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COURT OF APPEALS OF WISCONSIN
DISTRICT NO. I

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 2016AP001912-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

Vs.

MARCELLOUS D. TALLY-CLAYBORNE,

Defendant-Appellant,

APPEAL FROM A JUDGMENT OF CONVICTION FROM THE
CIRCUIT COURT, MILWAUKEE COUNTY,
THE HONORABLE T. CHRISTOPHER DEE AND PAUL J. RIFELJ
PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

- I. SHOULD THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS EVIDENCE HAVE BEEN GRANTED?

TRIAL COURT ANSWER: NO

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

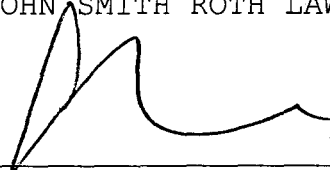
Appellant submits that the legal issues are clearly set forth in the Briefs, and the factual situation is properly reflected in the Statements of Fact and Briefs. Therefore, oral argument and publication are not necessary, but would be welcome if the Court so decides.

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using a monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this brief is 13 pages.

Dated: December 20, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

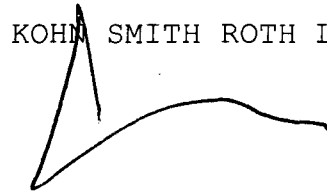
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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 this paper copies of this brief filed with the court and served on all opposing parties.

Dated: December 20, 2016.

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A handwritten signature in black ink, appearing to read 'Susan M. Roth', written over a horizontal line.

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STATEMENT OF THE CASE

On August 20, 2014, a Criminal Complaint was filed charging Mr. Tally-Clayborne with Count 1: Carrying a Concealed Weapon, in violation of Wis. Stats. Sec. 941.23(2) and 939.51(3)(a). (R:1) (A-App. 104). On that day, Mr. Tally-Clayborne made his Initial Appearance before The Honorable Rosa M. Barillas, at which time he was given a \$500 Signature Bond with various conditions. Two additional court appearances occurred, and on November 3, 2014, trial counsel filed a Notice of Motion and Motion to Suppress Evidence. (R:4) (A-App. 105). On January 9, 2015, a motion hearing was held at which City of Milwaukee Police Officer Mark Dillman testified. Id. (R:33) (A-App. 115). The Defense motion argued that there was not a basis for the stop and search of Mr. Tally-Clayborne on the evening of the incident alleged in the Criminal Complaint. Id. On January 16, 2016, The Honorable Christopher T. Dee denied the Defense motion in an oral ruling. (R:34) (A-App. 138).

After several intervening court dates, Mr. Tally-Clayborne's case proceeded to trial on March 16, 2016. On March 17, 2016, a jury found Mr. Tally-Clayborne guilty of Count 1: Carrying a Concealed Weapon, in violation of Wis. Stats. Sec. 941.23(2) and 939.51(3)(a). (R:18). Mr. Tally-Clayborne was sentenced to 20 days in the Milwaukee County

House of Correction on April 14, 2016, which was stayed until May 5, 2016. (R:44) (R:24) (A-App. 109). An Amended Judgment of Conviction was filed on April 6, 2016. (R:27) (A-App. 111). Counsel subsequently filed a Notice of Motion and Motion to Stay Sentence Pending Appeal, and on May 3, 2016, Mr. Tally-Clayborne's sentence was stayed pending appeal. (R:20). A Notice of Intent to Pursue Post Conviction Relief was filed on April 15, 2016, and a Notice of Appeal was filed on September 26, 2016. (R:25) (R:30) (A-App. 113).

STATEMENT OF THE FACTS

On August 18, 2014, City of Milwaukee Police Officers Sean Mahnke and Mark Dillman heard two gunshots in the area of 2nd and Ring Streets, in the City and County of Milwaukee. (R: 1) (A-App. 104). Officer Dillman indicated that he and his partner were in their squad car parked in a parking lot and the shots sounded as though they came from within one block of the squad. (R:33 at 6-7) (A-App. 120). Upon driving towards the sound of the shots, the officers came upon Mr. Tally-Clayborne and two other individuals at 3227 N. 2nd Street. (R:1) (A-App. 104). Officer Dillman did not see any one else in the vicinity, and stopped because he believed the three individuals were in the vicinity of where he heard the gunshots. (R:33 at 8) (A-App. 122). Officer Dillman and his partner exited their squad car and asked the three individuals

to show their hands because they (the officers) were investigating the sound of gunfire. (Id. at 9) (A-App. 123). Upon being asked to show the officers their hands, the three individuals started pointing north, indicating that the shots came from down the street. Id. Officer Dillman and his partner approached the three individuals, with Officer Dillman conducting a pat-down of one individual and his partner conducting a pat-down of another individual. Id. Mr. Tally-Clayborne was the third individual who had not yet been subject to a pat-down. Id. While the officers conducted a pat-down the other two individuals, Mr. Tally-Clayborne began to walk away from the scene towards a vehicle, and reach towards the waistband of his pants. (R:1) (A-App. 104). Officer Dillman approached Mr. Tally-Clayborne and began to conduct a pat-down search of him. During the pat-down, Mr. Tally-Clayborne kept lowering his arms to his sides and leaning on a vehicle to prevent the search of the right side of his body. Id. Upon moving Mr. Tally-Clayborne away from the vehicle and lifting his arms, Officer Dillman heard what sounded like a metal object hitting the pavement, and observed a .32 caliber revolver lying at Mr. Tally-Clayborne's feet. Id. The gun was loaded with two unfired cartridges that did not match the caliber of the gun. (R:33 at 12) (A-App. 126).

I. The Defendant-Appellant's Motion Should Have Been Granted by the Circuit Court.

On November 3, 2014, trial counsel filed a Notice of Motion and Motion to Suppress Evidence with the Circuit Court. (R:4) (A-App. 105). In the motion, citing Terry v. Ohio, 367 U.S. 643 (1961) as well as the Fourth and Fourteenth Amendments of the United States Constitution, Article I, Sections 8 and 11 of the Wisconsin State Constitution, and Wis. Stats. Secs. 968.24, Counsel argued that Mr. Tally-Clayborne was unlawfully stopped, detained and searched by law enforcement. Id. trial counsel also moved for the suppression of any and all derivative evidence, citing Taylor v. Alabama, 457 U.S. 687 (1982); Wong Sun v. United States, 371 U.S. 471 (1963); State v. Brady, 130 Wis.2d 443 (1986); and State v. Smith, 131 Wis.2d 220 (1986).

In the Defense Motion, trial counsel argued that when Mr. Tally-Clayborne and his companions were approached by Officer Dillman and Mahnke on the 18th of August 2014, they were not engaged in any illegal activity nor were there any complaints about the behavior of the three individuals from other people in the community. (R:4 at 2) (A-App. 106). trial counsel argued that the officers lacked reasonable suspicion under State v. Rutzinski, 2001 WI 22, ¶14, 241 Wis.2d 729,

623 N.W.2d 516, that Mr. Tally-Clayborne and the two other individuals "committed, [were] committing, or [were] about to commit an offense." Id. Citing State v. Johnson, 2007 WI 32 ¶21, 299 Wis.2d 675, 691, 729 N.W.2d 182 (citations omitted), Counsel argued that "there were no factors present which would have caused reasonable prudent offer under the circumstances to believe that his or her safety or that of others was in danger because the person may be armed with a weapon and dangerous." (R:4 at 3) (A-App. 107).

A Motion Hearing was held on January 9, 2015. Officer Dillman was the only officer to testify. He testified that on the 18th of August, he and his partner were parked in a squad car at 3rd and Auer Avenue in the City of Milwaukee when they heard two gunshots that sounded as though they came from approximately 2nd and Ring Street, or within a block from where they were parked. (R:33 at 5-6) (A-App. 119). Upon hearing the shots, Officer Dillman drove the car out of the parking lot and drove half a block towards where he thought the shots had emanated. (Id. at 7). The officer observed three individuals, one of whom was later identified as Mr. Tally-Clayborne, standing on the sidewalk at approximately 3227 North 2nd Street. (Id. at 8) (A-App. 121). Officer Dillman stopped his vehicle near the three individuals, and he and his partner asked them to show the officers their hands

because the officers were responding to the sounds of gunshots being fired. (Id. at 9) (A-App. 123). The individuals began to point north, indicating that the shots had come from that direction, but Officer Dillman did not necessarily believe them, testifying that he had "had that incident happen before to me." Id.

Officer Dillman went on to explain that he and his partner began to pat-down two of the individuals, with Mr. Tally-Clayborne being the individual who had not yet been subject to a pat-down. (Id. at 9-10) (A-App. 123). As the officers were patting down the other two individuals, Officer Dillman indicated that he observed Mr. Tally-Clayborne begin to walk around the side of a parked vehicle, an action that the officer described as suspicious. (Id. at 10) (A-App. 124). As the officer instructed Mr. Tally-Clayborne to stop, he (the officer) observed Mr. Tally-Clayborne reach towards the waist area of his pants. (Id. at 11) (A-App. 125). Officer Dillman testified that, fearing Mr. Tally-Clayborne was armed with a firearm, he conducted a pat-down search of Mr. Tally-Clayborne that involved the officer physically raising Mr. Tally-Clayborne's arms away from his waist and body, at which time the officer heard the sound of something metal hitting the street and observed a chrome revolver lying on the

pavement. (Id. at 11-12) (A-App. 125). The officer testified that the gun he recovered from the ground contained two unspent cartridges that were of a different caliber than the gun itself. (Id. at 12) (A-App. 126). Mr. Tally-Clayborne was subsequently taken into custody for carrying a concealed weapon. Id.

On cross-examination, Officer Dillman testified that he did not receive a complaint or call regarding "shots fired" but rather was responding to what he believed to be the sound of gunfire based on his training and experience. (Id. at 14) (A-App. 128). The officer did not see who fired the shots, and was "guesstimating" from how far away from his squad the shots were fired. Id. He admitted that many variables can make a gunshot sound further or closer away such as where the gun is fired and the caliber of the gun. (Id. at 15) (A-App. 129). Officer Dillman further testified that he later learned that one of Mr. Tally-Clayborne's companions lived at the address in front of which they were standing when the officers approached them. Id. None of the individuals ran from Officer Dillman or his partner when the officer pulled the squad car up to the two individuals. (Id. at 16) (A-App. 130). The individuals were standing on the sidewalk and the officers did not draw their weapons upon approaching the individuals. Id. Officer Dillman testified that the decision to pat-down

the Mr. Tally-Clayborne and his friends came as soon as he and his partner exited the vehicle, even before the individuals were asked to show their hands and subsequently indicated that the shots came from the north. (Id. at 17) (A-App. 131). No casings were observed on the ground when the officers approached, nor were any found after Mr. Tally-Clayborne's arrest. (Id. at 18) (A-App. 132). The officer did not ask the individuals' names prior to patting them down, whether any of the individuals lived at the address outside which they were standing, nor did the officer receive a complaint about the individuals standing on the sidewalk. Id. Mr. Tally-Clayborne did not run as he began to approach the parked vehicle, and Officer Dillman did not draw his weapon when Mr. Tally-Clayborne began to reach for his waistband. (Id. at 19) (A-App. 133).

On redirection examination, Officer Dillman testified that he has heard shots fired so many times that he has "lost count." (Id. at 20) (A-App. 134).

The court put the case over for a decision, and on January 16, 2015, the Honorable T. Christopher Dee denied the Defense Motion to Suppress Evidence. Citing Terry and State v. Sumner, 2008 Wis. 94, The Court indicated that the standard used to judge this instances is an objective one, examining what an "objective, reasonable, prudent officer [would] do in

this circumstance." (R:34 at 3) (A-App. 140). In making the determination that the officers' actions were justified, the court reasoned that, despite not having "a ton of information," the sound of gunshots near to the officers coupled with Mr. Tally-Clayborne and his companions being the only people that appear to be nearby, coupled with Mr. Tally-Clayborne approaching the vehicle and reaching towards his waistband would cause an objective reasonable officer to stop the three individuals and pat them down because the nature of the investigation "logically dictates that there's some gun around." (Id. at 3-6) (A-App. 140). The court indicated that Mr. Tally-Clayborne walking towards the vehicle as the officers were patting down his companions only gave the officers more reason to pat him down. (Id. at 5-6) (A-App. 142). Further, the Court reasoned that to not "contact" Mr. Tally-Clayborne and his companions based on the totality of the circumstances (shots fired nearby, the three individuals being the only people who seemed to be in the vicinity) would be "against all their training" and "pretty derelict of duty." (Id. at 6) (A-App. 143).

The Defendant-Appellant maintains that the investigating officers lacks a reasonable suspicion that Mr. Tally-Clayborne and his colleagues had committed, were committing, or were about to commit an offense, so as to justify the stop

and frisk of the individuals. See State v. Rutzinski, 2001 WI 22 ¶14, 241 Wis.2d 729, 737, 623 N.W.2d 516, 520. As stated in the court's decision and in trial counsel's motion, the test is an objective one: What a reasonably prudent officer, given the totality of the circumstances, would do in the situation, including an analysis of whether the officer could reasonably believe that his or her personal safety or that of others was at risk. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Johnson, 2007 WI 32, ¶21, 299 Wis.2d 675, 691, 729 N.W.2d 182, 190. State v. Sumner, 2008 WI 94 ¶22, 312 Wis.2d 292, 305, 752 N.W.2d, 783, 798.

The court concluded that despite not having a great deal of information as to what occurred, the sound of gunshots coupled with the proximity of Mr. Tally-Clayborne and his friends to the perceived source of the shots and Mr. Tally-Clayborne's behavior as his colleague were frisked justified the stop and frisk of all three individuals. (R:34 at 3-6) (A-App. 140). The Defense respectfully disagrees. Mr. Tally-Clayborne and his friends were standing on the sidewalk outside of a home that was later determined to be the residence of one of the individuals that was stopped and frisked. (R:33 at 15) (A-App. 129). The officers received no complaint about the men standing outside the house nor a

complaint that shots were fired by Mr. Tally-Clayborne and his friends or by anyone else: The officers came upon Mr. Tally-Clayborne and his colleagues while the officers investigated the sound of what *the officers* believed was gunfire. (Id. at 18) (A-App. 132). The only "suspicious" activity that Mr. Tally-Clayborne and his friends were engaging in was being on the sidewalk as a police car drove by because the officers therein thought gunfire came from the vicinity of where the men were standing. There is no evidence of any shell casings being visible on the ground around the men or of any visible signs of gunfire around or about where they stood. Id. When approached by the officers, the men were cooperative and directed the officers to where they (Mr. Tally-Clayborne and his friends) thought the gunfire had come from. (Id. at 16) (A-App. 130). They did not attempt to flee nor is there any evidence of them being nervous or making motions to demonstrate that they were armed as they were initially approached by officers. Id. Yet, the officer testified that he and his partner had made the decision to pat down Mr. Tally-Clayborne and his friends even before they (the officers) exited the squad to approach them. (Id. at 17) (A-App. 131). Based upon the totality of the circumstances, the officers in this instance had no grounds to stop and subsequently frisk Mr. Tally-Clayborne and his friends. Had

the officers not frisked Mr. Tally-Clayborne's friends first, there attention would have been drawn to Mr. Tally-Clayborne to being with. Since the officers had no justification for the stop and frisk at its inception, the fact that Mr. Tally-Clayborne was frisked last is moot. The officers had no reason to stop and frisk the men from the outset, a decision that the testifying officer admitted to making prior to exiting his squad. As such, the stop and frisk was not permissible and all derivative evidence against Mr. Tally-Clayborne must be suppressed. citing Taylor v. Alabama, 457 U.S. 687 (1982); Wong Sun v. United States, 371 U.S. 471 (1963); State v. Brady, 130 Wis.2d 443 (1986); and State v. Smith, 131 Wis.2d 220 (1986).

It is respectfully requested that the decision of the trial court be reversed.

CONCLUSION

For all the reasons stated herein and the arguments set forth in support thereof, Defendant-Appellant Marcellous D. Tally-Clayborne respectfully asks that this Honorable Court reverse the decision of the trial court as to the Defense Motion to Suppress Evidence.

Dated this 20th day of December, 2016.

Respectfully Submitted,

KOHN SMITH ROTH LAW OFFICES
Attorneys for Defendant-
Appellant

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