STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2533-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OMAR QUINTON TRIGGS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE CLARE H. FIORENZA, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State doesn't request oral argument or publication of this Court's opinion.

INTRODUCTION

Omar Quinton Triggs stands convicted upon his guilty plea to a single charge of possessing marijuana as a second or subsequent offense. (45.) He appeals his conviction, claiming that the circuit court erred in denying his pretrial motion to suppress physical evidence seized from his garage.

Triggs argues on appeal that:

- Police placed him in custody without first providing him with necessary *Miranda*[1] warnings. Triggs' Br. 11-15.

- Under the totality-of-the-circumstances test that governs the validity of a consent to search, the absence of *Miranda* warnings renders his oral and written consent to search his garage invalid. According to Triggs, "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." *Id.* 15.

For reasons discussed below, the circuit court properly admitted the physical evidence seized by police. Triggs gave valid consent to search the garage.

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[1] *Miranda v. Arizona,* 384 U.S. 436 (1966).

The circuit court's oral ruling contains comprehensive findings of fact. (58:2-26.) The State will incorporate those findings into its Argument.

ARGUMENT

Triggs executed a constitutionally voluntary consent to search.

A. Controlling principles of law—voluntariness of consent to search.

The State must prove by clear and convincing evidence that a subject gave consent to search freely and voluntarily. *State v. Phillips,* 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998). To establish voluntariness, the State must show that a person's consent is "an essentially free and unconstrained choice." *Schneckloth v. Bustamonte,* 412 U.S. 218, 225 (1973). Voluntariness is determined from the totality of the circumstances. *Ohio v. Robinette,* 519 U.S. 33 (1996); *State v. Rodgers,* 119 Wis. 2d 102, 110, 349 N.W.2d 453 (1984).

In considering the totality of the circumstances, the court looks at the circumstances surrounding the consent and the characteristics of the defendant; no single factor controls. *Phillips,* 218 Wis. 2d at 197-98. Factors courts consider in determining whether consent is voluntary include: (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. *Id.* at 198-203.

Voluntariness of consent presents a question of constitutional fact. *Id.* at 204. This Court will review the circuit court's findings of historical fact to determine if they are clearly erroneous, and independently apply those facts to constitutional principles. *Id.*

B. Controlling principles of law—custodial interrogation.

Courts suppress evidence unlawfully obtained by police to deter misconduct and preserve judicial integrity. *Harrison v. United States,* 392 U.S. 219, 224 n.10 (1968). It follows that if police didn't commit a *Miranda* violation, then their conduct shouldn't provide a basis upon which to invalidate Triggs' consent, whether considered as a stand-alone suppression argument, or in conjunction with a totality-of-the-circumstances analysis.

Triggs doesn't challenge the lawfulness of his stop, only the absence of *Miranda* warnings. The *Miranda* requirement depends "upon whether the interrogation is of a custodial nature, not upon the substance of the interrogation itself." *United States v. Mapp,* 561 F.2d 685, 688 (7th Cir. 1977). The State bears the burden of establishing 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).

To determine whether a suspect is in custody under *Miranda*, courts must ask whether there is a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest. *Stansbury v. California,* 511 U.S. 318, 322 (1994). 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).

Courts have identified several factors relevant to the totality of the circumstances analysis, such as the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. *Stansbury,* 511 U.S. at 322. When considering the degree of restraint, courts further consider: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved. *State v. Gruen,* 218 Wis. 2d 581, 594-95, 582 N.W.2d 728 (Ct. App. 1998).

C. Because police didn't restrain Triggs to the degree associated with a formal arrest, they weren't required to give him *Miranda* warnings.

Applying the *Gruen* factors to this case, Triggs was not arrested, but was subject to an investigatory stop. *Miranda* warnings were not required. The circuit court's comprehensive findings of fact support this conclusion.

Officers initially stopped Triggs' vehicle after seeing his illegally parked BMW blocking an alley, and after observing Triggs quickly close a nearby garage door and run to the driver's door of the BMW. (58:3-4.)

When Officer Schlachter approached Triggs, he smelled an odor of fresh marijuana coming from inside of his vehicle, and asked Triggs if he had anything illegal on him, like drugs or guns. (*Id.* 4.) Triggs stated that he had a gun on his person, gave Schlachter his Wisconsin ID card, and

began to move around his car looking for another ID. (*Id.* 4-5, 9.)

Upon seeing Triggs' movements, and with knowledge that Triggs had a gun on his person, Schlachter did not feel safe and told Triggs to show him his hands and exit his vehicle. (*Id.* 5.) Three officers escorted Triggs out of his vehicle, at which time Triggs became very agitated, loud, and distraught, and started yelling at the officers. (*Id.* 5, 9-10.)

Triggs would not keep his hands up as the officers instructed and kept trying to turn around to face them. (*Id.* 5, 10.) Fearing for their safety, officers handcuffed Triggs before removing a gun from his person. (*Id.* 5-6, 10-11.)

Officer Schlachter told Triggs he had seen him near the garage door, and had seen him close the garage door and run to the front door of the BMW. (*Id.* 6, 12.) Triggs initially denied he had done that. (*Id.* 6.)

Schlachter then asked Triggs for consent to search the garage. (*Id.* 6, 12.) Triggs gave officers verbal consent to search, and the officers removed his handcuffs. (*Id.*) Triggs himself opened the unlocked garage door and entered with the officers. (*Id.* 6-7, 12.) When the officers removed the handcuffs, Triggs calmed down. (*Id.* 12.) Triggs understood why police stopped him, and why they had him exit the vehicle. (*Id.* 13.)

Schlachter immediately smelled a strong odor of marijuana coming from the garage. (*Id.* 6.) He saw suspected marijuana, a digital scale, and plastic baggies in the garage, all in plain view. (*Id.* 7.)

Triggs, still without handcuffs, began to walk around the garage. (*Id.*) Police asked him to step out (*Id.*)

The circuit court found that Triggs "never told the officers to get out of the garage, that he—that he did not want the officers to do a search anymore." (*Id.*)

Officers then requested and received Triggs' written consent to search, and performed a complete search of the garage. (*Id.*) The search yielded marijuana. (*Id.*)

The circuit court again found that "Mr. Triggs never told the officers that they could not search." (*Id.*) The court also found that:

- "Officer Schlachter testified that Mr. Triggs was not free to go but was being detained during the stop until the end of the search." (*Id.*)

- "He was in custody once the search was concluded, and he was conveyed to the district for booking and processing." (*Id.* 8.)

- "He was being detained for officer safety due to the fact that he was very upset, and there was a weapon involved." (*Id.*)

- "I find Officer Schlachter's testimony credible." (*Id.* 9.)

- "I find Officer Molina's testimony credible." (*Id.* 13.)

- "I note that no guns were drawn on the defendant. I note that there's no credible

testimony that the officers made any type of misrepresentation or deception or trickery to entice the defendant to consent to the search of the garage." (*Id.* 20.)

- Police offered a reasonable explanation for why they handcuffed Triggs (he was agitated), and why they unhandcuffed him (he'd calmed down). (*Id.*)

The record doesn't reveal a *Miranda* violation.

Triggs disagrees. He argues that the deprivation of his freedom rose to a degree "associated with formal arrest" where police sent a message of domination and control when three officers took hold of him, searched his car while he was handcuffed, physically positioned him to help him get into his car, and questioned him. (Triggs' Br. 13.)

However, the amount of force used by police was no more than reasonably necessary given the circumstances. In fact, despite Triggs' possession of a handgun, agitated state, and erratic behavior, at no point did the officers use guns, electric weapons, or batons. They didn't take Triggs to the ground. The officers simply removed Triggs from his vehicle and placed him in handcuffs so that they could safely remove Triggs' firearm from his waistband in order to secure the scene and ensure officer safety. There is no evidence in the record that police conduct was overbearing, harassing, or disproportionate to the circumstances.

Additionally, although the use of handcuffs is restrictive, it "does not necessarily render a temporary detention unreasonable [or transform a] detention into an arrest." *State v. Pickens,* 2010 WI App 5, ¶ 32, 323 Wis. 2d 226, 779 N.W.2d 1. Such measures are reasonable if justified

by particular circumstances, such as risk of harm to the officers. *State v. Blatterman,* 2015 WI 46, ¶ 31, 362 Wis. 2d 138, 864 N.W.2d 26; *see also State v. Vorburger,* 2002 WI 105, ¶ 65, 255 Wis. 2d 537, 648 N.W.2d 829.

Here, officers used handcuffs explicitly due to safety concerns. Officer Schlachter observed Triggs run from a garage to the driver's side door of his vehicle, and smelled an odor of fresh marijuana coming from inside of Triggs' vehicle. Triggs notified Schlachter that he had a firearm on his person, displayed agitated and erratic behavior when officers escorted him from his vehicle, and was uncooperative with the officers' instructions to keep his hands up. As the circuit court correctly noted, Triggs' own behavior caused the officers to fear for their safety, and ultimately, to use handcuffs to detain Triggs. Triggs cannot now complain about the officers' reasonable response to his own erratic behavior.

Triggs further argues that he was in custody under *Miranda* because Officer Schlachter questioned him for up to ten minutes during the stop. (Triggs' Br. 15) In assessing whether a detention is too long in duration to be justified as an investigative stop, the court considers whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. *United States v. Sharpe,* 470 U.S. 675, 676 (1985). Here, officers acted reasonably and diligently when they questioned Triggs after smelling an odor of fresh marijuana coming from his vehicle, learning that he had a weapon on his person, and viewing his strange and erratic behavior.

Furthermore, the record shows that *less than eight minutes* elapsed between the time that Triggs was handcuffed and the time that he opened the garage door so

that officers could search the garage. (52:113-122.) Overall, less than 20 minutes elapsed between the time that officers first viewed Triggs' vehicle and the time that Triggs signed a written consent to search form. (*Id.*) The *Sharpe* court specifically rejected the notion that a 20-minute stop was unreasonable where police acted diligently and where a suspect's actions contributed to the added delay about what he complains. Under *Sharpe*, the less-than-eight minute stop here was reasonable. *Sharpe,* 470 U.S. at 683.

Finally, Triggs argues that he was in custody under *Miranda* because there was no testimony to suggest that officers told him that he was free to refuse to answer questions and where there was no testimony suggesting that officers told him that he was free to withhold consent to search the garage. (Triggs' Br. 13) Of course, they only needed to explain his right to refuse to answer questions if they had been obligated to give him *Miranda* warnings. And *Miranda* doesn't require police to give explicit warnings regarding consent or lack of consent to search. Because Triggs was not under arrest and in custody under *Miranda*, officers had no obligation to tell him that he could refuse to answer questions or withhold consent to search the garage. *See also State v. Stankus,* 220 Wis. 2d 232, 243, 582 N.W.2d 468 (Ct. App. 1998) ("[A]lthough it is true that the officers did not apprise Stankus of his right to refuse consent, the law is that a police allocution of this nature is not a prerequisite to a valid consent. Knowledge of a right to refuse is not an indispensible element of a valid consent.") (citation omitted).

For the foregoing reasons, given the totality of the circumstances, Triggs was not in custody within the meaning of *Miranda* when he gave officers consent to search his garage.

D. The totality of the circumstances establishes lawful consent.

Based on the totality of the circumstances, and considering the six *Phillips* factors above, *see* State Br. 2, *supra*, Triggs' consent to search was undoubtedly voluntary.

Regarding the first factor, no evidence suggests police used deception or trickery to obtain Triggs' consent to search. The officers simply explained what they observed and asked Triggs if they could search the garage, which he consented to verbally, and later, in writing. (58:11-13, 17-21.)

As to the second factor—threats or physical intimidation—Triggs argues there was protracted intimidation where the police overwhelmed him with five officers, three of whom physically extracted him from his vehicle, and where he was handcuffed during the interaction. (Triggs' Br. 15.)

Notably, the number of officers, by itself, does not conclusively show coercion; it is but one factor. *Stankus,* 220 Wis. 2d at 239-240. In *Stankus*, a stop was legally valid where officers outnumbered Stankus two to one. *Id.* Here, five officers were present at the stop of Triggs' vehicle, which had two people inside. (58:3-4, 13.) Thus, it is not five officers to one, as Triggs claims, but five officers to two. This is no more unreasonable than the officer to citizen ratio in *Stankus*, and therefore, the stop is no less valid. Further, there is no evidence in the record that any of the officers physically intimidated Triggs or made threats in order to gain his consent.

The third factor focuses on the expressed attitudes of the officers. Although Triggs was in handcuffs at the time he

gave consent, the officers only placed Triggs in handcuffs due to safety concerns caused by Triggs' own erratic behavior. After officers removed Triggs' firearm from his person and he calmed down, they removed the handcuffs, and Triggs remained unrestrained for the duration of the encounter. (58:6-7, 12.) Triggs was calm when he gave officers verbal consent to search, and was both calm and free of handcuffs when he signed a written consent to search. (*Id.* 6, 7, 12, 20.)

The fourth factor focuses on the subject's response to the request. Triggs not only affirmatively consented verbally and later confirmed this verbal consent in writing, but assisted the officers in their search of the garage. (*Id.* 6-7.) Aside from his initial denial that he had been near the garage at all, Triggs never told officers that he did not want them to search the garage, nor did he indicate that he wanted officers to terminate their search after he consented and the search began. (*Id.* 7-8.)

Regarding the fifth factor—the subject's observed personal characteristics—no evidence suggests that Triggs was particularly emotionally or physically susceptible to police manipulation at the time of consent. In fact, Officer Molina actively and successfully worked to calm Triggs down and explain what was happening before Officer Schlachter requested Triggs' consent to search. (*Id.* 6, 12, 13.)

The sixth, and final factor, is whether police inform an individual that he can refuse to consent. Triggs claims that his consent was not voluntary where the State adduced no evidence that police told Triggs that he had the option of withholding his consent. (Triggs' Br. 15) Although the officers in the instant case did not inform Triggs that he could refuse to consent, the Fourth Amendment does not require that a lawfully seized defendant be advised that he

is "free to go" before his consent to search will be recognized as voluntary. *Robinette,* 519 U.S. 33 at 36; *see also Schneckloth,* 412 U.S. 218 at 231 (holding that "it would be thoroughly impractical to impose on the normal consent to search the detailed requirements of an effective warning"); *Stankus*, 220 Wis. 2d at 243. Further, the state is not required to demonstrate whether "the defendant knew . . . he could refuse to give consent." *Phillips,* 218 Wis. 2d at 203. The officers' failure to tell Triggs that he could refuse to consent does not render his consent involuntary.

Similar to the facts in *Phillips*, the officers in the present case did not use any misrepresentation, deception, or trickery to entice Triggs to give consent to search the garage. As in *Phillips*, Triggs' cooperation and assistance demonstrated the non-threatening nature of his encounter with the police and the voluntariness of his consent. Triggs was not only calm at the point of consent, but provided both verbal and written consent to search, as well as helped officers enter the garage. At no time did Triggs rescind his verbal consent, nor did he make any indication that he wanted the officers to terminate their search. If the consent in *Phillips* was voluntarily given, the same is undoubtedly true here.

For the foregoing reasons, and based on the six *Phillips* factors above, the circuit court correctly held that, based on the totality of the circumstances, Triggs voluntarily consented to the search.

CONCLUSION

Triggs voluntarily consented to the garage search. The circuit court correctly denied his suppression motion, and this Court should affirm the judgment of conviction.

Dated at Madison, Wisconsin, this 24th day of October, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 3,101 words.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 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. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 24th day of October, 2016.

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