STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP000224-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KAVIN K. NESBIT,

Defendant-Appellant.

On Appeal from the Denial of a Pretrial Motion to Suppress Evidence and the Judgment of Conviction Entered in the Kenosha County Circuit Court, the Honorable Chad G. Kerkman, Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CATHERINE R. MALCHOW
Assistant State Public Defender
State Bar No. 1092705

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440
malchowc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

According to ***State v. Hart***, "the law in Wisconsin is that the need to transport a person in a vehicle is not, in and of itself, an exigency which justifies a search for weapons." ***State v. Hart***, 2001 WI App 283, ¶17, 249 Wis. 2d 329, 639 N.W.2d 213, *overruled in part on other grounds by* ***State v. Sykes***, 2005 WI 48, ¶33, 279 Wis. 2d 742, 695 N.W.2d 277. Here, a police officer encountered the defendant and his companion, carrying a gas can, walking along the shoulder of the interstate. After stopping the individuals, and finding out that their vehicle was disabled and had run out of gas, the officer informed them that he would give them a ride in his squad car to get fuel and then return them to their vehicle. The officer did not give them any other option but to accept the ride. Pursuant to department policy, the officer frisked them before allowing them in his car. Did the totality of the circumstances, including the fact that they were walking along the shoulder of the interstate, the ratio of two individuals to one officer, and the defendant's "change of demeanor" after being asked about weapons, provide the officer with the requisite reasonable suspicion to believe Mr. Nesbit was armed and dangerous and thus justify a ***Terry*** frisk?

The circuit court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Nesbit welcomes oral argument if it would be helpful to the court. As this case involves facts applied to well-settled law, publication is likely not warranted.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered in Kenosha County, the Honorable Chad G. Kerkman, presiding.

Kenosha County charged Kavin K. Nesbit with one count of felon in possession of a firearm, contrary to Wis. Stat. § 941.29(2)(a), and one count of possession of THC, as a second offense, contrary to Wis. Stat § 961.41(3g)(e). (1).

Mr. Nesbit filed a motion to suppress evidence, arguing that the evidence was found pursuant to an illegal search of his person. (14; App. 103-104). Following a hearing on February 26, 2015, the circuit court denied the motion. (36:35-38). On April 17, 2015, Mr. Nesbit pled guilty to one count of felon in possession of a firearm, and the state dismissed count two. (37:7-8).

On July 23, 2015, the circuit court withheld sentence and placed Mr. Nesbit on probation for four years, and ordered nine months in jail as a condition of probation. (39:15-16; 27; App. 101-102).

Mr. Nesbit subsequently filed a timely notice of intent to pursue postconviction relief and a timely notice of appeal. (26; 31).

STATEMENT OF FACTS

The facts relevant to this appeal arise from the frisk of Mr. Nesbit's person on September 15, 2014. The facts adduced from the suppression hearing are addressed below.

Suppression Hearing

On December 3, 2014, Mr. Nesbit's attorney filed a motion to suppress. (14; App. 103-104). The defense argued that a police officer frisked Mr. Nesbit solely because the officer intended to give him a ride in his squad car. Citing ***State v. Hart***[1], Mr. Nesbit argued that such a frisk is contrary to law, and therefore, all evidence derived from the illegal search must be suppressed. (14:1-2; App. 103-104).

At the hearing on the motion on February 26, 2015, the state called Trooper David Fowles as its sole witness. (36:6-27; App. 110-131). Trooper Fowles testified that he has been a trooper with the Wisconsin State Patrol for 17 years. (36:7; App. 111).

On September 15, 2014 at approximately 7:30 PM, Trooper Fowles was on patrol, traveling southbound on Interstate 94 in Kenosha County. (36:8; App. 112). It was still light outside, and he noticed two individuals walking southbound on the west shoulder of I-94. (36:8 App. 112).

[1] ***State v. Hart***, 2001 WI App 283, 249 Wis. 2d 329, 639 N.W.2d 213, *overruled in part on other grounds by* ***State v. Sykes*** 2005 WI 48, ¶33, 279 Wis. 2d 742, 695 N.W.2d 277.

Trooper Fowles had not encountered a disabled vehicle on the highway prior to seeing the individuals. (36:8 App. 112).

One of the individuals, identified as Duane Hudson, was carrying a red gas can. (36:8, 12 App. 112, 116). Trooper Fowles identified Mr. Nesbit as the other individual. (36:9; App. 113). Trooper Fowles activated his lights and pulled up behind them. (36:9; App. 113). He was concerned for their safety. (36:9; App. 113). Further, individuals are not allowed to be walking along the highway, as there are signs posted that state "no pedestrians." (36:9, 19; App. 113, 123). After Trooper Fowles stopped, Mr. Hudson and Mr. Nesbit approached his squad car and informed him that their vehicle had run out of gas. (36:9; App. 113).

According to Trooper Fowles, Mr. Nesbit was talkative, did not hesitate in providing answers, and seemed "perfectly normal." (36:10; App. 114). The individuals reported that their vehicle was near Highway 45, and when Trooper Fowles encountered them they were "at the top of the southbound ramp from County Highway C." (36:11; App. 115). Trooper Fowles stated he did not "quite understand how they could walk that far," however, their story did not cause him concern. (36:11; App. 115).

Trooper Fowles testified that he informed the individuals that it was not safe and they were not allowed to be walking on the interstate. (36:11; App. 115). He further informed Mr. Nesbit and Mr. Hudson that he would have to give them a ride to get some fuel and bring them back to their car. (36:11; App. 115). Trooper Fowles did not provide any other options other than giving them a ride to get fuel. (36:11, 20; App. 115, 124). Trooper Fowles stated, "I didn't know what else to do with them. They couldn't continue to walk

down the interstate, so I was going to give them a ride." (36:11-12; App. 115-16).

Before getting in the vehicle, Trooper Fowles asked Mr. Hudson whether he had any weapons on his person. (36:12; App. 116). Mr. Hudson was talkative, there was no change in his demeanor, and he answered that he did not have any weapons. (36:12; App. 116). Trooper Fowles testified that there was nothing that Mr. Hudson had done after he asked him about weapons that caused him concern. (36:12-13; App. 116-17). However, he acknowledged, "I can say that eventually I was going to pat him down." (36:12-13; App. 116-17). Trooper Fowles further testified that it is department policy that before someone gets into a squad car, the person must be frisked. (36:12-13, 26; App. 116-17, 130).

After Mr. Hudson answered the question concerning weapons, Trooper Fowles looked at Mr. Nesbit and he seemed "very deflated" and he "just shook his head to the negative very slightly." (36:13; App. 117). Trooper Fowles testified "it was a very, very different change in demeanor as compared to Mr. Hudson." (36:13-14, 21, App. 117-18, 125). He stated that "earlier he had been talking and pointing and everything else. All of a sudden his arms were down at his side. And when I looked at him, he shook his head to the negative just slightly. Just it was a change in his countenance." (36:14; App. 118). When asked if Mr. Nesbit's change of countenance caused any specific concern for safety, Trooper Fowles responded, "Well, I knew I had to search two individuals, so based on that, I made a decision to pat down Mr. Nesbit first….Because I observed a change in his attitude." (36:14; App. 118).

Trooper Fowles testified that in deciding to frisk the defendants, he considered that the individuals would have to

sit in the back, and he would have to operate his car and concentrate on driving, so it would compromise his ability to defend himself if there was a problem in the back of the squad car. (36:14-15; App. 118-19). Further, Trooper Fowles stated that he was by himself, so there would be a "two-to-one" ratio of individuals he was transporting to officers. (36:16; App. 120). He also noted that the glass separating himself from the back of the squad is not bulletproof. (36:16; App. 120).

Trooper Fowles ordered and positioned Mr. Nesbit between himself and Mr. Hudson, and Mr. Nesbit was compliant. (36:17-18; App. 121-122). Trooper Fowles then conducted a frisk of Mr. Nesbit first. (36:16; App. 120). He felt what he believed to be a gun on Mr. Nesbit's left side hip, and removed a loaded gun from Mr. Nesbit's pants. (36:17; App. 121). He then ordered both Mr. Nesbit and Mr. Hudson on the ground. (36:17; App. 121). Trooper Fowles testified that approximately five minutes had elapsed between the time he pulled over until the time he discovered the gun.[2] (36:18; App. 122).

On cross-examination, Trooper Fowles testified that he is trained on how to properly write police reports, to write reports when an incident is fresh in his mind, and to include all pertinent facts in his report, including why he might fear for his safety in a situation. (36:22; App. 126). Trooper Fowles identified Defense Exhibit 1 as his police report regarding the incident. (36:23; App. 127). Trooper Fowles testified that he did not include any facts regarding Mr. Nesbit's change of demeanor, nor any facts

[2] After being transported to Kenosha County jail, Mr. Nesbit informed the officers that he had marijuana on his person, which formed the basis for the one count of possession of THC, as a second offense, contrary to Wis. Stat § 961.41(3g)(e). (1).

regarding Mr. Nesbit going from talkative to quiet, and no description of Mr. Nesbit shaking his head slightly when he was asked if he had any weapons. (36:24; App. 128). The police report was received into evidence. (41;36:24; App. 128).

Trooper Fowles stated that Mr. Nesbit never acted aggressive. (36:24; App. 128). After he noticed Mr. Nesbit's "change of demeanor," he did not call for backup or draw his weapon. (36:25; App. 129). Trooper Fowles agreed that he was patting Mr. Nesbit down because he was going to give him a ride. (36:25; App. 129). Trooper Fowles further agreed that "whatever the facts were here," department policy requires that before someone gets into a squad car, "you will frisk them." (36:26; App. 130).

After the parties' arguments, the circuit court denied Mr. Nesbit's motion. The court found that Trooper Fowles testified credibly, and after reciting the facts, held:

> I agree with [the state] and [its] legal analysis applying the facts of this case to the law. I think this case is distinguished from the ***Hart*** case. In the ***Hart*** case there was one defendant. That defendant was told specifically that he would not be arrested. That he would be given a ride home instead of being arrested. And in this case we have the defendant and his companion walking on the interstate and they weren't supposed to be walking on the interstate.
>
> Also there is a two-to-one ratio between the defendant and his companion and the trooper and the defendant seem to have a change of countenance and perhaps attitude when the trooper mentioned frisking the defendant and his companion and asking if they had any weapons.

> So for all of those reasons and for the reasons given by [the state], I'm denying the motion to suppress.

(36:35-38; App. 139-142).

ARGUMENT

Trooper Fowles Did Not Have the Requisite Reasonable Suspicion to Conduct a Frisk of Mr. Nesbit, and Therefore, All Evidence Found as a Result of the Frisk Must be Suppressed.

A. Introduction and Standard of Review.

At 7:30 PM, while it was still light outside, Officer Fowles observed two men walking along the shoulder of the interstate. (36:8; App. 112). One was carrying a gas can. Officer Fowles pulled over, intending to help, and found both men to be "perfectly normal." (36:8-10; App. 112-14). Their explanation that their car was disabled did not cause him any concern. (36:10-11; App. 114-15). Trooper Fowles informed the men that they had to get into his squad car, and he was going to take them to get fuel and return them to their car. (36:11-12; App. 115-16). He did not give the men any other option other than to get into his vehicle. (36:11-12, 20; App. 115-16, 120). Further, he testified that "whatever the facts were," he was going to pat down the individuals because department policy mandated pat-downs prior to any individual getting into a car. (36:26; App. 130). Wisconsin law is clear that there is no "search incident to a squad ride" exception to reasonable suspicion; rather there must be specific, articulable facts and reasonable inferences therefrom, that a person is armed and dangerous in order to justify a frisk. ***In re Kelsey C.R.***, 2001 WI 54, ¶¶50, 91, 243

Wis. 2d at 422, 626 N.W.2d 777; ***Hart***, 2001 WI App 283, ¶17.

Here, those facts were lacking. The totality of the circumstances, including the fact that the two men were walking along the interstate, the two-to-one officer-to-citizen ratio, and Mr. Nesbit's "change of countenance," does not provide the requisite reasonable suspicion that Mr. Nesbit was armed and dangerous in order to justify a frisk. As such, all evidence derived from the frisk must be suppressed. ***State v. Buchanan***, 2011 WI 49, ¶8, 334 Wis. 2d 379, 799 N.W.2d 775. ("If the protective search was unconstitutional because there was not the requisite reasonable suspicion to support it, the evidence ultimately seized as a result of the search must be suppressed.")

A pat-down frisk for weapons, commonly known as a "frisk," is a search. ***State v. Morgan***, 197 Wis. 2d 200, 208, 539 N.W.2d 887 (1995). "[T]he law in Wisconsin is that the need to transport a person in a vehicle is not, in and of itself, an exigency which justifies a search for weapons." ***Hart***, 2001 WI App 283, ¶17[3]. The ***Hart*** court relied on the

[3] The Wisconsin Supreme Court overruled ***State v. Hart***, in part, in ***State v. Sykes***. ***State v. Sykes***, 2005 WI 48, ¶33, 279 Wis. 2d 742, 695 N.W.2d 277. In ***Blum v. 1st Auto Cas. Ins. Co.***, 2010 WI 78, ¶¶ 3, 42, 326 Wis.2d 729, 786 N.W.2d 78, the Wisconsin Supreme Court held that a court of appeals decision overruled by the supreme court no longer has any precedential value unless the supreme court expressly states otherwise. However, the Court has subsequently clarified this holding, and stated that in cases prior to ***Blum***, if the Court used qualifying language in overruling a decision of the court of appeals, then "the surviving portion of the partially overruled decision may be cited as precedent." *See* ***State v. Stevens***, 2012 WI 97, ¶93, 343 Wis. 2d 157, 822 N.W.2d 79. Here, the Wisconsin Supreme Court's decision in ***State v. Sykes*** overruled part of the ***Hart*** decision, specifically using qualifying language stating, "Any discussion in ***Hart*** that could be interpreted to

Wisconsin Supreme Court decision ***In re Kelsey C.R.***, where a plurality declined to adopt a blanket rule that a police officer may frisk a person just because the officer is going to place that person inside a police vehicle, acknowledging that such a rule might be found to eliminate the constitutional requirement that a search be reasonable. ***In re Kelsey C.R.***, 2001 WI 54, ¶¶50, 91.

Indeed, the Fourth Amendment protects the right of the people against unreasonable searches and seizures. *See* ***State v. Waldner,*** 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996); ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). "A lawful frisk does not always flow from a justified stop." ***State v. Stout***, 2002 WI App 41, ¶24, 250 Wis. 2d 768, 641 N.W.2d 474 *citing* ***Terry***, 392 U.S. at 27.

The reasonableness of a protective frisk is determined based on an objective standard. ***State v. McGill***, 2000 WI 38, ¶23, 234 Wis. 2d 560, 609 N.W.2d 795. The question is whether a reasonably prudent officer would be warranted in the belief that the person is dangerous and may have immediate access to a weapon. ***State v. Johnson***, 2007 WI 32, ¶¶21-22, 299 Wis. 2d 675, 729 N.W.2d 182. The court must examine the totality of the circumstances. ***Id***. In doing so, courts have "first broken down the reasonable suspicion issue into an analysis of each primary factor present and then concluded by viewing these primary factors in the totality of the circumstances." *See* ***State v. Sumner***, 2008 WI 94, ¶23, 312 Wis. 2d 292, 752 N.W.2d 783.

---

invalidate a search incident to arrest for which the officer has probable cause is overruled." ***Sykes***, 2005 WI 48, ¶33. As such, the court of appeals' ***Hart*** decision discussing ***Kelsey C.R.*** and the holding that the need to transport a person in a vehicle is not a sufficient exigency by itself to frisk someone still has precedential value.

A court reviewing an order granting or denying a motion to suppress evidence will uphold a trial court's findings of fact unless they are clearly erroneous. ***State v. Secrist***, 224 Wis. 2d 201, 207, 589 N.W.2d 387 (1999). However, deciding whether a search is unreasonable under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution is a question of law reviewed *de novo*. ***State v. Betterley***, 191 Wis. 2d 407, 415–16, 529 N.W.2d 216 (1995).

B. Wisconsin law has explicitly rejected a per se rule allowing "search incident to squad car ride."

This case is similar to ***State v. Hart***, where the officer frisked the defendant solely because he was going to transport him in a squad car. 2001 WI App 283. In ***Hart***, a police officer pulled Hart over for drunk driving, administered a breath test to establish that Hart was intoxicated, and instead of arresting him, decided to drive him to the police station so that he could arrange for a ride home. ***Id.***, ¶2. The officer informed Hart that he was not under arrest and that he would be allowed to go home once he had arranged for someone to drive him. ***Id.***, ¶7. Pursuant to department policy that required officers to conduct a protective search prior to transporting a citizen in a squad car, the officer frisked Hart and discovered a marijuana pipe. ***Id.***, ¶7. Hart was subsequently arrested for possession of drug paraphernalia. ***Id.***, ¶2.

The ***Hart*** court held that the need to transport a person in a police vehicle does not justify a search for weapons, but rather, specific and articulable facts that the person is armed and dangerous must be shown to support a ***Terry*** frisk. ***Id.***, ¶¶ 17-18. The court held that the record was void of specific or articulable facts that would make a police officer

reasonably fear for his or her safety, and thus ordered the evidence discovered from the search suppressed. ***Id.***, ¶17.

In so holding, the ***Hart*** court relied on a plurality opinion in ***Kelsey C.R.*** In ***Kelsey C.R.***, two officers saw Kelsey sitting alone, after dark, on the street in a high crime neighborhood. 2001 WI 54, ¶1. After a short discussion, the officers asked her to stay put; however, she fled, and the officers chased and finally caught her. ***Id.*** The officers contacted Kelsey's mom who asked that they bring her home. ***Id.***, ¶6. It was standard policy for officers to conduct a search prior to placing an individual in the squad car. ***Id.***, ¶75. After conducting a pat-down search, the officers discovered a gun. ***Id.***, ¶7.

The two dissenting justices concurred with the plurality holding that a police officer may not frisk a person solely because the person is getting into the squad car, noting that the "search incident to squad car ride" exception was not consistent with Fourth Amendment jurisprudence requiring specific and articulable facts that a person may be armed and dangerous. ***Id.***, ¶¶50, 91. However, a plurality concluded that a frisk was justified based on the totality of the circumstances: Kelsey's flight, Kelsey's demeanor, the time of night, and the neighborhood. ***Id.***, ¶49.

Wisconsin law does not allow a per se rule that a person may be frisked solely due to transportation in a squad car. As in ***Hart*** and ***Kelsey C.R.***, department policy required that Trooper Fowles conduct a frisk prior to allowing citizens in the squad car. This policy in and of itself is not enough to justify a frisk of Mr. Nesbit. Furthermore, as the court held in ***Hart***, this court should find that the record lacks reasonable suspicion that Mr. Nesbit was armed and dangerous.

C. The totality of the circumstances does not provide reasonable suspicion that Mr. Nesbit is armed and dangerous.

The record demonstrates that the totality of the factors do not support a finding of reasonable suspicion to believe that Mr. Nesbit was armed "and dangerous to the officer or others." ***State v. Kyles***, 2004 WI 15, ¶72, 269 Wis. 2d 1, 675 N.W.2d 449; *see also* ***Terry***, 392 U.S. at 27.

The circumstances surrounding Mr. Nesbit's frisk, such as the time of day and location of the stop, are either neutral or weigh against a determination that reasonable suspicion existed. It was still light outside, the stop occurred on the shoulder of the interstate, and there is no evidence that the stop occurred in a high crime area. *See* ***State v. Morgan***, 197 Wis. 2d at 211–15 (factors to be considered include time of day and the high-crime nature of the area); ***McGill***, 2000 WI 38, ¶32. When Trooper Fowles activated his lights and pulled up behind Mr. Nesbit and his companion, both men walked towards Trooper Fowles, were not evasive, nor acting strange. *Contrast* ***McGill***, 2000 WI 38, ¶¶8, 24, 27-28 (driver failed to pull over in a timely manner, behaved erratically after traffic stop by exiting the vehicle immediately and walking away). Indeed, Trooper Fowles indicated that he found them "perfectly normal" and that they answered all of his questions. (36:10; App. 114).

Moreover, Trooper Fowles initiated the stop because he was concerned for Mr. Nesbit's safety, so this was not a stop to investigate criminal activity. *Contrast* ***State v. Applewhite***, 2008 WI App 138, ¶2, 314 Wis. 2d 179, 758 N.W.2d 181 (suspect stopped outside residence where there was a report of a burglary in progress).

The circuit court distinguished the present case from ***Hart*** based on three factors:

> (1) We have the defendant and his companion walking on the interstate and they weren't supposed to be walking on the interstate; (2) also there is a two-to-one ratio between the defendant and his companion and the trooper; and (3) the defendant seem to have a change of countenance and perhaps attitude when the trooper mentioned frisking the defendant and his companion and asking if they had any weapons.

(36:35-38; App 139-142). However, these factors, in a totality of the circumstances analysis, do not provide the requisite reasonable suspicion that Mr. Nesbit was armed and dangerous. *See* ***Sumner***, 2008 WI 94, ¶23 (in reasonable suspicion calculus, courts break down reasonable suspicion issue into an analysis of each primary factor present and then view the factors in the totality of the circumstances).

First, the consideration that Mr. Nesbit and his companion were walking on the interstate does little to differentiate this case from ***Hart***. The defendant in ***Hart*** was drunk driving, and instead of arresting him for that offense, the police officer offered to give him a ride home. 2001 WI App 283, ¶2. Here, there is no evidence that the defendants were engaged in a crime: the two men had run out of gas, were carrying a gas can, and Trooper Fowles testified that their story did not cause him any concern. Trooper Fowles indicated he pulled them over because he was concerned for their safety and because individuals are not allowed to be walking on the highway.

A frisk serves to prevent injury, so the question is whether a reasonable suspicion exists that the person is armed and dangerous. *See* ***Stout***, 2002 WI App 41, ¶24. The circuit court's distinction between walking on the interstate versus

the defendant driving in ***Hart*** is meaningless. The fact that Mr. Nesbit was walking along the interstate does not provide reasonable suspicion to believe that he is armed and dangerous. No reasonable inferences can be made that a person is armed and dangerous simply from the fact that a person is walking, rather than driving a car.

Secondly, the ratio of "two-to-one" does not provide reasonable suspicion to believe that Mr. Nesbit is armed and dangerous. First, the fact that there were two individuals and only one police officer would seem to be more concerning, if there were any concern, when the individuals were outside of the vehicle, without a partition separating the officer from the individuals. This is significant because Trooper Fowles did not acknowledge considering a frisk of the two men until he decided he had to give them a ride in his squad car. Additionally, Trooper Fowles did not testify that he felt that he needed to request back-up upon encountering two men walking along the interstate. *See* ***State v. Kyles***, 2004 WI 15, ¶37. (An officer's perception is not determinative when considering reasonableness of the frisk, but "it may be of some assistance to a court in weighing the totality of the factors.") The fact that he was outnumbered at the time of the stop did not cause him concern.

Furthermore, while the ratio of police to individuals stopped is a consideration in a totality of the circumstances, the fact that there is an additional person to an officer does not in and of itself lead to an inference that an individual is armed and dangerous. *See* ***State v. Limon***, 2008 WI App 77, ¶34, 312 Wis. 2d 174, 751 N.W.2d 877 (officers were outnumbered and without backup *but also* investigating an anonymous tip about drug dealing and witnessing drug activity).

Finally, Mr. Nesbit's "change in demeanor" does not provide reasonable suspicion that Mr. Nesbit is armed and dangerous. Importantly, Trooper Fowles confirmed that Mr. Nesbit never acted aggressive. Furtive or suspicious movements do not automatically give rise to an objectively reasonable suspicion that person is armed and dangerous. *See* ***Johnson***, 2007 WI 32, ¶12; ***Kyles***, 2004 WI 15, ¶¶48-50. Additionally, no testimony established that Mr. Nesbit was unusually nervous. *See* ***Kyles***, 2004 WI 15, ¶54 (unusual nervousness is a factor to consider in evaluating totality of the circumstances).

Mr. Nesbit's conduct is far less suspicious than the "furtive movement" in ***Johnson***, where the Wisconsin Supreme Court held the circumstances did *not* provide reasonable suspicion for a protective search. ***Johnson***, 2007 WI 32, ¶36. ***Johnson***, like this case, did not involve a stop to investigate criminal activity. ***Id***. at ¶40. After officers signaled for a routine traffic stop, the driver leaned forward so far that his head and shoulders disappeared from view, conduct one officer described as a "strong furtive movement." ***Id***. at ¶3. Both officers testified that, based on their training and experience, they believed the driver was trying to conceal contraband or weapons. ***Id***.

The supreme court held that under the totality of the circumstances, the driver's "head and shoulders" movement did not provide reasonable suspicion for a protective search. ***Id***. at ¶36. Here, Trooper Fowles testified that Mr. Nesbit slightly shook his head, and had a change of demeanor, which is far less suspicious than the furtive movement of person believed to be trying to conceal contraband or weapons. Mr. Nesbit's slight shake of the head and "change in countenance" cannot amount to reasonable suspicion if a

"strong furtive movement" which evinces a belief of hidden weapons does not.

Indeed, Trooper Fowles' own testimony, while not dispositive, confirms that Mr. Nesbit's change in countenance did not give him concern or cause him to believe that Mr. Nesbit was armed and dangerous. When asked if Mr. Nesbit's change of countenance caused any specific concern for safety, Trooper Fowles responded, "I knew I had to search two individuals, so based on that, I made a decision to pat down Mr. Nesbit first….Because I observed a change in his attitude."[4] (36:14; App. 118); *see* ***State v. Kyles***, 2004 WI 15, ¶37. Additionally, Trooper Fowles did not call for back-up or draw his weapon after observing Mr. Nesbit's change of demeanor. *Contrast* ***Buchanan***, 2011 WI 49, ¶15 (Fact that officer called for backup and then returned to frisk suspect only after second officer arrived part of totality of the circumstances determining reasonableness of frisk).

Taken together, without more, Mr. Nesbit's "change of demeanor," the ratio of two individuals to one officer, the fact that Mr. Nesbit and his companion were walking along the interstate at the time of the stop, which occurred during daylight and not in a high-crime area; Trooper Fowles' testimony that the individuals were "perfectly normal" and he had no reason to doubt their story, and Trooper Fowles' actions in not calling for back-up or drawing his weapon, provided the officer with no more than an "inchoate and unparticularized suspicion or 'hunch'," instead of the requisite reasonable suspicion that Mr. Nesbit was armed and

[4] Trooper Fowles testified that he did not include any facts about Mr. Nesbit's change of demeanor or attitude in his police report, and he acknowledged that he is trained to write reports when an incident is fresh in his mind, and to include all pertinent facts in his report, including why he might fear for his safety in a situation. (36:22-24).

dangerous. *See* ***Terry***, 392 U.S. at 27; s*ee* ***State v. Kyles***, 2004 WI 15, ¶¶69-72; *Contrast* ***Kelsey C.R.***, 2001 WI 49, ¶49 (plurality concluded that frisk was justified due to Kelsey's flight, her demeanor, the time of night and the neighborhood).

Trooper Fowles confirmed several times that he was going to search the individuals because they were going to get into his squad car, pursuant to department policy. Indeed, the "most natural conclusion is that the frisk was a general precautionary measure, not based on the conduct or attributes of" Mr. Nesbit. *See* ***State v. Mohr***, 2000 WI App 111, ¶15, 235 Wis. 2d 220, 613 N.W.2d 186. The totality of the circumstances demonstrates that this search was the result of Trooper Fowles' decision to transport Mr. Nesbit in a squad car, which is contrary to Wisconsin law. ***Hart***, 2001 WI App 283, ¶¶17-18; ***Kelsey C.R.***, 2001 WI 54, ¶¶50, 91. Further, the search was not based on reasonable suspicion that Mr. Nesbit was armed and dangerous, but rather on the sort "hunch" that is insufficient under ***Terry*** to trigger the requisite reasonable suspicion. ***Terry***, 392 U.S. at 27. As such, all evidence derived from the frisk must be suppressed. ***Buchanan***, 2011 WI 49, ¶8.

CONCLUSION

For the reasons stated in this brief, Mr. Nesbit respectfully requests that this court vacate his judgment of conviction and remand to the circuit court with directions that all evidence derived from the unlawful search be suppressed.

Dated this 27th day of April, 2016.

Respectfully submitted,

CATHERINE R. MALCHOW
Assistant State Public Defender
State Bar No. 1092705

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440
malchowc@opd.wi.gov

Attorney for Defendant-Appellant

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 4,883 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 27th day of April, 2016.

Signed:

CATHERINE R. MALCHOW
Assistant State Public Defender
State Bar No. 1092705

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440
malchowc@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 27th day of April, 2016.

Signed:

CATHERINE R. MALCHOW
Assistant State Public Defender
State Bar No. 1092705

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440
malchowc@opd.wi.gov

Attorney for Defendant-Appellant