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STATE OF WISCONSIN

COURT OF APPEALS

10-31-2016 DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

**Appeal No. 2016-AP-127-CR
Circuit Court Case No. 15-CT-421**

v.

GREGORY J. MCMILLAN,

Defendant-Appellant.

**ON APPEAL FROM A JUDGMENT OF CONVICTION AND
SENTENCE IMPOSED IN THE CIRCUIT COURT OF DANE COUNTY
ON SEPTEMBER 11, 2015, DANE COUNTY CASE NO. 15-CT-421,
THE HONORABLE NICHOLAS MCNAMARA, PRESIDING**

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE TOTALITY OF THE CIRCUMSTANCES DOES NOT SUPPORT THE FINDING BY THE TRIAL COURT THAT REASONABLE SUSPICION EXISTED TO CONDUCT A TERRY STOP OF THE DEFENDANT'S VEHICLE AND THE STATE'S ARGUMENT IS UNDEVELOPED AND CONCLUSORY.

The State's two page argument is factually barren and conclusory. It fails to properly cite facts in the record to uphold the legal standard to conduct an investigatory stop. Instead the State cites three cases regarding reasonable suspicion and then offers the bald conclusory statement that "[t]he record in this matter clearly supports Judge McNamara's findings that Officer Onken had reasonable suspicion to temporarily seize McMillan based upon the officer's knowledge of the area and crimes committed in that area, the time of night, and the Officer's observations of McMillan's behavior, including attempting to evade the officer." State's Brief p. 5. The State did not address nor does it in any way attempt to distinguish the numerous cases cited by the defendant where reasonable suspicion was found but additional facts existed to support the reasonable suspicion findings unlike the case at bar. The State's argument is not a developed theme reflecting any legal reasoning and instead is only supported by a general conclusory statement. See State v. Pettit, 171 Wis.2d 627 (Ct. App. 1992); State v. S.H., 159 Wis.2d 730, 738 (Ct. App. 1990). In short it is inadequately briefed and this court is not required to search the record for evidence to support a party's arguments. See Cook v. Cook, 2013 WI App. 84.

The totality of the circumstances does not establish reasonable suspicion that the defendant had committed or was about to commit a crime or violate any ordinance violation. The mere fact that an individual pulls into a closed business in the middle of the night is not, in and of itself, a sufficient basis for reasonable suspicion of criminal activity without additional suspicious factors. See 4 LAVAFE SEARCH AND SEIZURE §9.5 (e), at 687-91 (5th ed. 2012) (discussing reasonable suspicion as it relates to certain premises and times of day). Unlike other cases where this court found reasonable suspicion to conduct an investigatory stop of a vehicle at a closed business additional suspicious factors existed which are not present in this case. The State's failure to properly develop its argument with cites to the record that reasonable suspicion did exist and to address the appellant's developed arguments that it did not exist should not be considered by this court. See Cook v. Cook, 2013 WI App. 84. The State's undeveloped argument urging affirmance of the trial court's decision should not be further considered.

II. THE STATE FAILED TO ESTABLISH THAT OFFICER ONKEN WAS ACTING UNDER A BONA FIDE COMMUNITY CARETAKER FUNCTION AND ITS ARGUMENT ON THIS ISSUE IS ALSO UNDEVELOPED AND CONCLUSORY.

“[T]he State bears the burden of proof that the Officer's conduct fell within the scope of a reasonable community caretaker function.” State v. Kramer, 2009 WI 14, ¶17. Additionally, a bona fide community caretaker function exists only if a law enforcement

officer has “an objectively reasonable basis” to conclude “that a motorist may have been in need of assistance” at the time of the stop. *Id.* at ¶36-37. Here, the evidence does not demonstrate that Gregory McMillan was in need of any assistance. When approached by Officer Onken McMillan was outside of his vehicle casually speaking on his cell phone. The video of the encounter between Onken and McMillan clearly shows that the officer in this case, unlike the officer in *State v. Kramer*, 2009 WI 14, never offered any assistance. Onken never asked McMillan if he needed medical help nor did he check to see if there appeared to be any vehicle problems. See *Id.* at ¶37. The video demonstrates no such inquiries. Indeed, after the officer says “hello” and “what’s going on?” McMillan continues to casually talk on his phone. After approximately 29 seconds at .39 of the video Onken asks McMillan “what are you doing hanging around businesses?” R. 22 (Video). McMillan responded that he was not hanging around behind businesses but rather was just waiting for his daughter. Simply put, there was no evidence adduced at the motion hearing to justify a seizure under the community caretaker function.

Like its first argument, the State’s argument is completely conclusory. Again, there is no exposition or application of the facts to the relevant legal standard, there are no cites to the record and the State again repeats in conclusory fashion its request that this court affirm the trial judge’s ruling on this issue. This court should not search the record for facts supporting the State’s argument and even if it did it would not find any to substantiate either the trial court’s conclusion or the State’s conclusory argument on this

issue.

CONCLUSION

The State's arguments seeking affirmance of the trial court fail to develop facts in the record and apply those facts to the appropriate legal standard justifying affirmance of the trial court's decision. This court has a long history of not searching the record for facts to support undeveloped and conclusory arguments and it should not make an exception on behalf of the State in this case.

Once Officer Onken engaged his emergency lights he effectuated a seizure of Gregory McMillan. When approached, the defendant did not engage in any additional suspicious activity. Pulling one's vehicle into the parking lot of a closed business is not, by itself, a sufficient basis for reasonable suspicion of criminal activity. There must be additional suspicious factors. Here, there are not. There was no recent history of burglaries or break ins at the industrial park and McMillan was not parked near any closed businesses. Instead, he was at the far end of the parking lot away from the Dakota Supply building itself. When approached by Onken he calmly remained on his phone, talking for approximately one half minute.

The State did not offer any evidence at the hearing justifying the seizure under a bona fide community caretaker function. The record clearly establishes that unlike the officer in Kramer, Officer Onken did not offer any assistance or inquire of McMillan as to whether he was having either a vehicle problem or medical issue. Onken's actions in

this case were plainly investigatory and not totally divorced from his law enforcement function. Reasonable suspicion did not exist to justify an investigative stop in this case and the record does not establish a bona fide community caretaker function.

The State's conclusory arguments without any application of the facts or cites to the record supporting its arguments leave those arguments unsupported and undeveloped. Based on this record this court should reverse the trial court's finding that reasonable suspicion existed to conduct an investigatory stop and further reverse the court's finding that Officer Onken was engaged in a bona fide community caretaker function. The record supports neither of the trial court's conclusions.

Respectfully submitted this 31st day of October, 2016.

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CERTIFICATION

Undersigned counsel hereby certifies that this appellate brief conforms to the rules contained in §809.19 (8) (b) and (c) Wis. Stats. for a brief produced with the proportional serif font. The length of this reply brief is 1,558 words.

Signed:

Patrick J. Stangl

CERTIFICATION OF COMPLIANCE WITH RULE 809.19 (12)

The undersigned certifies that an electronic copy of this brief, excluding the appendix, if any, complies with the requirement of §809.19 (12). The electronic brief is identical in content and format to the printed brief filed this date.

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

Signed:

Patrick J. Stangl