

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

No. 2015AP002533-CR
Milwaukee Co. Circuit Court Case No. 2013CF4195

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OMAR QUINTON TRIGGS,

Defendant-Appellant.

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

Appeal from a Judgment of Conviction
Entered in Milwaukee County Circuit Court,
Honorable Claire L. Fiorenza, Presiding

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ISSUE PRESENTED FOR REVIEW

1. Where police seized evidence as a result of a search, for which they obtained Mr. Trigg's consent in the course of un-*Mirandized* questioning and while Mr. Triggs was handcuffed and surrounded by numerous officers, did the trial court err in concluding that the consent was voluntary?

The trial court expressed concern that Mr. Triggs was handcuffed when he initially consented to the search. (58:18, 23; App. 118, 123). However, under the totality of the circumstances, the court found that the consent was valid. (58:1-26; App. 101-126).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The briefs can adequately present and develop the factual and legal issues, so that oral argument would be insufficiently helpful to warrant expenditure of resources. *See*, Wis. Stat. § 809.22(2)(b). The appeal can be decided by applying settled legal principles, making publication unwarranted. *See*, Wis. Stat. § 809.23.

STATEMENT OF THE CASE

Procedural History

The State charged Mr. Triggs with possessing approximately 214 grams of marijuana with intent to deliver. (2). Mr. Triggs moved to suppress the evidence, and the court held evidentiary hearings, Honorable Clare L. Fiorenza, presiding. (12, 52-54). The court denied the motion. (58:1-26, App. 101-126).

Mr. Triggs then pleaded guilty to an amended charge of possessing marijuana as a second or subsequent offense. (59). Judge Fiorenza sentenced him to one year in the House of Correction, stayed the sentence, and placed him on probation for 18 months. (60:16-18). Pursuant to Wis. Stat. §971.31(10), he appeals the denial of his suppression motion.

Facts

Milwaukee Police Officer Christopher Schlachter testified that he was a passenger in one of multiple squad cars patrolling as a group on Milwaukee's west side on the evening of September 13, 2013. (52:13). He saw a BMW parked in an alley. (*Id.* at 14). The BMW was parked toward the side of the alley, close to a garage. However, it stuck out enough so that two cars would not have been able to pass. (*Id.* at 15). In addition, police believed that tinted windows on the BMW constituted an equipment violation. (52:84).

Officer Schlachter directed the driver of his squad, Officer Juarez, to pull into the alley toward the BMW. Officer Schlachter saw a man, later identified as Mr. Triggs, "close a garage door and quickly run to the driver's door of the BMW." (52:16-17). Officer Schlachter did not see Mr. Triggs put anything in the garage. (54:12). In short order, Officer Schlachter's and two other squad cars moved close to the BMW. (52:39). A total of five law enforcement officers were on the scene. (*Id.* at 38). One squad car faced north toward the back of the BMW; another faced south toward the front of it. (52:60).

Officer Schlachter exited his squad and approached Mr. Triggs, seated in the driver's seat of the BMW. Officer

Schlachter had not told other officers about seeing Mr. Triggs move from the garage to the BMW. (52:16, 21).¹

As he started talking to Mr. Triggs, Officer Schlachter noticed a strong odor of fresh marijuana coming from inside the BMW. (52:18). Officer Schlachter asked Mr. Triggs whether he had anything illegal, such as drugs or guns. (*Id.*). Mr. Triggs told Officer Schlachter that he had a gun and “he began to move around the vehicle looking for an ID, which maybe, I thought was for—a permit for a handgun.” (52:19).

Officer Schlachter then saw the gun—Mr. Triggs showed it to him by pulling up his shirt. (52:58). Despite Mr. Triggs’ disclosure and display of his gun, Officer Schlachter “fear[ed] for [his] safety.” He decided to gain control over the gun, and over Mr. Triggs, instead of allowing Mr. Triggs to continue looking for the permit or ID. (52:20, 57).

Officer Schlachter demanded that Mr. Triggs show his hands and get out of the car. When Mr. Triggs did not immediately comply—or before he could comply—the officer took hold of his hands. He and “other officers” “escorted” Mr. Triggs out of the BMW. In addition to Officer Schlachter, Police Officer John Schott was at the BMW and participated in removing Mr. Triggs. Officer Schott recovered Mr. Triggs’ gun. (52:20).

Officer Andrew Molina testified that he, too, was at the BMW. He was the third officer who physically seized Mr.

¹ As soon as Officer Schlachter decided to approach the BMW, he activated his squad car’s video recording system. The system was equipped to “backtrack” by preserving video of events up to 20 or 30 seconds before activation. (52:44-45). The circuit court reviewed the video, which is about 13 minutes long. (52:3). The court noted that the video is part of the record (R.61) “so any appellate Court is very free to look at this whole thing.” (52:117).

Triggs, and the three officers, with two others nearby, maintained control of Mr. Triggs.

When Officer Molina approached the BMW, Officer Schlachter had ahold of Mr. Triggs' hands. (53:19). Seconds passed as Officer Schlachter and Mr. Triggs spoke. Officer Molina believed that Officer Schlachter controlled Mr. Triggs' hands while he and Officer Schott took control of Mr. Triggs' person and took him out of the BMW. (53:20).

As they did so, Officer Molina recalls Mr. Triggs becoming "very loud," "very upset, distraught." (53:20). Officers Molina and Schott took Mr. Triggs to the back of the BMW, where it "took minutes" to calm him down. (53:23-24).

Immediately after taking Mr. Triggs out of his car, police handcuffed him. (53:23, 49). Police maintained control over Mr. Triggs' body from the time they took him out of his BMW until they moved him to the back, and for a few minutes until he calmed down. (53:49, 52-53).

With Mr. Triggs removed from the BMW, the police searched it. Officer Schlachter could not recall—but did not deny—that Mr. Triggs helped the officers get into the BMW and into compartments inside it. (52:73-74; 54:6-7)). Officer Molina, who took Mr. Triggs to the back of the BMW before the search, believes they took him to unlock a door to the BMW so the search could be completed. Although claiming that Mr. Triggs was still belligerent and upset, Officer Molina acknowledged that police maintained control over him even as they moved him from the back of the BMW to the side so he could assist with the vehicle search. (53:51-52).

Officer Schlachter thinks the vehicle search lasted three to five minutes. (52:69). The search of the BMW yielded no

evidence of a crime. (52:20-21).² The officers found no controlled substances on Mr. Triggs' person. (54:12).

After the vehicle search, Officer Schlachter then told Officers Schott and Molina that, when he first saw Mr. Triggs, Mr. Triggs had been in the garage. Mr. Triggs quickly closed the garage door and got into the BMW. (52:21, 70-71). Officer Schlachter told the other officers about this because he wanted to "conduct our investigation a little bit farther and see if we could investigate the garage." (52:21).

Officer Schlachter began his effort to gain access to the garage by approaching Mr. Triggs, who was with Officer Schott and a Sergeant Hermann. (52:73-74). Mr. Triggs initially responded by telling Officer Schlachter he had not closed the garage door. (52:76). While unable to recall all the questions and answers, Officer Schlachter recalled some questions about whether Mr. Triggs owned the garage or nearby residence. The officer also remembers learning that Mr. Triggs stored cars and motorcycles in the garage. (*Id.* at 76-77).

Mr. Triggs was handcuffed throughout the questioning. (52:77-78). He was handcuffed when Officer Schlachter confronted him about seeing him run from the garage to his car. (52:33). The questioning lasted, "[m]aybe somewhere between five to seven, ten minutes." (*Id.* at 77). From the time police approached the BMW until the eventual search of the garage, Mr. Triggs was not free to go. (*Id.* at 82). He was not given *Miranda* warnings. (54:12).³

² The Record discloses no weapons-related charges, corroborating that Mr. Triggs lawfully possessed the firearm.

³ See, *Miranda v. Arizona*, 384 U.S. 436 (1966).

Whatever questions and answers Officer Schlachter and Mr. Triggs exchanged, Officer Schlachter succeeded in “investigat[ing] the garage.” (52:11). He obtained Mr. Trigg’s oral consent to search it. The consent was given after police had taken control of Mr. Triggs’ person, after they had searched his vehicle,⁴ and after they had questioned him while he was surrounded by armed officers and his car was surrounded by squad cars. In addition to these circumstances, Mr. Triggs was still in handcuffs when he orally consented to the search. (52:77-78). In the search, police recovered the marijuana forming the basis for this prosecution. (52:37).

Officers Schlachter and Molina claimed that, despite Mr. Trigg’s agitation when three officers took him out of his car, he calmed down subsequently. Officer Schlachter believed Mr. Triggs calmed down by the end of the vehicle search. (52:102). Officer Molina believed Mr. Triggs calmed down after two or three minutes. (53:66).

This change of mood would have to have occurred while Mr. Triggs’ vehicle was searched and he was then questioned about the garage. Officer Schlachter testified that he and the other officers approached Mr. Triggs at 6:00 p.m. He gave his oral consent to search at 6:07, after the physical actions of the officers, the vehicle search, and the questioning. (52:75).⁵

After Mr. Triggs gave oral consent, police then removed his handcuffs, and he helped them open the door to the

⁴ All indications are that the vehicle search was conducted without consent—Mr. Triggs was objecting to the officers’ physical domination of him when he wanted to look for and show them his permit. The vehicle search (which yielded no evidence) is not challenged, but Mr. Triggs will argue that it was part of the totality of circumstances to evaluate when determining whether Mr. Triggs voluntarily consented to the search of the garage, or whether he had been overwhelmed by police force.

⁵ Officers first saw the BMW at 5:58 p.m. (52:96).

garage. (52:78). He and the officers entered the garage together through the main door—where vehicles enter. (52:79). Officers saw criminal evidence in plain view, so they took Mr. Triggs out of the garage. They subsequently obtained his written consent and that of the garage's owner, Mr. Triggs' cousin, Michelle Triggs. (52:100-101).

Defense counsel disputed the claim that Mr. Triggs was agitated or belligerent. Counsel argued that Mr. Triggs was handcuffed and kept in handcuffs not because of his conduct, but because police were using custody and coercion to obtain his consent, rendering it involuntary. (54:57-58).

In addition to hearing the testimony of Officers Schlachter and Molina, and reviewing the video tape, the court also heard from a defense witness, Fatima Adams. (54:16-38). Mr. Trigg's girlfriend of about five years, Ms. Adams was a passenger in the BMW and present throughout Mr. Triggs' interactions with police. (54:17, 18-19). She testified that the BMW was not blocking the alley. (54:19). After two or three officers approached the BMW, Mr. Triggs offered his "CCW" (his concealed-carry permit), but the officers threw it aside and told him to be still. According to Ms. Adams, Mr. Triggs complied with their order to be still. Police blocked the BMW with a detective car (Sergeant Hermann's, presumably), two squad cars, and a truck. (54:22-24). Police repeatedly asked Mr. Triggs, while he was handcuffed, for permission to enter the garage. After he provided consent, the handcuffs were removed. (54:32-33).

The trial court acknowledged Ms. Adams' testimony that the BMW was not blocking the alley. (58:13, App. 113). However, the court could not determine from Ms. Adams' testimony "when exactly handcuffs were taken off of the defendant in relation to when the officers entered the garage." (58:16, App. 116). Ultimately, the court determined that "[t]his

record does not establish Mr. Triggs was being interrogated at the time that he granted consent verbally and then later in writing.” (*Id.*).

Other facts will be discussed as necessary to develop the argument.

ARGUMENT

I. Because the Totality of the Circumstances Include Custodial Interrogation Without *Miranda* Warnings, and Consent Given in Coercive Circumstances Needlessly Created by the Police, the State Failed to Prove a Voluntary Consent to Search, and This Court Should Order Suppression of all Evidence Obtained as a Result of the Search.

A. Standard of review.

The State bears the burden of “establish[ing] by a preponderance of the evidence whether a custodial interrogation took place.” *State v. Armstrong*, 223 Wis. 2d 331, 345, 588 N.W.2d 606 (1999). The State must prove by clear and convincing evidence that a consent to search was given freely and voluntarily. *State v. Sobczak*, 2013 WI 52, ¶11, 347 Wis. 2d 724, 833 N.W.2d 59; *State v. Phillips*, 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998).

Reviewing courts uphold factual findings unless clearly erroneous, but independently determine whether the facts meet the constitutional standard. *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182; *State v. Smiter*, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920.

- B. The State failed to prove that its questioning of Mr. Triggs was proper and failed to prove that the consent he gave on the heels of that questioning, amid the other circumstances, was voluntary.

Determining whether a person was in custody when questioned requires examination of the totality of the circumstances: “A person is in ‘custody’ if under the totality of the circumstances ‘a reasonable person would not feel free to terminate the interview and leave the scene.’” *State v. Lonkoski*, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552 (citation omitted). *See also, State v. Swanson*, 164 Wis. 2d 437, 445, 475 N.W.2d 148 (1991).

A reviewing court must also examine the totality of the circumstances when determining the validity of a consent to search. *Phillips*, 218 Wis. 2d at 196. Reviewing courts answer two questions: whether consent was given in fact and then whether that consent was voluntary. *State v. Artic*, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430.

Mr. Triggs gave oral and written consent. However, the State did not prove he did so voluntarily.

To determine whether consent was voluntary, courts consider several non-exclusive factors. *Artic*, ¶33; *see also Phillips*, 218 Wis. 2d at 198-203: (1) whether police used deception, trickery or misrepresentation to obtain consent; (2) whether the police made threats or physically intimidated the person; (3) the conditions attending the request for consent, i.e., whether they were congenial and non-threatening or the opposite; (4) the response to the search request; (5) characteristics of the person granting consent, like age, intelligence, emotional condition, and prior experience with police; and (6) whether police advised that consent could be refused.

1. Mr. Triggs was in custody.

The trial court found that police used handcuffs because of Mr. Triggs' belligerent conduct. (58:18, App. 118). This suggests that, but for Mr. Triggs' own conduct, he would not have been in handcuffs. Nevertheless, the circuit court, which found the police testimony credible in general, did not dispute that three squad cars surrounded Mr. Triggs' vehicle and five police officers surrounded Mr. Triggs. Indeed, three officers exerted total physical control over him throughout the period leading up to his oral consent. Officer Molina testified that police had sufficient control over Mr. Triggs that they could move him from the back to the side of the BMW, where they had him assist Officer Schlachter in getting inside the car to search it. (53:51-52).

Focusing on the officers' explanation for handcuffing Mr. Triggs, the court found that Mr. Triggs was not in custody. (58:22, App. 122). However, the court failed to integrate into this finding any consideration of the amount of force used by the police.

Miranda's protections are not triggered only after a full-throated announcement by police of a formal arrest. Rather, police are said to have custody when a person "...has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). While that deprivation must generally be to a degree "associated with formal arrest," *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984), there is no question that police action in this case rose to that level. Police sent a message of domination and control when three of them took hold of him; when they searched his car while he was handcuffed; when they physically positioned him to help get into the car; and when they questioned him. They gave no testimony suggesting that Mr. Triggs was free to refuse to answer questions—protections that *Miranda* warnings would have provided. More to the point, the police gave no testimony suggesting they told Mr. Triggs he was free to withhold consent to search the garage.

Despite the trial court's finding that Mr. Triggs was handcuffed because he was belligerent, this court should reach the legal conclusion that Mr. Triggs was in custody. Just because police admitted Mr. Triggs was not under arrest before they seized the evidence in the garage (53:23), that does not mean he was not in custody. There is no reason to think they held off on arresting Mr. Triggs out of generosity or a desire to be solicitous of his freedom: he was not under arrest because police lacked probable cause. The lack of incriminating evidence should entitle a citizen to better protection from undue police force. Relying on the lack of formal arrest to justify intrusive physical contact and questioning during that contact would be irrational and unjust.

2. Mr. Triggs was interrogated while in custody, and not provided with *Miranda* warnings.

"Interrogation" refers to "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Officer Schlachter conferred with his colleagues before questioning Mr. Triggs. He testified he wanted to "see if we could investigate the garage." (52:21). There can be no doubt that he conducted the ensuing questioning, exploiting the custodial and intimidating circumstances created by the police, with the hope of eliciting incriminating responses. There is no dispute that Mr. Triggs was not given *Miranda* warnings prior to his oral consent to search. Indeed, other than questioning Mr. Triggs about the garage, with the goal of gaining entry, the record discloses no other police purpose: the officers held him, handcuffed and surrounded, with no *Miranda* warnings, and talked to him about the garage until he consented to their entry—and *then they removed the handcuffs*.

The trial court concluded, "This record does not establish Mr. Triggs was being interrogated at the time that he granted consent verbally and then later in writing." (58:16, App. 116).

However, Officer Schlachter testified without contradiction that he wanted to keep investigating and try to investigate the garage after police found no evidence in the BMW or on Mr. Triggs' person. (52:21). Officer Schlachter testified, again without contradiction that, in pursuit of that desire, he questioned Mr. Triggs about the garage for up to ten minutes. (52:77).

To the extent the trial court found that Mr. Triggs failed to establish the full nature and extent of the questions, the trial court (a) impermissibly shifted the State's burden of proof under *Armstrong* and (b) imposed an unnecessary requirement. The circumstances show that the oral consent flowed seamlessly from the police apprehending Mr. Triggs, seizing and holding him, and questioning him about the garage for up to ten minutes without providing *Miranda* warnings.

3. Under the totality of the circumstances, the State failed to prove voluntary consent.

As noted, involuntary consent is suggested if the circumstances include threats or intimidation by the police. *Phillips*, 218 Wis. 2d at 198-203; *Artic*, 327 Wis. 2d at ¶33. This case involves protracted intimidation: the police overwhelmed Mr. Triggs with five officers, three of whom physically extracted him from his vehicle. The State did not establish that this level of force was necessary. The number of police officers used to dominate a suspect is relevant when determining voluntariness of the suspect's consent. *See, State v. Stankus*, 220 Wis. 2d 232, 582 N.W. 2d 468 (Ct. App. 1998).

The State adduced no evidence that police told Mr. Triggs he had the option of withholding his consent. This *Phillips/Artic* factor also suggests involuntariness. Other than their claim that Mr. Triggs calmed down before consenting, police offer nothing—except perhaps for his desire to get the handcuffs removed—to explain or provide a rational context for an oral consent that would have been voluntary.

The State failed to meet its burden because police conduct ran afoul of four of the six nonexclusive factors set for in *Artic*, 327 Wis. 2d at ¶33 and *Phillips*, 218 Wis. 2d at 198-203: The police physically intimidated Mr. Triggs; they created and maintained conditions attending the request for consent, were not “congenial and non-threatening;” or the opposite; they failed to explain why Mr. Triggs’ the response to the search request should be accepted as a voluntary act; and they apparently failed to tell Mr. Triggs that he could refuse consent and remain silent.

CONCLUSION

Mr. Triggs asks this court to reverse the judgement of conviction and remand this case with directions to suppress all evidence seized as a result of the search.

Dated at Milwaukee, Wisconsin, September 7, 2016.

Respectfully submitted,

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 4,117 words.

RANDALL E. PAULSON

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

RANDALL E. PAULSON

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the 28th of July 2015, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Omar Triggs to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin, 53701-1688. On this date, I also served three copies of the brief, also by U.S. Mail, on the Wisconsin Department of Justice, Criminal Appeals Unit at the addresses on file with this court.

RANDALL E. PAULSON

CERTIFICATION OF THE APPENDIX

I hereby that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed:

RANDALL E. PAULSON

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