STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP1856-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JANAYA L. MOSS,

Defendant-Appellant.

On a Notice of Appeal from a Judgment of Conviction
Entered in the Circuit Court for Washburn County,
the Honorable Eugene D. Harrington, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
melek@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

CASES CITED

CONSTITUTIONAL PROVISIONS CITED

ARGUMENT

I. No Exception to the Warrant Requirement Permitted the Deputy's Warrantless Search. Therefore, the Search Was Unconstitutional.

A. Ms. Moss has standing to challenge the search.

As argued in Ms. Moss's brief-in-chief, she has standing to contest the warrantless search of her wallet. (Moss's Brief, 5-9). The state argues otherwise. (State's Brief, 1-3). The state claims that Ms. Moss abandoned her wallet that evening when she placed it on table at which her friends had gathered and drifted 10 to 15 feet from the area. (State's Brief, 2-3). The state's position is both unsupported by case law and unreasonable.

i. Abandoned items for Fourth Amendment purposes.

"A defendant does not have a reasonable expectation of privacy in an item once it has been abandoned." ***State v. Roberts***, 196 Wis. 2d 445, 453, 538 N.W.2d 825 (Ct. App. 1995). Whether property has been abandoned is primarily a question of intent, to be determined by the defendant's words or actions concerning the alleged abandonment. *See* ***United States v. Alexander***, 573 F.3d 465, 472 (7th Cir. 2009); *see also* ***Ball v. State***, 57 Wis. 2d 653, 662, 205 N.W.2d 353 (1973).

The seminal case on abandonment in this context is ***Hester v. United States***, 265 U.S. 57 (1924). In ***Hester***, the police were investigating the defendant for concealing distilled spirits. ***Hester v. United States***, 265 U.S. 57, 58 (1924). Upon seeing the defendant deliver a quart bottle to

another man, the police gave chase. ***Id***. During the chase, the defendant discarded the jug he was carrying. ***Id***. The United States Supreme Court held that it was lawful for the police to obtain and examine the contents of the jug without a warrant because the property had been abandoned. ***Id***.

The United States Supreme Court once again addressed the concept of abandonment 36 years later in ***Abel v. United States***, 362 U.S. 217 (1960). In ***Abel***, police arrested a man in his hotel room and allowed him to pack his belongings before being escorted off the property. ***Abel v. United States***, 362 U.S. 217, 223-24 (1960). The man placed several items in the room's wastepaper basket. ***Id***. at 224. The United States Supreme Court held that it was lawful for the police to obtain those items without a warrant because the defendant had abandoned them by throwing them away, vacating the room, and paying his hotel bill. ***Id***. at 241.

The Wisconsin Supreme Court's decisions on abandonment are in line with ***Hester*** and ***Abel***. In ***Molina v. State***, 53 Wis. 2d 662, 193 N.W.2d 874 (1972), the police were involved in a high-speed chase of an automobile and witnessed the defendants emptying the contents of envelopes on the road as they traveled. ***Molina v. State***, 53 Wis. 2d 662, 669, 193 N.W.2d 874 (1972). The court held that there was no unlawful seizure when the police picked up the discarded material without a warrant. ***Id***. at 668-69. Similar to ***Hester*** and ***Abel***, the court reasoned that there was an "affirmative act of divesting control, possession, and ownership by emptying powdery contents and abandoning emptied envelopes onto a public street." ***Id***. at 669; *accord* ***State v. Roberts***, 196 Wis. 2d 445, 456, 538 N.W.2d 825 (Ct. App. 1995) (warrantless search of defendant's car not unlawful where police attempted to arrest defendant and defendant fled from vehicle).

One year later, in ***Ball v. State***, 57 Wis. 2d 653, 205 N.W.2d 353 (1973), the Wisconsin Supreme Court took on another abandonment case. There, police arrested the defendant at a tavern several miles from his home. ***Ball v. State***, 57 Wis. 2d 653, 662, 205 N.W.2d 353 (1973). Police then conducted a warrantless search of a trash barrel located on the defendant's property. ***Id***. The barrel was not visible to people passing by the property. ***Id***. Although the defendant had attempted to burn the contents of the barrel, the court considered any hypothetical decision to abandon the property "a revocable decision which would not be made irrevocable until defendant either vacated the premises or in some way placed the barrel or its contents in 'public view' outside his expectation of privacy." ***Id***. Accordingly, the court held that the warrantless search was unlawful. ***Id***. at 664.

Consistent with the above cases, in ***State v. Kirby***, 2014 WI App 74, 355 Wis. 2d 423, 851 N.W.2d 796, the court of appeals upheld the warrantless search of the defendant's backpack where the defendant left it unattended at his friend's house and disclaimed any ownership interest in the property when the police asked whose it was. ***State v. Kirby***, 2014 WI App 74, ¶21, 355 Wis. 2d 423, 851 N.W.2d 796; *accord* ***Alexander***, 573 F.3d at 473 (warrantless search of vehicle not unlawful where defendant specifically disclaimed ownership interest in car).

The principle that emerges from these cases is clear: for a finding of abandonment, there must be some affirmative act which leads a reasonable person in the searching officer's position to believe that the defendant has relinquished his or

her property interest in the item to be searched. It is within this legal framework that the court must evaluate the facts of Ms. Moss's case.[1]

ii. Ms. Moss did not abandon her wallet.

In light of the above case law, the state's position that Ms. Moss abandoned her wallet on the night in question is tenuous. There can be no reasonable claim that Ms. Moss threw her wallet away when she placed it on the table at which her friends had gathered and drifted 10 to 15 feet from the area. Consequently, ***Hester***, ***Abel***, and ***Molina*** are inapposite. Moreover, the record is clear that the deputy never asked Ms. Moss whether the wallet was hers. Therefore, Ms. Moss never disclaimed an ownership interest in the property, making ***Kirby*** distinguishable as well.

The facts of this case most closely align with ***Ball***. As in ***Ball***, the circumstances here support the presumption that Ms. Moss intended to return to her wallet. Just as it is reasonable to assume that a homeowner who is frequenting a tavern will return to his premises (and the property contained therein), it is reasonable to assume that a bar patron will return to her wallet if she places it on a table at which her friends are gathering for the evening. This is not a situation where the deputy walked into an empty bar and saw a wallet left behind. When the deputy got to the bar, he saw Jasmine standing near the table with the wallet on it. (23:6). He knew that Jasmine was, at a minimum, in the company of Ms. Moss

[1] The state's citation to ***State v. Earl***, 2009 WI App 99, 320 Wis. 2d 639, 770 N.W.2d 755, is misplaced. ***Earl*** is not an abandonment case: the court specifically distinguished ***Earl*** from abandonment cases by noting that Earl "failed to show that he had the ability to possess or control the package in the first instance." ***Id***., ¶15.

that evening. (23:5). And there were other bar patrons in the area. (23:5). No reasonable person under these circumstances would believe the wallet to be abandoned.

The state's suggestion that Ms. Moss was required to place identifying information on the *outside* of her wallet in order to safeguard her expectation of privacy in this situation is simply unreasonable. (State's Brief, 2). Is the state really saying that a bar patron must write her name on the outside of her personal items in order to prevent the police from searching or seizing her property when she temporarily leaves her table to get a drink (or talk to a friend or go to the bathroom)? To adopt the state's position is to declare "open season" on bar patrons across this state.

The state's further suggestion that Ms. Moss was required to proclaim the wallet as hers or take actual possession of the property once the deputy was within striking distance of the table in order to protect her privacy is similarly unreasonable. (State's Brief, 2). For starters, there is no indication in the record that Ms. Moss even knew that the deputy was near her wallet. But even if she did, was she to assume that the deputy would perform a warrantless search of her property unless she immediately protested? It has long been established that warrantless searches are per se unreasonable, ***State v. Parisi***, 2016 Wi 10, ¶28, 367 Wis. 2d 1, 875 N.W.2d 619—not the other way around.

The bottom line is that Ms. Moss took no affirmative act which would have led a reasonable person in the deputy's position to believe that she had relinquished her property interest in the wallet. She therefore did not abandon her property and has standing to contest the deputy's warrantless search in this case.

B. The deputy's warrantless search of Ms. Moss's wallet was unreasonable.

i. The identification search exception does not apply.

The state first argues that the identification search exception to the warrant requirement permitted the deputy's warrantless search of Ms. Moss's wallet. (State's Brief, 3-5). The state generally acknowledges that courts undertaking the inquiry must employ "a balancing test in which the need for the particular search is weighed against the invasion of personal rights that the search entailed." ***State v. Black***, 2000 WI App 175, ¶15, 238 Wis. 2d 203, 617 N.W.2d 210. But the state's analysis in this regard ignores several undisputed facts that are central to the issue at bar.

Most importantly, the state fails to acknowledge that the deputy performed the so-called identification search *after* he handcuffed and arrested Jasmine for disorderly conduct. (23:6).[2] This key fact significantly diminishes society's need for the particular search and distinguishes this case from both ***Flynn*** and ***Black***, where the searches occurred in the midst of investigations into serious crimes. ***State v. Flynn***, 92 Wis. 2d 427, 431, 285 Wis. 2d 710 (1979); ***Black***, 238 Wis. 2d 203, ¶¶2-4. This was not a situation where the deputy's failure to

[2] As noted in Ms. Moss's brief-in-chief, the evidence is clear that the deputy never performed an investigative stop on Ms. Moss. (Moss's Brief, 12, n. 4). The state's claim that the deputy was "actively investigating" Ms. Moss for disorderly conduct is therefore unsupported by the record. (State's Brief, 4). Similarly, there is no support in the record for that state's contention that the deputy was "actively investigating" Ms. Moss and Jasmine for allegedly not paying their dancing fees. (State's Brief, 4).

immediately identify Jasmine posed a threat to an ongoing investigation and to society at large—Jasmine was not going anywhere.

The state further ignores the following critical facts: (1) the deputy did not know whether the wallet belonged to Jasmine; (2) the deputy *did* know that Jasmine was, at a minimum, in the company of Ms. Moss that evening; and (3) the deputy *did* know that there were other patrons in the area. (23:5, 9). These undisputed facts heighten the nature of the privacy intrusion at issue here and further distinguish this case from ***Flynn*** and ***Black***.

The state maintains that the scope of the deputy's search was "limited" because he did not "engage in a fishing expedition." (State's Brief, 4). But when compared to the officers' actions in ***Flynn*** and ***Black***, it is evident that the deputy's search was not as limited as was reasonably possible to effectuate the purpose underlying it. In ***Flynn***, the officer knew before reaching into the defendant's pocket that the defendant was carrying identification in his wallet. ***Flynn***, 92 Wis. 2d at 431. In ***Black***, the officer did not know the precise location of the defendant's wallet, so he conducted a frisk as a means of discovering it. ***Black***, 238 Wis. 2d 203, ¶5. Here, by contrast, the deputy did not know whether Jasmine had identification and did not stop with a frisk of Jasmine's person. He proceeded to pick up a wallet on a nearby table and open it, without asking around to see whose it was, and with full knowledge that other patrons were in the area. This was not a limited search for identification within the meaning of ***Flynn*** and ***Black***.

The import of the above distinctions must not be overlooked: the court in ***Flynn*** went out of its way to state that its holding was "limited to factual situations such as the

one presently before [it]." ***Flynn***, 92 Wis. 2d at 448-49. Here, the justification for obtaining Jasmine's identity pales in comparison to the compelling reasons supporting the searches in ***Flynn*** and ***Black***, and yet the search in this case was broader in scope. Given these significant distinctions, the identification search exception to the warrant requirement did not permit the deputy's warrantless search of Ms. Moss's wallet.

ii. The search incident to arrest exception does not apply.

The state also contends that the search incident to arrest exception to the warrant requirement permitted the deputy's warrantless search, either as applied through the deputy's conduct toward Jasmine or Ms. Moss. (State's Brief, 5-6). The state is incorrect.

With respect to the exception as applied to Jasmine, the state maintains that the deputy's search of the wallet was lawful because the wallet was within Jasmine's wingspan. (State's Brief, 6). The state offers ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, for support. In ***Sykes***, the defendant was sitting in his living room when the police asked him where his wallet was located. ***State v. Sykes***, 2005 WI 48, ¶21, 279 Wis. 2d 742, 695 N.W.2d 277. The defendant nodded and pointed under a cedar chest in the living room. ***Id***. Importantly, because the defendant apparently conceded that the search of his wallet was within the physical area for a lawful search incident to arrest, the court applied the exception. ***Id***.

Of course, this case is different. Ms. Moss argues that the search incident to arrest exception does not apply because there was no possibility that Jasmine could have reached into the wallet. (Moss's Brief, 13-14). The question is not simply

whether Jasmine was within reaching distance of the wallet, as the state maintains. Rather, the question is whether Jasmine was within reaching distance of the wallet *and* unsecured. *See* ***Arizona v. Gant***, 556 U.S. 332, 339-42 (2009). Clearly, the answer is no: the undisputed evidence shows that the deputy handcuffed Jasmine upon arresting her for disorderly conduct. (23:6). Thus, there was no possibility that Jasmine could have reached into the wallet at the time of the search, and the exception does not apply in this context.

As for the exception as applied to Ms. Moss, the state contends that the deputy's search of the wallet was lawful because, at the time, he had probable cause to arrest Ms. Moss for disorderly conduct. (State's Brief, 6). As argued in Ms. Moss's brief-in-chief, at the time of the search, the deputy did not have probable cause to arrest Ms. Moss for disorderly conduct or any other crime. (Moss's Brief, 15). But even if he did, the exception still would not apply, as Ms. Moss was 10 to 15 feet from the wallet. Thus, there was no possibility that Ms. Moss could have reached into the wallet at the time of the search, and the exception does not apply in this context.

Because no valid exception to the warrant requirement permitted the deputy's warrantless search, the deputy's action was unconstitutional.

II. The Inevitable Discovery Doctrine Does Not Render the Fruits of the Deputy's Unlawful Search Admissible.

Finally, the state argues that the fruits of the deputy's unlawful search should not be suppressed because the evidence would have been inevitably discovered by way of an inventory search following the arrest of Jasmine or Ms. Moss. (State's Brief, 6-8). Again, the state is wrong.

As argued in Ms. Moss's brief-in-chief, the state's position unreasonably assumes that the contents of Ms. Moss's wallet would have been inventoried following Jasmine's arrest. (Moss Brief, 16). The deputy had no idea whose wallet it was. The wallet was not on Jasmine's person; rather, it sat on a table at a bar with other patrons in the area. To suggest, as the state does, that the deputy would have been perfectly justified in seizing (and ultimately searching) whatever property happened to be in the area following Jasmine's arrest without first determining ownership is patently unreasonable.

The state's position that the contents of Ms. Moss's wallet would have been inevitably discovered by way of an inventory search following the hypothetical arrest of Ms. Moss for disorderly conduct is equally unavailing. Prior to the search, the police did not have probable cause to arrest Ms. Moss. When the deputy got to the bar, he did not see anyone arguing. Instead, he saw Jasmine, who was very loud and belligerent. He also saw Ms. Moss, who was sitting on a barstool, apparently intoxicated. An unsubstantiated claim that two women were arguing at a bar does not give rise to probable cause to arrest for disorderly conduct. *Compare* ***State v. Jackson***, 2016 WI 65, ¶¶74-87, 369 Wis. 2d 673, 882 N.W.2d 422 (the state offered "substantial evidence" to show it had probable cause to search the defendant's home absent the illegal information it obtained during a police interrogation).

Moreover, prior to the search, the police were not actively pursuing an investigation into Ms. Moss's purported disorderliness. The evidence shows that the deputy got to the bar, saw Jasmine and Ms. Moss, spoke with the bartender,

and made the decision to arrest Jasmine for disorderly conduct. (23:5-6). Active pursuit is an important indicator of inevitability, ***Id***., ¶66, and here is it clearly absent.

The state has therefore failed to prove by a preponderance of the evidence that it inevitably would have discovered the contents of Ms. Moss's wallet.

CONCLUSION

For the reasons set forth above, as well as those set forth in the brief-in-chief, Ms. Moss respectfully requests that the court reverse the judgment of conviction and remand to the circuit court with directions that all evidence derived from the search be suppressed.

Dated this 17th day of April, 2017.

Respectfully submitted,

KARA L. MELE
State Bar No. 1081358
Assistant State Public Defender

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
melek@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 2,997 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 17th day of April, 2017.

Signed:

KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
melek@opd.wi.gov

Attorney for Defendant-Appellant