

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

RECEIVED

11-11-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

No. 2015AP002533-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OMAR QUINTON TRIGGS,

Defendant-Appellant.

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

REPLY BRIEF

Randall E. Paulson
State Bar. No. 1010266

PAULSON LAW OFFICE
Counsel for Defendant-Appellant
2266 N. Prospect Ave., Suite 310
Milwaukee, WI 53202-6306
[414] 202-9447

TABLE OF CONTENTS

Argument.....	3
I. Because the Totality of the Circumstances Include Custodial Interrogation Without <i>Miranda</i> 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.....	3
A. The State admits it bears the burden of proof and that the voluntariness of consent presents a question of constitutional fact. The State does not dispute that it also bears the burden of proving that interrogation was non-custodial.....	3
B. The State tacitly admits that at least some legally recognized factors suggest the State failed to meet its burden.....	3
Conclusion.....	6

TABLE OF AUTHORITIES

<i>State v. Armstrong</i> , 223 Wis. 2d 331, 588 N.W.2d 606 (1999).....	11
<i>State v. Artic</i> , 2010 WI 83, 327 Wis. 2d 392, 786 N.W.2d 430.....	12, 15
<i>State v. Lonkoski</i> , 2013 WI 30, 346 Wis. 2d 523, 828 N.W.2d 552.....	12
<i>State v. Phillips</i> , 218 Wis. 2d 180, 577 N.W.2d 794 (1998).....	11, 12

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. **The State admits it bears the burden of proof and that the voluntariness of consent presents a question of constitutional fact. The State also admits it bears the burden of proving, by a preponderance of the evidence, that interrogation was non-custodial.**

The State admits it bears the burden of proving, by clear and convincing evidence, that Mr. Triggs voluntarily consented to the search. State's brief at 2, *citing State v. Phillips*, 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998). Further, the State admits that the voluntariness of consent is a question of constitutional fact, independently determined by reviewing courts. State's brief at 3, *citing Phillips*, 218 Wis. 2d at 204.

At page three of its brief, the State agrees with the standard set forth at page 11 of Mr. Triggs' brief: 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).

- B. **The State tacitly admits that at least some legally recognized factors suggest the State failed to meet its burden.**

Although the State admits bearing the burdens of proof, it does not explain why this court should conclude that it met them. The State's brief argues individual factors and notes,

with respect to individual factors considered individually, that in and of itself, a given factor does not entitle Mr. Triggs to relief. Mr. Triggs agrees that this court will consider the totality of the circumstances to determine both whether the State can be excused for interrogation-without-*Miranda*-warnings and whether it can utilize the consent it obtained from Mr. Triggs.

“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).

On this record, the State cannot meet its burden of proving that a reasonable person in Mr. Triggs’s position would have felt free to leave. Indeed, no sentient person in Mr. Triggs’ situation—enveloped not only by officers but by squad cars—could have imagined it was even *possible* to leave, much less that police would have permitted it.

The State mentions the free-to-leave standard at pages three and four of its brief. Understandably, however, the State does not argue that a reasonable person in Mr. Triggs’ position would have felt free to leave. Instead, it points out that courts have sometimes relied on specific circumstances to find that a person was not in custody for *Miranda* purposes.

This court should conclude, in its independent weighing of the circumstances, that police restrained Mr. Triggs to the extent that no reasonable person in his position would have felt free to terminate the interview and leave the scene. Any safety concerns that permitted the police to so restrain Mr. Triggs did not justify simultaneous restraint and interrogation. Similarly, the ability of the police to restrain Mr. Triggs did not justify doing so until they got him to consent to searching the garage.

As the State acknowledges at page one of its brief, Mr. Triggs’ brief, at page 15, points to the custodial nature of the

non-*Mirandized* interrogation to challenge not only the interrogation, but the consent that flowed seamlessly in the coercive environment created by the interrogation, physical domination, and other factors.

This court, holding the State to its burden of proof, should find, under the totality of the circumstances:

1. The State did not prove that the interrogation was non-custodial.
2. The State did not prove that Mr. Triggs' consent was voluntary.
3. Application of the exclusionary rule is appropriate. Contrary to the argument at page 3 of the State's brief, the police violated *Miranda*. They also used overwhelming force, with scant justification, to create a coercive atmosphere which they then exploited to obtain a consent not proved to be 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 that were not "congenial and non-threatening," but the opposite; they failed to explain why Mr. Triggs' response to the search request should be accepted as a voluntary act; and they failed to tell Mr. Triggs that he could refuse consent and remain silent. Even if none of these factors, standing alone, would prove Mr. Trigg's arguments, the burdens are not his, and, considered collectively, the factors demonstrate that the burdens of proof have not been met by the State.

CONCLUSION

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

Dated at Milwaukee, Wisconsin, November 11, 2016.

Respectfully submitted,

PAULSON LAW OFFICE
*Counsel for Omar Quinton Triggs,
Defendant-Appellant*

RANDALL E. PAULSON
State Bar No. 1010266

2266 N. Prospect Ave, Suite 310
Milwaukee, Wisconsin 53202
[414] 202-9447 [phone]
attyrepaulson@hotmail.com

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 1,288 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 11th of November, 2016, I caused 10 copies of this reply brief 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 this brief, also by U.S. Mail, on Assistant Attorney General Gregory M. Weber, Wisconsin Department of Justice.

RANDALL E. PAULSON