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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

Mr. Nesbit does not challenge his initial stop; rather, the question before this court is whether, under the totality of the circumstances, Trooper Fowles was authorized to frisk Mr. Nesbit.

As outlined in the brief-in-chief, Wisconsin case law holds 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; ***In re Kelsey C.R.***, 2001 WI 54, ¶¶50, 91, 243 Wis. 2d 422, 626 N.W.2d 777. Rather, specific and articulable facts that the person is armed and dangerous must be shown to support a ***Terry*** frisk. ***Hart***, 2001 WI App 283, ¶¶17-18; ***Terry v. Ohio***, 392 U.S. 1 (1968).

The state argues that the totality of the circumstances amounted to reasonable suspicion that Mr. Nesbit was armed and dangerous. The state is wrong. The record demonstrates that Mr. Nesbit was frisked because department policy required that Trooper Fowles conduct a frisk prior to allowing citizens in the squad car; however, under Wisconsin law, this policy in and of itself is not enough to justify a frisk of Mr. Nesbit. ***State v. Hart***, 2001 WI App 283, ¶17; ***In re Kelsey C.R.***, 2001 WI 54, ¶¶50, 91. This court should find that the record lacks reasonable suspicion 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. 1, 27 (1968).

Pat-down searches are justified only when an officer has reasonable suspicion that a suspect may be armed. ***State v. Guy***, 172 Wis. 2d 86, 94, 492 N.W.2d 311, 314 (1992). The fact that Mr. Nesbit and his companion were suspected of violating Wis. Stat. § 346.16(2)(a), which prohibits pedestrians from walking along the highway if signs have been erected, does not support a finding that Mr. Nesbit was 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 along the side of the highway, with a gas can, while it is light outside.

Moreover, Trooper Fowles indicated he stopped Mr. Nesbit and his companion because he was concerned for their safety and because individuals are not allowed to be walking on the highway.[1]

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[1] The state has not argued, not before the circuit court nor in its brief to this court, that Trooper Fowles could have arrested Mr. Nesbit for violating Wis. Stat. § 346.16(2)(a), or that this could have resulted in a search incident to arrest. *See* ***State v. Sykes***, 2005 WI 48, ¶34. It is no surprise that the State did not do so, as none of the facts suggest this was an arrest. But even if such an argument were applicable under the circumstances present in this case, the state has forfeited the argument because it has failed to raise it, and thus failed to meet its burden that an exception to the warrant requirement applies. ***State v. Kaczmarski***, 2009 WI App 117, 320 Wis. 2d 811, 772 N.W.2d 811 (arguments not raised in the circuit court are generally not considered on appeal); *see also* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (Appellate courts have observed that the "well known rule of law [that issues not raised on appeal are deemed abandoned] ... mean[s] that in order for a party to have an issue considered by this court, it must be raised and argued within its brief.")

While Trooper Fowles testified that he had not seen a disabled car, he stated that their explanation did not cause him concern. (36:11; App. 115) *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."). Indeed, the record shows that Mr. Nesbit's companion was carrying a red gas can, which reflects Mr. Nesbit's account of a disabled car. (36:8, 12; App. 112, 116).

Likewise, Mr. Nesbit's "change in demeanor" does not provide reasonable suspicion that Mr. Nesbit is armed and dangerous. Furtive or suspicious movements do not automatically give rise to an objectively reasonable suspicion that a person is armed and dangerous. *See* ***State v. Johnson***, 2007 WI 32, ¶12, 299 Wis. 2d 675, 729 N.W.2d 182; ***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). Police encounters can be inherently stressful for all persons, which is why courts, when utilizing nervousness as a factor in the totality of the circumstances usually specify "unusual nervousness" as a factor supporting reasonable suspicion to frisk. *See* ***Id.*** Nothing in the record suggests that Mr. Nesbit was unusually nervous.

Indeed, warrantless searches are unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions, which are "jealously and carefully drawn." ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994) (internal citations omitted). It is well-established that it is the state's burden to show that the search in question fell within one of the recognized exceptions to the warrant requirement, such as the search incident to arrest exception. ***Id***.

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." (36:14; App. 118); *see* ***Kyles***, 2004 WI 15, ¶37. Trooper Fowles' actions support that he was not concerned for his safety, as he did not call for back-up or draw his weapon after observing Mr. Nesbit's change of demeanor. *Contrast* ***State v. Buchanan***, 2011 WI 49, ¶15, 334 Wis. 2d 379, 799 N.W.2d 775. (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).

Further, the ratio of "two-to-one" does not provide reasonable suspicion to believe that Mr. Nesbit is armed and dangerous. 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). As noted in the brief-in-chief, 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. However, 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.

Finally, ***State v. Morgan*** is not analogous to this case, but rather, demonstrates why the facts at hand do not amount to reasonable suspicion. 197 Wis. 2d 200, 539 N.W.2d 887 (1995). In ***Morgan***, the police stopped a vehicle, with three people inside, after witnessing the car driving in and out of alleyways, with expired tags, at 4AM, in a "fairly high-crime-rate area." ***Id.*** at 204. After stopping the car, the two police officers approached the car and asked for the operator's, who would become the defendant in the case, license. ***Id.*** The defendant checked his pockets and wallet and "seemed nervous" while searching for his license, and the officer testified it was unusual nervousness. ***Id.*** at 215. During the ensuing pat-down search, the officers found a loaded .22-caliber pistol, pills, and a pipe. ***Id.*** at 205.

The defendant filed a motion to suppress, which the circuit court granted after an evidentiary hearing. ***Id.*** at 206-207. The court of appeals reversed, holding that the search was permissible because under the totality of the circumstances, a protective search for weapons was justified. ***Id.*** at 207. The Wisconsin Supreme Court affirmed and the analysis focused on the fact that an officer's perception of an area as "high-crime" can be a factor justifying a search. ***Id.*** at 210-14. The court also noted several times that the defendant was "more nervous than the 'usual person stopped by the police.'" ***Id.*** at 215.

In contrast, the case at hand is missing two critical factors present in ***Morgan***. This stop did not occur in a high crime area. Further, Mr. Nesbit's "change of demeanor" was never characterized as "unusual" or as "extreme nervousness." While the facts in ***Morgan***, under the totality of

the circumstances, established reasonable suspicion to believe the defendant was armed; here, those critical facts are lacking.

"Before a concatenation of factors individually consistent with innocent behavior can trigger reasonable suspicion, however, some degree of suspicion must attach to the specific acts which, when combined, add up to reasonable suspicion." *See* ***Morgan***, 197 Wis. 2d at 222 (J. Abrahamson, dissenting) *citing* ***United States v. Sokolow***, 490 U.S. 1, 10 (1989). Here, that "degree of suspicion" on each of the specific facts is lacking. 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 and suspected to be violating Wis. Stat. § 346.16(2)(a) 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, does not amount to the requisite reasonable suspicion that Mr. Nesbit was armed and dangerous. *See* ***Terry***, 392 U.S. at 27.

As with any Fourth Amendment question, the key concern is reasonableness. *See* ***Terry***, 392 U.S. at 19. The totality of the circumstances demonstrates that this search was not reasonable, but rather the result of Trooper Fowles' decision to transport Mr. Nesbit in a squad car, which is contrary to Wisconsin law. ***State v. Hart***, 2001 WI App 283, ¶17-18; ***In re Kelsey C.R.***, 2001 WI 54, ¶¶50, 91. All evidence derived from the frisk must be suppressed. ***State v. Buchanan***, 2011 WI 49, ¶8.

CONCLUSION

For the reasons stated, 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 30th day of June, 2016.

Respectfully submitted,

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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 1,893 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 30th day of June, 2016.

Signed:

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