STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2015AP2307-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SAMUEL K. DIXON,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Thomas J. McAdams, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Police Lacked Reasonable Suspicion To Stop And Detain Dixon Based On the Fact That He Was Talking To a Woman For Five Minutes In an Area Where There Had Been Prostitution Complaints In the Last Thirty Days.

Dixon's principal brief argued that he was stopped and seized for purposes of the Fourth Amendment when Hannah drove his squad car up on the sidewalk, stopped two feet from where Dixon was standing, and activated his squad car's red and blue emergency lights.[1] (Dixon's Initial Br. at 10-11). Dixon further argued that at that point, Hannah lacked reasonable suspicion to stop him. (*Id.* at 11-19).

In response, the State points out that Dixon did not immediately comply with Hannah's instructions to stop reaching into his back pocket. (State's Resp. Br. at 9). The State thus asserts that Dixon did not initially yield to Hannah's show of authority, so he was not seized until he physically complied with Hannah's orders to raise his arms and turn around. (*Id.* at 8-10). As support for this argument, the State cites ***California v. Hodari D.***, 499 U.S. 621 (1991). (*Id.*)

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[1] Citing ***State v. Young***, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729, the State suggests that "[t]he use of spotlights and *emergency lights* on a squad car" does not necessarily constitute a seizure. (*See* State's Resp. Br. at 7 (emphasis added)). It is important to clarify that the "emergency lights" referred to in ***Young*** were the "emergency flashers," not the "red-and-blue rolling lights." ***Young***, 294 Wis. 2d 1, ¶¶ 10, 68.

The State's reliance on ***Hodari D.*** is misplaced. In that case, Hodari ran when he saw police. ***Hodari D.***, 499 U.S. at 622-23. During the ensuing chase, Hodari tossed away a rock of crack cocaine shortly before an officer tackled him. ***Id.*** at 623. The United States Supreme Court held that although the officer's pursuit qualified as a "show of authority," a seizure had not occurred at that point because Hodari did not yield. Instead, he continued to run. ***Id.*** at 623, 625-26. The Court thus concluded that Hodari was not seized until the officer tackled him, and cocaine was admissible because he abandoned it before then. ***Id.*** at 629.

Wisconsin case law establishes that ***Hodari D.*** "governs when a seizure occurs" only if "a person flees in response to a show of authority." *See* ***State v. Young***, 2006 WI 98, ¶ 39, 294 Wis. 2d 1, 17 N.W.2d 729. Where a person does not flee, the ***Mendenhall*** test applies. *See* ***id.*** Under the ***Mendenhall*** test, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980).

The Wisconsin Supreme Court has applied the ***Hodari D.*** test only in cases in which a defendant has fled in response to a show of police authority. *See* ***Young***, 294 Wis. 2d 1, ¶¶ 5, 11-12; ***State v. Kelsey C.R.***, 2001 WI 54, ¶¶ 5-6, 30-33, 243 Wis. 2d 422, 626 N.W.2d 777. In ***Young***, the officer stopped his vehicle behind a car that had been parked near a local bar for five to ten minutes with five occupants inside. ***Young***, 294 Wis. 2d 1, ¶¶ 7-9. When the officer illuminated the car with his spotlight and turned on his flashing hazard lights, Young exited the car and started walking away. ***Id.***,

¶¶ 10-11. After the officer ordered Young twice to get back in the car, Young started running. The officer gave chase and was able to apprehend Young. ***Id.***, ¶ 11. In Young's coat pocket, the officer discovered a vial of marijuana. ***Id.***, ¶ 12.

The court in ***Young*** concluded that ***Hodari D.*** "supplements the ***Mendenhall*** test to address situations where a person flees in response to a police show of authority." ***Id.***, ¶ 38. The court further stated that "[u]nder ***Hodari D.*** the protection afforded by the exclusionary rule remains unless the person confronted by a show of authority chooses to abandon its protection by opting for self-help flight." ***Id.***, ¶ 50. Because Young had fled in response to a show of police authority, the court held that the ***Hodari D.*** test applied in that case. Thus, Young was not seized until he was apprehended. ***Id.***, ¶ 52. The court further held that by that time, there was probable cause to arrest Young for obstructing an officer. ***Id.***, ¶ 56.

Similarly, in ***Kelsey C.R.***, police observed Kelsey, a fifteen-year-old juvenile, sitting in the middle of a block in a high-crime neighborhood after dark. ***Kelsey C.R.***, 243 Wis. 2d 422, ¶ 4. The officers were concerned that Kelsey might be a runaway, so they stopped their car on the opposite side of the street and asked her a few questions. After getting evasive answers, one of the officers told Kelsey to "stay put" so he could make a U-turn and ask her more questions with the police car on the same side the street. Kelsey fled, however. ***Id.***, ¶ 5.

After a thirty-to-forty second chase, the officers caught Kelsey. A pat-down search later revealed a handgun in her pocket. ***Id.***, ¶¶ 6-7. Applying the ***Hodari D.*** test, the Wisconsin Supreme Court determined that no seizure had occurred until the officers caught Kelsey after she fled, at

which point it was reasonable to detain her and conduct a pat-down search. ***Id.***, ¶¶ 30-33, 43, 49.

This case is distinguishable from ***Hodari D.***, ***Young***, and ***Kelsey C.R.*** Unlike the defendants in those cases, Dixon did not run or attempt to flee when Hannah activated his car's emergency lights, which was the initial show of authority in this case. There is not one shred of evidence that Dixon continued to walk back and forth – or that he even moved one inch from the spot where he was standing – after Hannah activated his emergency lights. To the contrary, Hannah testified that after he activated the emergency lights and exited the car, Dixon "just stood there." (25:29; App. 129). Dixon thus yielded to Hannah's show of authority from the outset, before Hannah even ordered him to take his hand out of his pocket. The ***Mendenhall*** test therefore applies in this case, under which Dixon was seized when Hannah drove his squad car up on the sidewalk and activated the car's emergency lights. No reasonable person would feel free to leave after such a powerful display of police authority.

The conclusion that Dixon was seized when he stopped in response to the activation of Hannah's emergency lights is also supported by this court ruling in ***State v. Washington***, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305. In ***Washington***, the police were responding to a complaint of loitering and drug dealing at an allegedly vacant house. ***Id.***, ¶ 2. As the police arrived, Washington was walking in front of the house, and one of the officers ordered him to stop. ***Id.*** Washington stopped; however, he also took a few steps backwards and allegedly looked nervous like "he wanted to run." ***Id.***, ¶¶ 2-3. He then threw his hands up and a towel flew out of his hand. ***Id.***, ¶ 2. At that point, Washington was pushed to the ground and subdued. ***Id.*** One

of the officers retrieved the towel and discovered a bag of cocaine inside. ***Id.***

The court in ***Washington*** concluded that the ***Hodari D.*** test should not apply under those facts:

> In [***Hodari D.***], there was no question as to whether Hodari fled from the police. . . . Here we cannot conclude that Washington, like Hodari, fled from the officer's show of authority and was not seized until he was subdued by the police. The trial court found that Washington stopped when ordered to do so. Though he also continued to take a few steps backwards, and the officer may have thought that he might run, that does not equate his actions with fleeing. Indeed, he stopped and addressed the police, allegedly inquired as to what he had done, and eventually threw his hand up in the air. . . . We cannot conclude, under these facts, that Washington did not yield until after he threw his hands up in the air.

Id., ¶ 14.

Like the defendant's actions in ***Washington*** of taking a few steps backwards, Dixon's actions of briefly continuing to reach into his pocket "does not equate . . . with fleeing." *See* ***id.*** As in ***Washington***, Dixon did not run or attempt to flee in response to the show of police authority. Instead, he stopped when Hannah activated his car's emergency lights, which was an implicit command to stop. Also, as in ***Washington***, Dixon eventually threw his hands up in the air. He therefore yielded and was seized "when he initially stopped after [Hannah] commanded him to do so" by activating his squad car's emergency light. *See* ***id.***, ¶ 15.

Therefore, at the time Dixon was seized, the relevant facts were as follows: (1) there had been prostitution complaints in the area during the previous thirty days; (2)

Dixon was talking to a woman on a public sidewalk for five minutes; and (3) there was a closed liquor store nearby with "no loitering" signs outside. (*See* Dixon's Initial Br. at 11). None of these facts alone or taken together provided Hannah with reasonable suspicion that Dixon was engaging in criminal activity.

First, the prostitution complaints did not provide a reasonable, individualized basis to suspect Dixon or Anderson of any wrongdoing. The complaints were not specific to either of them or anyone else who matched their descriptions. Nor were the complaints even received on the day in question. Instead, they were reported at unknown dates and times[2] during the previous thirty days. (25:8, 17-18; App. 108, 117-18).

Second, the fact that Dixon was talking to woman for a few minutes on a public sidewalk was not suspicious conduct. (*See* 25:6-8; App. 106-08). Talking to a member of the opposite sex in a public place is something that most law-abiding people do on a regular basis.

The State points out that police need not "dispel all innocent inferences before conducting an investigatory stop." (State's Resp. Br. at 8, 12). Perhaps not. But any competing inference of unlawful conduct must still be a *reasonable* one. ***State v. Young***, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct.

[2] The State asserts that the prostitution complaints and prior arrests that Hannah testified about "occurred at the exact time – the early morning hours – that [Hannah and his partner] saw Dixon." (State's Resp. Br. at 14). However, Hannah never stated what time(s) of day the complaints or prior arrests occurred. While he stated that his special overtime assignment on August 17, 2014 took place "when we felt that the prostitutes were out there," he did not explain why he or other law enforcement personnel felt this way. (25:16; App. 116).

App. 1997). In this case, it was simply unreasonable for Hannah to infer that Dixon was soliciting prostitution or engaging in any other type of criminal behavior just because he was talking to a woman in a public place for five minutes.

Even in a "high prostitution" area, this type of every-day behavior is not enough to create reasonable suspicion. This is not a case where Hannah saw Dixon exchange something with Anderson that could have been money or drugs. It is not a case where Dixon or Anderson were known to be prostitutes or panderers. Also, Hannah did not see Dixon beckon for Anderson to come over by him or direct her to get in a car or talk to another man. He also did not observe Anderson beckon at or attempt to stop other passersby. Nor did he see her hailing or attempting to stop any motor vehicles. Instead, Hannah simply saw Dixon and Anderson smiling and "chitchatting" with one another on a public sidewalk for a few minutes. (25:25; App. 125).

Third, the State fails to explain how the presence of the liquor store made Dixon's and/or Anderson's conduct suspicious. (25:7; App. 107). The liquor store was closed, so no alcohol was available for purchase and no patrons were there yet. (25:10; App. 110). So how did the liquor store make it more likely that Dixon or Anderson were soliciting prostitution or engaging in some other type of criminal activity? The State offers nothing to explain the significance of a closed liquor store.

The State also fails to explain how the "no-loitering" signs played any part in the reasonable suspicion analysis. (25:10; App. 110). The State does not even argue that there was a reasonable basis to believe that Dixon or Anderson were "loitering" within the meaning of any ordinance or law. Any such argument should therefore be deemed waived. *See*

Brown County DHS v. Terrance M., 2005 WI App 57, ¶ 13, 280 Wis. 2d 396, 694 N.W.2d 458 ("Arguments not refuted are deemed admitted.").

Accordingly, none of the facts that existed at the time Hannah stopped Dixon by activating his emergency lights provided reasonable suspicion that Dixon was engaging in criminal activity of any kind. The stop was therefore unreasonable under the Fourth Amendment, and the evidence it produced should be suppressed.

Moreover, even assuming for the sake of argument that the ***Hodari D.*** test should apply in this case, that would not change the outcome. As an initial matter, since Dixon did not discard or abandon the handgun, as the defendant did in ***Hodari D.*** with the cocaine, the State would still have to show that reasonable suspicion existed at some point before Dixon complied with the show of authority and was seized. *See* ***Young***, 294 Wis. 2d 1, ¶ 26, 53.

Here, even if Dixon failed to yield to Hannah's initial show of authority, he certainly complied when he put his hands up in the air. (25:11; App. 111). Under ***Hodari D.***, Dixon would therefore be considered seized at that point. *See* ***Young***, 294 Wis. 2d 1, ¶ 52. This occurred before Hannah even ordered Dixon to turn around and subsequently observed the gun in Dixon's pocket. The following testimony by Hannah demonstrates this sequence of the events:

> A I told him to quit reaching, and then I told him to put his hand up.
>
> Q And he did put his hand up?
>
> A Yes, he did.

Q. And it was at this point that you told him to turn around?

A Yes.

(25:27; App. 127). Consequently, the only additional relevant fact under a ***Hodari D.*** analysis would be that Dixon put his hand in his pocket and continued to reach inside for a short time after Hannah told him to "quit reaching." (25:11; App. 111).

However, absent any prior reasonable suspicion, the simple fact that Dixon reached into his pocket, even after being told not to do so, does not provide reasonable suspicion that Dixon was soliciting prostitution or engaging in any other crime. If reasonable suspicion had already been established, this fact may have been relevant as to whether Hannah had a "particularized and objective basis" to believe that Dixon may be armed, such that a pat-down might be performed. *See* ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). However, the fact that Dixon reached into his pocket is irrelevant to the underlying reasonable suspicion analysis. Observing an individual reach into his or her pocket is no more a basis to suspect criminal activity than witnessing an individual conduct a "security adjustment." *See* ***State v. Gordon***, 2014 WI App 44, 353 Wis. 2d 466, 846 N.W.2d 483 (holding that police did not have reasonable suspicion to conduct an investigative stop of a defendant who was walking down the street in a "high-crime" neighborhood and, after recognizing the presence of police, conducted a "security adjustment" by patting the outside of his pants pockets). After seeing Dixon reach into his pocket, Hannah might have had a hunch that Dixon had something in his pocket, but nothing more.

Furthermore, the fact that Dixon did not immediately comply with Hannah's instructions to stop reaching into his

pocket also did not provide reasonable suspicion, because Hannah never had reasonable suspicion to give the order in the first place. As the Wisconsin Supreme Court noted in ***Young***:

> Where a police officer, "without reasonable suspicion or probable cause, approaches an individual, the individual has a right *to ignore* the police and *go about his business*." Under these circumstances, "any 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a [stop] or [arrest].'"

Young, 294 Wis. 2d 1, ¶ 73 (citations omitted; emphasis in original).

Additionally, even if the seizure in this case did not occur until Dixon turned around, as the State appears to suggest, that brief delay adds nothing to the reasonable suspicion analysis. (State's Resp. Br. at 9). Hannah did not observe any additional relevant facts between the times Dixon raised his hands and turned around. (25:12; App. 112). He also did not see the gun in Dixon's pocket until after Dixon turned around:

> And I told him to turn around for me, and when he turned around, I observed a handle of what I thought to be a semiautomatic handgun.

(25:12; App. 112). Thus, even if the stop did not occur until Dixon turned around, the gun was still discovered only after and as the result of the stop. Since there was no reasonable suspicion at that point, the gun and all other evidence discovered as a result of the stop should be suppressed.

CONCLUSION

For the foregoing reasons, Samuel Dixon respectfully requests that this court reverse the judgment and order of the circuit court, order the evidence obtained as a result of the unlawful stop to be suppressed, and remand the case to the circuit court for further proceedings consistent with this court's opinion.

Dated this 26th day of May 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 2,985 words.

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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 26th day of May 2016.

Signed:

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