going to "attempt to apply" for a warrant. We do not see how that phrasing lessens the coercive nature of the officer's actions. There is no reason why a lay person who had been stopped by a number of squads, taken out of his car, arrested, taken to sit on the ground in handcuffs, who watched his car being searched, would not believe the officer would be capable of obtaining a warrant if he said he was going to attempt to do so.

**CONCLUSION**

The State has the burden to show that Mr. Williams' consent to search his home was voluntary. The State has attempted to make this decision a credibility determination. It is not. The

primary testimony relied on by the defendant to show coercion is the testifying officer's own testimony. That testimony established that Mt. Williams' car was stopped; he was arrested; he was handcuffed; his car was searched with nothing being found; he initially denied consent; and, only after being told that a warrant would be applied for, did he give consent.

For the reasons stated herein the State failed to carry its burden. It failed to show that Mr. Williams' consent was the result of free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. The trial court erred when it denied the defendant's motion to suppress. We ask therefore that the defendant's judgment of conviction be vacated.

Dated: _____, 2016.

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**CERTIFICATION**

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 12 pages long including this page.

Dated: _____, 2016.

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**CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat § 809.19(12).

I further certify that this electronic brief is identical to the printed form of the brief filed as of this date.

A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: _____, 2016.

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