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WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF DANE COUNTY
HONORABLE MARYANN SUMI

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
BRIANNA L. FLAHAVAN,
DEFENDANT-APPELLANT.

BRIEF AND ARGUMENT OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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ISSUE PRESENTED FOR REVIEW

Whether the circuit court erred in denying Ms. Flahavan's Motion to Suppress Evidence by finding sufficient facts to constitute reasonable suspicion to initiate an investigatory stop?

Ms. Flahavan raised the issue in a pretrial motion. At the conclusion of the motion hearing, the court denied the motion. A copy of the Motion and Transcript from the Motion Hearing is contained in the Appendix.

STATEMENT OF REASONS FOR ORAL ARGUMENT AND PUBLICATION

Ms. Flahavan does not request oral argument and does not recommend that the opinion be published.

STATEMENT OF THE CASE

On October 1, 2013, a criminal complaint was filed in Dane County Circuit Court charging Brianna Flahavan with one count of Possession with Intent to Deliver THC as party to the crime, contrary to Wis. Stats. § 961.41(1m)(h)2, Wis. Stats. § 939.05; one count of Possession of THC, in violation of Wis. Stats. § 961.41(3g)(e); and one count of Possession of Drug Paraphernalia, in violation of Wis. Stats. § 961.573(1).[1]

At the conclusion of the preliminary hearing on December 3, 2013, the court found sufficient probable cause to bind Ms. Flahavan over for trial. The state filed an Information consisting of the same charges included in the original criminal complaint.

Ms. Flahavan filed a Notice of Motion and Motion to Suppress Evidence. The motion argued that evidence had been obtained in violation of Ms. Flahavan's rights as set forth in the Fourth Amendment

[1] All references to Wisconsin Statutes are to the 2011-2012 Edition.

to the U.S. Constitution, and Article I, section 11 of the Wisconsin Constitution. The motion requested that the evidence seized pursuant to the seizure and search be excluded from use at trial. At the conclusion of the hearing, the court denied Ms. Flahavan's motion in an oral ruling.

With the consent and agreement of the parties, the Information was amended at Ms. Flahavan's plea hearing. An additional charge was added; count six alleged one count of Resisting or Obstructing an Officer, contrary to Wis. Stats. § 946.41(1).

Pursuant to a negotiated plea agreement, Ms. Flahavan ultimately entered a plea of no contest to counts four, five and six of the Information. The agreement called for adjudication on felony count three of the amended information to be withheld, with the understanding that it would be dismissed upon Ms. Flahavan's successful completion of probation (sentence

was withheld and a term of probation was imposed on counts four, five and six).

The trial court accepted Ms. Flahavan's plea as well as the terms of the negotiated plea agreement. Adjudication on felony count three was withheld. Ms. Flahavan subsequently filed a timely Notice of Intent to Pursue Postconviction Relief and Notice of Appeal.

The Court of Appeals subsequently issued an Order requesting the parties submit briefs on the issue of whether the Court of Appeals had jurisdiction. The Court of Appeals concluded that that the Judgment of Conviction included a deferred entry of judgment as to one of the counts, and accordingly, dismissed Ms. Flahavan's appeal for lack of jurisdiction.

On May 2, 2016, the circuit court dismissed the count that had been subject to a deferred entry of judgment. Ms. Flahavan filed a Notice of Appeal on June 1, 2016. The Court of Appeals issued an Order on July 15, 2016, extending the time for the previously

filed Notice of Intent until June 1, 2016, so that the Notice of Appeal may serve as a timely Notice of Intent and Notice of Appeal.

STATEMENT OF FACTS

The relevant facts of this case are not in dispute. On February 28, 2013, the Dane County Narcotics and Gang Task Force coordinated a controlled drug transaction involving a confidential information and target Jordan Lehr. (Doc 2:3; Appendix B:3). The confidential informant had been provided with $3600 in currency for the purpose of purchasing one pound of marijuana from Mr. Lehr. (Doc 2:3; Appendix B:3).

The transaction ultimately took place shortly after 5:00pm on February 28, 2103, at D Mobile Media, 4510 Femrite Dr., in Madison. (Doc 2:3-4; Appendix B:3-4). Officers apprehended Mr. Lehr shortly thereafter as he was leaving 4510 Femrite Dr., operating a 2005 black Chevrolet Avalanche. (Doc 2:4; Appendix B:4).

At approximately 5:45pm on February 28, 2013, law enforcement initiated an investigatory stop of Ms. Flahavan. (Doc 2:4; Appendix B:4). Law enforcement had information that Ms. Flahavan was the girlfriend of Mr. Lehr, and she was observed leaving their shared residence at 809 Herndon in a white Chevrolet Trailblazer. (Doc 2:5; Appendix B:5).

Upon contact with law enforcement, Ms. Flahavan admitted that there was marijuana in her vehicle, and consented to its search. (Doc 2:5; Appendix B:5). She further stated that she had observed the events as they unfolded at D Mobile Media, including the arrest of Mr. Lehr, by virtue of security cameras set up on the premises. (Doc 2:5; Doc 27: 9-10; Appendix B:5). Ms. Flahavan stated that after observing these events, she collected the marijuana and departed from the residence. (Doc 2:5; Appendix B:5).

Upon the consent search of Ms. Flahavan's vehicle, marijuana was recovered from a backpack

located in the vehicle as well as from Ms. Flahavan's purse. (Doc 2:5-6; Appendix B:5-6). Paraphernalia and scales were also recovered from the backpack. (Doc. 2:5; Appendix B:5).

APPELLANT'S ISSUE ON APPEAL

II. Whether the circuit court erred in denying the motion to suppress evidence by finding that law enforcement had reasonable suspicion to initiate an investigatory stop of Ms. Flahavan.

A. Summary of the Argument

The circuit court erred in denying the motion to suppress evidence by finding reasonable suspicion, justifying the investigatory stop of Ms. Flahavan.

Law enforcement initiated an investigatory stop of a vehicle being driven by Ms. Flahavan after she was observed leaving the residence she shared with Mr. Lehr, whom law enforcement had just arrested. At the time of the investigatory stop/seizure, law enforcement had no information to suggest that Ms. Flahavan herself

was involved in any type of criminal activity. However, law enforcement believed that Mr. Lehr had engaged in drug activity at the residence, and believed that Ms. Flahavan might have information relevant to their investigation. Law enforcement further speculated that Ms. Flahavan might be attempting to remove evidence from the residence.

Ms. Flahavan submits that an investigatory stop must be supported by reasonable suspicion that the individual is actually engaged in criminal activity. The belief that a person might have knowledge or information relevant to a criminal investigation, or the speculation that a person might be engaging in criminal conduct, is not enough to justify an intrusion into the liberty and privacy interests protected by the Fourth Amendment.

Accordingly, Ms. Flahavan respectfully submits that the circuit erred in denying her motion to suppress evidence by finding reasonable suspicion.

B. Standard of Review

In reviewing a denial of a motion to suppress, the reviewing court will uphold the circuit court's findings of fact unless they are clearly erroneous. State v. Young, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App.1997). Whether those facts satisfy the constitutional requirement of reasonableness is a question of law, which the reviewing court considers *de novo*. State v. Young, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App.1997). A reviewing court considers the determination of reasonable suspicion *de novo*. State v. Williams, 2001 WI 21, 241 Wis.2d 631, 623 N.W.2d 106, ¶18 (2001).

C. Relevant Law

A brief investigatory stop is a seizure and is therefore subject to the requirement of the Fourth Amendment that all searches and seizures be reasonable. State v. Young, 212 Wis.2d 417, 424, 569

N.W.2d 84 (Ct.App.1997); Terry v. Ohio, 392 U.S. 1, 20-22, 88 S.Ct. 1868 (1968).

In order for an investigative stop to be warranted, it is required that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. State v. Limon, 2008 WI App. 77, 312 Wis.2d 174,751 N.W.2d 877, ¶14 (Ct.App.2008).

The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. State v. Young, 212 Wis.2d 417, 424-5, 569 N.W.2d 84 (Ct.App.1997).

The question of what constitutes reasonable suspicion is a common sense test, considering under all the facts and circumstances present, what a reasonable police officer would reasonably suspect in light of his or her training and experience. State v. Young, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App.1997).

D. Argument

Ms. Flahavan does not dispute the state's interest in investigating criminal activity, and recognizes that Terry investigative stops further that interest. The reasonable suspicion standard functions to balance the state's interest against the privacy of the individual. See for example, State v. Amos, 220 Wis.2d 793, 799, 584 N.W.2d 170 (Ct.App.1998).

In order to safeguard the individual's interest, law enforcement must rely on specific articulable facts (and the reasonable inferences drawn from those facts) that the person is involved in criminal activity in order to execute a valid investigatory stop.

In this case, law enforcement had no information that Ms. Flahavan was involved with or ever assisted in Mr. Lehr's activities or that she had ever engaged in any type of criminal behavior. Law enforcement officers had been instructed to initiate a stop of any vehicle observed

leaving the Herndon residence, with particular attention to be given Ms. Flahavan, as it was known to law enforcement that she lived with Mr. Lehr at the Herndon residence and was his girlfriend.

Based on those associations and a belief that Mr. Lehr had dealt drugs from the residence in the past, law enforcement believed that Ms. Flahavan might have information about his activities. Law enforcement also speculated that Ms. Flahavan might be in the process of removing evidence from the residence.

Ms. Flahavan submits that neither justification for the investigatory stop is sufficient under the reasonable suspicion standard. Accordingly, the seizure and subsequent search of her vehicle were unreasonable, and the evidence recovered should be suppressed/excluded from use at trial.

1. Discussion of facts set forth by law enforcement at motion hearing.

At the motion hearing on Ms. Flahavan's motion to suppress, several law enforcement officers testified

regarding the question of the basis for the investigatory stop of Ms. Flahavan.

Two officers involved in the investigatory stop of Ms. Flahavan testified that the reason for the stop was that they were following instructions. (Doc 28:8; Appendix F:8); (Doc 28:29; Appendix F:29).

Two other officers testified. According to his testimony, Sgt. Freedman had directed officers to conduct a stop of any vehicle coming to or leaving the Herndon address. (Doc 28:40; Appendix F:40). He indicated that information had been provided at their briefing that the Herndon address had been involved in past drug activity. (Doc 28:41; Appendix F:41).

In explaining why he specifically wanted Ms. Flahavan's vehicle stopped, Sgt. Freedman testified that since Mr. Lehr had utilized his vehicle to facilitate the drug transaction, "it's very reasonable to believe that drugs might be inside this vehicle in addition to inherent transportability, destructibility of that evidence and

other potential proceeds of the evidence." (Doc 28:43-44; Appendix F:43-44). He elaborated that "if drugs are in one vehicle that's associated with this case, it's reasonable to believe that there might be drugs in another vehicle associated with this case." (Doc 28:45; Appendix F:45). Finally, Sgt. Freedman testified that "both vehicles were known to be owned or operated by the suspect." (Doc 28:46; Appendix F:46).

On redirect examination, Sgt. Freedman expanded on the basis for wanting any vehicle stopped if observed leaving the Herndon residence:

> So again, based on the information provided by Det. Wagner as well as my own training and experience, I believed that there was a likelihood that there might be drugs or proceeds of drugs at that residence, so my concern was that anybody leaving might be attempting to remove, conceal, destroy those items. (Doc 28:48; Appendix F:48).[2]

[2] Sgt. Freedman also testified that since law enforcement planned on executing a search warrant at the Herndon address, they were interested in talking to anyone coming from that residence to find out information about whether anyone inside the residence was armed, whether there were violent animals, and generally to assess how to deploy resources. (Doc 28:48; Appendix F:48).

Detective Wagner, a detective with the Dane County Narcotics Task Force, was investigating Mr. Lehr and was at the business location monitoring the arrest of Mr. Lehr. (D 28:50,55; Appendix F:50,55). He testified that he had informed Sgt. Freedman immediately after Mr. Lehr had been taken into custody. (Doc 28:58; Appendix F:58).

When asked if he was aware of any facts suggesting that Ms. Flahavan was violating the law when she was stopped by law enforcement, Det. Wagner responded:

> I have no specific knowledge other than it is common in the drug investigations that I do that at the residence where drugs may possibly be kept that spouses, people who live in those houses, have knowledge of the drug activity that is taking place. (Doc 28:65; Appendix F:65).

Det. Wagner further testified that:

> The issue with the residence was is that as soon as we were done with the business, we were going to go over there and do a knock and talk and talk to Ms. Flahavan, but the traffic stop had been conducted prior to that event…" (Doc 28:65; Appendix F:65).

On redirect examination, Det. Wagner elaborated on why he wanted Ms. Flahavan's vehicle pulled over and for her to be detained as part of the investigation:

> Because I had previous information that drug deals had taken place at the 809 Herndon residence,[3] and we wanted to stop and detain Ms. Flahavan so we could find put out *(sic)* if there was any other drug activity, if there were any illegal drugs, weapons, any other contraband, inside that residence as part of the continuing investigation. (Doc 28:66; Appendix F:66).

Finally, Det. Wagner indicated that in his experience, he had seen instances "many times" in which wives or other associates act in concert with drug traffickers and destroy evidence for them. (Doc 28:66; Appendix F:66).

Following the testimony of law enforcement, the court heard arguments from the parties. The court then denied the motion to suppress.

[3] Det. Wagner indicated that he had received information from an identified informant that the informant claimed to have sold marijuana to Mr. Lehr at the Herndon residence on four separate occasions in October, 2011. (Doc 28:51; Appendix F:51). Det. Wagner also indicated he had received an anonymous tip that Mr. Lehr sold Oxycontin from the residence; the tip provided few specific details and no timeframe, and was uncorroborated by law enforcement. (Doc 28:52,64; Appendix F:52,64).

2. The information and facts relied on by law enforcement do not constitute sufficient reasonable suspicion to justify the investigatory stop of Ms. Flahavan.

In explaining its decision to deny the motion to suppress, the court went over the factors it considered in determining that law enforcement had a reasonable belief to justify the investigatory stop of Ms. Flahavan:

> Now here are the most important facts that would give rise to that reasonable belief. First of all, the association, the known association of the Herndon address with previous drug trafficking; the involvement and the ownership of both automobiles, the Trailblazer and the Avalanche; the proximity in time of the controlled buy taking place and this defendant, Ms. Flahavan, leaving the residence; the fact that drugs had been dealt from the Avalanche, one of two cars owned and registered to either of these two defendants; the fact, of course, that the Trailblazer was associated with Lehr; the facts that Ms. Flahavan did live at the Herndon Street residence. The fact that there was video surveillance or video cameras at the business while in itself would not establish reasonable suspicion is important in that it leads to an inference that that activity, the buy and the bust, was being observed at some point by someone, and it is a reasonable inference that the observance was taking place at the Herndon Street address. (Doc 28:79-80: Appendix F:79-80).

The court then summarized its conclusion:

> None of these facts in and of themselves would constitute reasonable suspicion, but when you take them all together they do add up to specific and articulable facts that warrant a reasonable belief that criminal activity is afoot, again within the words of State v. Young. So for all these reasons, the motion to suppress is denied. (Doc 28:79-80; Appendix F:79-80).

Ms. Flahavan respectfully disagrees with the court's conclusion.

a. The standard required to justify an investigatory stop requires more than reasonable suspicion that the individual has information to give regarding a criminal investigation.

Prior to discussing the factors it believed constitute reasonable suspicion for the investigatory stop of Ms. Flahavan, the court explained the standard it was applying:

> All of this suggests that this was a Terry stop and need only be based on a reasonable suspicion that criminal activity is afoot. Not that she was a direct, primary suspect but that she may have information to give. (Doc 28:78; Appendix F:78)(Emphasis added).

Ms. Flahavan respectfully submits that reasonable suspicion must be based on more than a belief that the person may have information to give about someone else's criminal activity or a location where law enforcement plans to execute a search warrant.

Law enforcement testified at the motion hearing that they wanted to talk to Ms. Flahavan in order to find out if she had any information regarding Mr. Lehr's activities. They also planned to obtain and execute a search warrant of the Herndon residence, and had safety concerns about possible weapons or violent animals on the premises.

Certainly, an investigatory stop may be properly conducted for an investigatory purpose, and in that sense, to find out information about criminal activity. However, the standard for a Terry investigatory stop does not reduce it an interview tool for law enforcement.

Wisconsin's statutory expression of the constitutional requirements set forth in Terry is found in Wis. Stats. §§ 968.24 and 968.25:

> 968.24 Temporary questioning without arrest. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

State v. Limon, 2008 Wis. App 77, 312 Wis.2d 174,751 N.W.2d 877, ¶13 (Ct.App.2008)(Emphasis added).

In order to conduct a valid investigatory stop of an individual, law enforcement must have reasonable suspicion that the individual is actually committing, has committed, or is about to commit a crime. The standard is not met when police conduct an investigatory stop of

a person based on their belief that she "may have information to give." [4]

In State v. Young, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App.1997), the Wisconsin court of appeals, in considering the validity of a Terry investigatory stop, applied a standard of reasonable suspicion that considered the conduct of the individual who was stopped by law enforcement, not whether the individual had relevant information to provide.

In so doing, the court noted that criminal activity may be afoot even if the individual is observed engaging in innocent activity "if a reasonable inference of unlawful conduct can be objectively discerned." State v. Young, 212 Wis.2d 417, 430, 569 N.W.2d 84 (Ct.App.1997).

The language employed by the court in Young indicates that a reasonable inference of criminal conduct on the part of the person being stopped is necessary, as

[4] Ms. Flahavan's trial counsel raised this argument at the motion hearing. (Doc 28:70; Appendix F:70).

such an inference must be "objectively discerned" if the observed conduct appears innocent.

Belief that a person has information to give about a criminal investigation of another is not enough to justify the intrusion into the person's liberty. The Fourth Amendment prohibition on unreasonable seizures does not contemplate law enforcement seizure of individuals who are not suspected of criminal activity merely to facilitate the gathering of information. An investigatory stop is valid only if based on reasonable suspicion that the person is actually engaged in, is about to engage in, or has previously engaged in criminal activity.

b. The facts set forth by law enforcement are insufficient to constitute reasonable suspicion that Ms. Flahavan was engaged in criminal activity.

The facts relied on by law enforcement and set forth at the motion hearing are insufficient to establish reasonable suspicion to conclude that Ms. Flahavan was engaged in criminal activity, necessary to justify the investigatory stop.

One justification offered was the reasoning that since Mr. Lehr used his vehicle to facilitate one drug transaction, it made sense to think that there might be drugs in Ms. Flahavan's vehicle. (Doc 28:45; Appendix F:45).

Even if Mr. Lehr drove Ms. Flahavan's vehicle or used her vehicle to facilitate drug transactions (and no evidence was offered to suggest that he ever did), Ms. Flahavan's vehicle would seem to be an unlikely (and unsecure) place for Mr. Lehr to store drugs.[5] Law enforcement expressed no belief or suspicion that Ms. Flahavan herself was actively or knowingly involved in drug trafficking. Thus, the suggestion that Ms. Flahavan was unknowingly driving her vehicle around while it

[5] The fact that an officer is experienced does not require a court to accept all of his suspicions as reasonable, nor does mere experience mean that an [officer's] perceptions are justified by the objective facts. State v. Young, 212 Wis.2d 417, 429, 569 N.W.2d 84 (Ct.App.1997).

contained Mr. Lehr's drugs seems more akin to unfounded speculation than a specific, articulable fact.

Law enforcement also expressed a concern that someone, particularly a spouse or associate, might be attempting to destroy evidence or remove evidence from the residence. (Doc 28:48,66; Appendix F:48,66).

The logical flaw in that concern is that at the time of the stop of Ms. Flahavan, law enforcement had no reasonable basis for the concern. Mr. Lehr had not contacted anyone since he was arrested, and as far as law enforcement was aware when they observed Ms. Flahavan leave the residence, there would have been no reason for her or anyone at the Herndon residence to know that Mr. Lehr had been arrested or to begin destroying or removing evidence.

However, Det. Wagner did explain why law enforcement might have had a *theoretical* concern. During the course of the investigation into Mr. Lehr, Det. Wagner had observed surveillance video cameras

set up at Mr. Lehr's business. He testified at the motion hearing:

> It is not uncommon for individuals to be able to monitor those cameras from a remote location so possibly that was not the only location where those cameras could be seen. (Doc 28:57; Appendix F:57).
>
> Well, if somebody was able to monitor the feed from location A from location B and if the proceeds, drugs, or other destructible evidence was at those locations, that evidence could be removed without our knowledge. (Doc 28:57; Appendix F:57).

In deciding that law enforcement had reasonable suspicion, the court appeared to find Det. Wagner's speculation compelling:

> The fact that there was video surveillance or video cameras at the business while in itself would not establish reasonable suspicion is important in that it leads to an inference that the activity, the buy and the bust, was being observed at some point by someone, and it is a reasonable inference that observance was taking place at the Herndon Street address. (Doc 28:80; Appendix F:80)(Emphasis added).

Ms. Flahavan would respectfully disagree that such an inference is reasonable or that there was any

reasonable basis to believe that she was monitoring the arrest from the Herndon residence.

Det. Wagner's testimony itself was expressed in terms of theoretical possibility rather than an articulable suspicion as applied to Ms. Flahavan. Det. Wagner stated that "if somebody" was watching the video, and "if" drugs or other evidence were at that location, the evidence "could" be removed. (Doc 28:57; Appendix F:57).

Further, according to the preliminary hearing, when law enforcement first observed surveillance cameras at the business, offsite monitoring and the risk of evidence destruction by Ms. Flahavan evidently did not come to mind:

> We knew there were video systems on the business, we didn't realize at that time that the video system also went back to the house and that we were being watched. (Doc 27:10).

Thus, although concern over the possible destruction or removal of evidence is valid, law

enforcement had no reasonable and articulable basis to think that Ms. Flahavan was engaged in such activity when they executed the investigatory stop.

The speculation/theoretical possibility that the video surveillance cameras were being monitored at a remote location by an associate of Mr. Lehr is not a specific articulable fact that supports a reasonable inference that Ms. Flahavan was actually monitoring the surveillance cameras from the Herndon residence.

When the facts set forth by law enforcement at the motion hearing are considered in totality, they do not add up to a reasonable suspicion that Ms. Flahavan was actually engaging in criminal activity that justifies the investigatory stop.

c. Reasonable suspicion of the mere *possibility* that criminal activity is afoot is insufficient to justify a Terry investigatory stop.

The facts set forth at the motion hearing do not establish a reasonable suspicion that Ms. Flahavan was

actually engaging in criminal activity. The belief that there might have been drugs in Ms. Flahavan's vehicle or that she might have been removing evidence from the residence functions more like speculation based on abstract possibility.

A reasonable inference is a qualitative measure of a certain degree of likelihood or probability. Speculation, in contrast, is simply a reflection of possibility.

Perhaps a reasonable law enforcement officer, looking at the available facts, would conclude that Ms. Flahavan might *possibly* be involved in some type of criminal activity. However, the standard of reasonable suspicion – balancing the state's interest in solving crimes with the individual's liberty and privacy interests protected by the Fourth Amendment – requires a more qualitative foundation.

In State v. Young, 212 Wis.2d 417, 424, 569

N.W.2d 84 (Ct.App.1997), the Wisconsin court of appeals considered whether an investigatory stop was justified by reasonable suspicion. Law enforcement initiated an investigatory stop of an individual suspected of being involved in drug dealing. The suspect was stopped in an area known for drug trafficking, and had been observed by another officer making 'short term contact' with an individual, suggesting that a drug transaction may have occurred.

The court of appeals concluded that the record provided insufficient facts to establish reasonable suspicion to justify the investigatory stop. The court noted that the high drug-trafficking area was also a residential neighborhood, and that there was nothing inherently suspicious about the suspect's observed conduct, as large numbers of innocent citizens engage in such conduct on a daily basis. State v. Young, 212 Wis.2d 417, 429-30, 569 N.W.2d 84 (Ct.App.1997).

Conduct that has an innocent explanation can also give rise to reasonable suspicion if a reasonable inference of unlawful can be objectively discerned. State v. Young, 212 Wis.2d 417, 430, 569 N.W.2d 84 (Ct.App.1997).The court in Young was unable to objectively discern a reasonable inference of unlawfulness when the observed conduct was not inherently suspicious nor became suspicious based on its context.

The present case is analogous to Young. In the present case, law enforcement observed Ms. Flahavan engaging in innocent conduct that by itself would not be suspicious. Only by considering the conduct in the context of speculation that there may be drugs at the residence, and that someone might possibly have been monitoring the arrest from the residence by remote video, did law enforcement justify the stop.

The *possibility* of criminal activity is insufficient to justify an investigatory stop. Based on that

circumstantial context, a reasonable belief that Ms. Flahavan was *actually* engaging in criminal activity cannot be objectively discerned from her conduct.

3. The evidence seized from Ms. Flahavan's vehicle must be suppressed in accordance with the exclusionary rule.

Since the investigatory stop of Ms. Flahavan constitutes an unreasonable seizure, the ensuing search of her vehicle must also be deemed unreasonable. In accordance with the exclusionary rule, the evidence recovered from her vehicle must be suppressed and excluded from use at trial.

The exclusionary rule requires courts to suppress evidence obtained through the exploitation of an illegal search or seizure. Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407 (1963). This rule applies not only to primary evidence seized during an unlawful search, but also to derivative evidence acquired as a result of the illegal search, unless the state shows sufficient attenuation from the original illegality to dissipate that

taint. State v, Carroll, 2010 WI 8, 322 Wis. 299, 778 N.W.2d 1, ¶19 (2010).

Under the attenuation doctrine, the determinative issue is whether the evidence came about from the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. State v. Simmons, 220 Wis. 2d 775, 781, 585 N.W.2d 165 (Ct. App. 1998); Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407 (1963).

Based on a consideration of the relevant factors such as the amount of time elapsed, the presence of intervening circumstances, and the degree of the unlawful conduct, the evidence seized from Ms. Flahavan's vehicle came about by direct exploitation of the illegality.

The illegal seizure commenced when law enforcement interfered with Ms. Flahavan's liberty without sufficient reasonable suspicion. Under the Fourth Amendment, law enforcement was not justified

in the initial seizure. The ensuing consent search and recovery of evidence occurred almost immediately after contact was made with Ms. Flahavan.

There is no indication that a lengthy amount of time passed between the illegal seizure and the discovery of evidence. There were no intervening factors to break the causal chain of events. Law enforcement officers may have believed they were acting appropriately, but the unreasonable seizure of Ms. Flahavan constitutes a significant infringement on her liberty. Since the recovery of evidence is not sufficiently attenuated from the unreasonable seizure, the evidence must be excluded.

CONCLUSION TO BRIEF AND ARGUMENT

Ms. Flahavan respectfully requests that this court reverse the denial of her motion to suppress, vacate the judgment of conviction, and remand for further proceedings.

Dated this 18th day of August, 2016.

Respectfully submitted,

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Certification of Brief Complaince with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5071 words.

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Certification of Appendix Complaince with Wis. Stats. § Wis. Stats. 809.19(2)(a).

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 Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the understanding of the issues raised, including oral or

written rulings or decisions showing the trial 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 required by law to be confidential, the portions of the record included in the Appendix are reproduced using first names and last initials instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portion of the record has been so reproduced as to preserved confidentiality and with appropriate references to the record.

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