STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2016AP1856 -CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JANAYA L. MOSS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WASHBURN COUNTY CIRCUIT COURT, THE HONORABLE EUGENE D. HARRINGTON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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POSITION ON ORAL ARGUMENT AND PUBLICATION

The respondent does not believe oral arguments are necessary in this case because the briefs presented can fully address the issues and develop the theories and legal authorities on either side.

The respondent does not believe that the decision in this case should be published because the issues on appeal can be resolved by the application of established legal principals to the facts of record.

STATEMENT OF THE CASE

Deputy Jordan Price testified that on November 21, 2015, at approximately 2:58 a.m, he was dispatched to a report of a fight between two females at Lookers Bar in Trego, Washburn County, Wisconsin. (R.23:2-3).

Upon entering the bar, Deputy Price observed a very loud and belligerent female, Ms. Moody, and another female, later identified to be the defendant herein, Ms. Moss, sitting on a bar stool appearing intoxicated. (R23:4). Deputy Price assumed the seated woman was intoxicated because she couldn't talk, didn't understand what was going on and was wobbly when she stood. (R.23:4).

According to the bartender, the two women had been arguing and they wouldn't pay their dancing fee. (R23:4).

Deputy Price then observed Ms. Moody yelling at the officers on scene and the other bar patrons and noticed that Ms. Moss was now standing next to a man holding her up so she wouldn't fall. (R23:4).

After observing Ms. Moody's outbursts, the officers placed Ms. Moody under arrest for disorderly conduct. (R23:5).

When asked to identify herself, Ms. Moody would only say her name was Jasmine. (R23:5). Deputy Price indicated he tried to ask her if she had any identification but she wasn't very cooperative. (R23:8). Deputy Price also asked the bartender what Ms. Moody's name and was told Jasmine was the only name she would go by that night. (R23:8).

Officers then noticed Ms. Moody was standing right next to a table with a wallet right in front of her. (R23:5). Deputy Price indicated he attempted to ask Ms. Moody if the wallet belonged to her but Ms. Moody wasn't paying attention to him. (R23:8).

Deputy Price looked inside the wallet, as he explained, because he was trying to get identification for Ms. Moody who was standing about two feet from the wallet. (R23:5). Although Ms. Moss was in the same room, she was located 10 to 15 feet away from the table where the wallet was located. (R23:5).

Deputy Price ultimately located Ms. Moss's identification inside the wallet, along with a bag containing a white substance which field tested positive for cocaine. (R23:5-6).

After the cocaine fell out of the wallet, Ms. Moody indicated the wallet belonged to Ms. Moss. Deputy Price then attempted to ask Ms. Moss about the white substance in her wallet. (R23:6).

Deputy Price also ultimately located a green leafy substance in the wallet identified as Marijuana and an additional bag of cocaine.(R23:6-7).

ARGUMENT

I. The Trial Court Properly Found That Deputy Jordan Price Had Authority To Search Janaya Moss's Unattended Wallet Because The Search Was A Valid Identification Search, A Valid Search Incident To Arrest, And A Valid Inventory Search.

A. Standard Of Review.

When the trial court denies a defendant's motion to suppress, the reviewing court must uphold the trial court's findings unless they are clearly erroneous. *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 750-751, 695 N.W.2d 277, 282. The trial court's conclusions of law, however, are reviewed de novo. *Id.*

B. Jayana Moss Lacks Standing To Object To The Validity Of The Search Of The Wallet She Left Unattended, 10 To 15 Feet Across The Room.

To raise a Fourth Amendment issue, an individual must show a governmental intrusion and that the individual has standing. *State v. Bruski*, 2007 WI 25, ¶¶21-22, 299 Wis. 2d 177, 186-187, 727 N.W.2d 503, 508.

Standing, in turn, exists if that person has a "reasonable expectation of privacy." State v. *Bruski*, 2007 WI 25, ¶22. Whether an individual has a reasonable expectation of privacy depends on

> First, whether the individual's conduct exhibited an actual (i.e., subjective) expectation of privacy in the area searched and the item seized… [and] if the individual has the reasonable expectation of privacy, courts determine whether such an expectation of privacy was legitimate or

> justifiable (i.e., one that society is willing to recognize as reasonable).

State. v. Bruski, 2007 WI 25, ¶ 23.

Here, although Ms. Moss now claims she had an expectation of privacy in the wallet she discarded on a table 10-15 feet away from her in a bar, her expectation is unreasonable. There is no indication from the record that she had any identifying information on the outside of the wallet.

Perhaps more importantly, she did nothing to proclaim the wallet was hers nor took any overt action to safeguard her property when she observed the law enforcement standing near the wallet. Instead, she continued standing next to a man, holding her up so she wouldn't fall, halfway across the bar (R23:4-5).

This case is similar to that of *State v. Earl*, in which the Wisconsin Court of Appeals determined that no reasonable expectation of privacy existed in a package whose sender's information is unknown and which is addressed to a fictitious recipient. *State v. Earl*, 2009 WI App 99, ¶17, 320 Wis. 2d 639, 650, 770 N.W. 755, 761.

As in the present case, in *State v. Earl*, the Court of Appeals ultimately determined that even if the true owner of an item, such as an unmarked package, has a subjective expectation of privacy, that expectation is not one that society accepts as reasonable. *State v. Earl*, 2009 WI App 99, ¶18.

As in *Earl*, here, although Ms. Moss may, subjectively, have expected privacy in the unmarked wallet she took no action to protect despite the gathering of law enforcement, her expectation is not one which is objectively reasonable.

The testimony elicited at the suppression hearing from Deputy Jordan Price was that the wallet was lying in a room, 10-15 feet away from Ms. Moss. (R23:5). Ms. Moss's co-defendant, Ms. Moody, was the closest to the

wallet, which lay directly in front of the table she was standing two feet from. (R23:5).

Rather than protecting the contents of her wallet, Ms. Moss continued to stand across the room while officers arrested Ms. Moody then ultimately looked in the wallet, for clues as to the identify of Ms. Moody. (R23:5).

It is reasonable to surmise, like in *Earl*, the ownership of the wallet could only be discovered by looking inside.

Although Ms. Moss may subjectively have expected the contents of her wallet to remain private, when she abandoned it 10-15 feet across the room next to her inebriated co-defendant, her expectation is simply unreasonable.

C. Deputy Price Was Legally Justified When He Looked Inside Ms. Moss's Wallet.

i. Deputy Price's Search Of The Wallet Was A Valid Identification Search.

While investigating a crime, an officer may briefly detain an individual and request that person provide identification if the officer reasonably suspects that person is involved in a crime. *State v. Black*, 2000 WI App 175, ¶10, 238 Wis. 2d 203, 209, 617 N.W.2d 210, 212.

As the Court of Appeals noted "unless the officer is entitled to at least ascertain the identity of the suspect, the right to stop him can serve no useful purpose at all." *State v. Black*, 2000 WI App 175, ¶14. *(quoting State v. Flynn*, 92 Wis. 2d 427, 442, 285 N.W.2d 710 (1979)).

Indeed, long ago in *Flynn*, the Wisconsin Supreme Court upheld a search where the officer removed the defendant's wallet from his pocket and opened it, indicating, "the Fourth Amendment does not require a policemen who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to

escape". *State v. Flynn*, 92 Wis. 2d 427, 433, 285 N.W.2d 710, 712 (1979).

While the right to conduct an identification search is not without limits, in *Flynn* the search was upheld because the Court noted the officers weren't "fishing for whatever evidence they could find, but sought merely to learn the defendant's identify." *State v. Black*, 2000 WI App 175 at ¶15. Indeed, the Wisconsin Supreme Court made special note of the fact that the intrusion upon the defendant's privacy was as limited as possible to effectuate the identification and search for weapons and that the defendant could have avoided the intrusion in the first place by simply identifying himself. *State v. Flynn*, 92 Wis. 2d 427, 448.

Ultimately, the Wisconsin Court of Appeals concluded that when officers are justified in stopping a person and requesting their identification, and when that person refuses to provide that identification, the officer may "remove his or her wallet to obtain identification." *State v. Black*, 2000 WI App 175, ¶15.

In the present, case, Deputy Price was justified in opening the wallet as a proper identification search because he was actively investigating the complaint that Ms. Moss and Ms. Moody had been disorderly and were refusing to pay their dancers' fees.

While investigating whether Ms. Moss and Ms. Moody had been disorderly, pursuant to *Flynn* and *Black*, Deputy Price was entitled to ask Ms. Moody for her identification. When Ms. Moody refused to indicate anything more than "Jasmine" and the bartender couldn't provide any more complete information, Deputy Price properly looked inside the wallet lying two feet in front of "Jasmine" to see if there was identifying information inside.

The search should also be upheld as a valid identification search because the scope of the search was limited pursuant to *Flynn* and Deputy Price didn't engage in a "fishing expedition." Deputy Price was merely

looking for a photo identification when the cocaine fell out of Ms. Moss's wallet.

As Deputy Price was entitled to search for identification in the vicinity of Ms. Moody, including inside the wallet which he reasonably assumed belonged to Ms. Moody, who was refusing to provide her full name, the search was a proper identification search and the evidence should not be suppressed.

ii. The Search Was Also Permissible As A Valid Search Incident To Arrest Of Both Ms. Moss And Ms. Moody.

In *State v. Sykes*, which arose under similar facts to those in the present case, where officers arrested the defendant for possession of cocaine immediately after a search of his wallet, although officers originally had probable cause for criminal trespass, the Wisconsin Supreme Court determined that the search incident to arrest was valid. *State v. Sykes*, 2005 WI 48, ¶22, 279 Wis. 2d 742, 756, N.W.2d 277, 284. As the Court explained, a "search may immediately precede a formal arrest so long as the fruits of the search are not necessary to support the arrest." *State v. Sykes*, 2005 WI 48, ¶ 16.

Of course, the scope of such a search is limited to the defendant's "wing-span" or "area from within which [the suspect] might gain possession of a weapon or destructible evidence." *State v. Sykes*, 2006 WI 48, ¶ 20 (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034 (1969).

Here, the trial court's denial of the defendant's suppression motion should be upheld because Deputy Price had proper justification to search the wallet as a valid search incident to the arrest of Ms. Moody. Just prior to the search of Ms. Moss's wallet, Ms. Moody was placed under arrest for her continuing unruly, disorderly behavior. While the officers were present, Ms. Moss exhibited no ownership, possession or control over the wallet and therefore, the officer's reasonably assumed it belonged to Ms. Moody. The search of the wallet,

therefore, occurred as a proper search incident to Ms. Moody's arrest as it was clearly within her wingspan and could have contained small weapons.

In addition, examination of the wallet was also a proper search incident to the arrest of Ms. Moss for disorderly conduct. Although Ms. Moody's behavior drew the deputies' attention first, it should not be forgotten that the officers were also investigating Ms. Moss for her involvement in the argument with Ms. Moody.

Although Ms. Moss was ultimately charged only with Possession of Cocaine and Possession of Tetrahydrocannabinols, pursuant to *Sykes* the search of the wallet was also proper because at the time, Deputy Price had sufficient probable cause to arrest both Ms. Moss and Ms. Moody for their unruly behavior at Looker's Bar that evening. Had the wallet not been examined moments earlier as a valid identification search of Ms. Moody, undoubtedly the wallet would have been searched moments later as a valid search incident to Ms. Moss's arrest.

iii. Even If The Court Determines The Search Was Not Either A Valid Identification Search Or Search Incident Arrest, The Evidence Should Not Be Suppressed Because It Would Have Inevitably Been Discovered As A Part Of An Inventory Search When Ms. Moody And Ms. Moss Were Taken To The Jail After Being Arrested For Disorderly Conduct.

Both the United States Supreme Court and the Wisconsin Supreme Court have long recognized the inevitable discovery exception to the exclusionary rule whereby "evidence obtained during a search which is tainted by some illegal act may be admissible if the tainted evidence would have inevitably been discovered by lawful means." *State v. Jackson*, 2016 WI 56, ¶47, 369 Wis. 2d 673, 697-698, 882 N.W.2d 422, 434.

To fall within the exception, the Wisconsin Court of Appeals has applied the following three-pronged analysis:

> To establish that the evidence would have been inevitably discovered, the State must demonstrate, by a preponderance of the evidence, that: (1) there is a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) prior to the unlawful search the government also was actively pursuing some alternative line of investigation.

State v. Jackson, 2016 WI 56, ¶42.

Indeed, the inevitable discovery exception frequently occurs when the evidence would have been discovered during a subsequent inventory search. *State v. Jackson*, 2016 WI 56, ¶58.

Finally, it is well recognized that "[e]ven if the police were not actively pursuing an alternative line of investigation at the time of police error or misconduct, for example, the government may well be able to establish that the execution of routine police procedure or practice inevitably would have resulted in discovery of disputed evidence." *State v. Jackson*, 2016 WI 56, ¶62 ((quoting *United States v. Thomas,* 524 F.3d 855, (8th Cir. 2008)).

As noted by the Wisconsin Supreme Court in *State v. Weide,* inventory searches "serve three vital functions: protecting the owner's property while it is in police custody; protecting the police department from claims that the property was lost or stolen while it was in police custody; and protecting the police from harm." *State v. Weide*, 155 Wis. 2d 537, 542-543, 455 N.W. 2d 899, 902 (1990).

In addition, it is not necessary that the defendant's vehicle be impounded or the defendant be in custody for valid inventory searches of closed containers. *State v. Weide*, 155 Wis. 2d. 537, 547-548.

In the present case, the trial court properly refused to suppress the evidence. Here, the search of the wallet proper as a valid identification search, and a proper search incident to the arrest of both Ms. Moody and Ms. Moss. Ultimately, however, had the wallet not been searched at Looker's Bar, inevitably the contents of the wallet would have been discovered anyway as part of the booking process at the Washburn County Jail when both Ms. Moss and Ms. Moody were arrested.

CONCLUSION

As Ms. Moss lacks standing to object to the search of her wallet and examination of the contents of the wallet was proper based upon the three equally proper grounds stated herein, the respondent respectfully requests that this court affirm the trial court's denial of the defendant's suppression motion in this matter.

Dated this 28th day of March, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,632 words.

Dated this 28th day of March , 2017.

ANGELINE WINTON
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 28th day of March , 2017.

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