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DISTRICT I

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Appeal Case No. 2016AP001912-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARCELLOUS D. TALLY-CLAYBORNE,

Defendant-Appellant.

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

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BRIEF OF PLAINTIFF-RESPONDENT

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**TABLE OF CONTENTS**

**Page**

ISSUE PRESENTED ..... 1

STATEMENT ON ORAL ARGUMENT AND  
PUBLICATION .....2

STATEMENT OF THE CASE .....2

STANDARD OF REVIEW .....3

ARGUMENT .....4

    I. OFFICER DILLMAN HAD SUFFICIENT  
        REASONABLE SUSPICION TO STOP AND FRISK  
        MR. TALLY-CLAYBORNE.....4

CONCLUSION .....6

**TABLE OF AUTHORITIES**

**CASES CITED**

	<b>Page</b>
<i>State v. Allen</i> , 226 Wis. 2d 66, 593 N.W.2d 504 (Ct. App. 1999).....	4
<i>State v. Johnson</i> , 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182 .....	4
<i>State v. Knapp</i> , 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899 .....	3
<i>State v. Post</i> , 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634 .....	4
<i>State v. Sumner</i> , 2008 WI 94, 312 Wis. 2d 292, 752 N.W.2d 783 .....	5
<i>State v. Turner</i> , 136 Wis. 2d 333, 401 N.W.2d 827 (1987).....	3
<i>State v. Waldner</i> , 206 Wis. 2d 51, 556 N.W.2d 681 (1996).....	4
<i>State v. Williams</i> , 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106 .....	4
<i>Terry v. Ohio</i> , 392 U.S. 1, 21 (1968).....	4

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**ISSUE PRESENTED**

1. Did officers have the requisite reasonable suspicion to stop and frisk Mr. Tally-Clayborne?

Answer: Yes

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State of Wisconsin does not believe oral argument is required in this case as the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side, so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant. Wis. Stat. § 809.22(3).

Because this case is an appeal from a misdemeanor, and therefore, subject to a one judge review pursuant to Wis. Stat. § 752.31(2) & (3), this opinion is not eligible for publication. Wis. Stat. § 809.23(1)(b)4.

## **STATEMENT OF THE CASE**

On August 19<sup>th</sup>, 2014, at 9:43pm, Milwaukee Police Officer Mark Dillman and Officer Sean Mahnke were parked in their marked squad car at 3<sup>rd</sup> St. and Auer St, Milwaukee. (R33:5-6). While parked facing northbound in the parking lot, Officer Dillman heard two gun shots coming from the northwest. (R33:6). Officer Dillman, who, in his eight years as a police officer is familiar with the distinct sound of firearms, testified that the gunshots he heard came from within a block of where he was parked. (R33:5-7). The officers drove out of the parking lot east on W. Auer St. and then north on 2<sup>nd</sup> St. in the 3200 block. (R33:7). The officers drove towards where they believed the gun shots came from and observed three individuals standing on the sidewalk at approximately 3227 N. 2<sup>nd</sup> St. (R33:7-8). Officer Dillman testified that it took no longer than 20 to 25 seconds to get from their parked location to this address. (R33:7)

Officer Dillman did not see anybody other than the three subjects standing at 3227 N. 2nd St. (R33:8). Officer Dillman approached these three subjects because he believed they were in the proximity of where he heard the gunshots. *Id.* Officer Dillman was able to identify Mr. Tally-Clayborne as one of the three individuals. *Id.*

Given the nature of the investigation and for officer safety, the officers asked the three individuals to show their hands. (R33:9). Although the individuals pointed to the north saying that the shots were coming from down the street, Officer Dillman didn't necessarily believe them and conducted pat-down searches. *Id.* Officer Dillman conducted a pat-down of one of the individuals, while Officer Mahnke conducted a pat-down of another. *Id.*

While the officers were conducting pat-downs of two of the subjects, Officer Dillman noticed Mr. Tally-Clayborne start to walk away behind the vehicle that was parked on the street. (R33:10). Officer Dillman thought this was suspicious and told Mr. Tally-Clayborne to stop. *Id.* Officer Dillman observed him reaching towards his waist band area with both hands. *Id.*

Based on recently hearing gunshots in the vicinity where Mr. Tally-Clayborne was, noticing Mr. Tally-Clayborne reaching for his waistband, and his training and experience, Officer Dillman believed Mr. Tally-Clayborne was armed with a firearm and thus conducted a pat-down. *Id.* While conducting the pat-down, a chrome revolver fell to ground. (R33:12).

After a motion hearing held on January 9, 2015, the honorable T. Christopher Dee denied the defense's motion to suppress. (R34:6). The court held that under an objective, reasonable standard, the officers were reasonable in stopping and conducting a pat-down of Mr. Tally-Clayborne. (R34:3-6).

## **STANDARD OF REVIEW**

"Whether evidence should be suppressed is a question of constitutional fact." *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899. A finding of constitutional fact consists of the circuit court's findings of historical fact, and its application of those historical facts to constitutional principles. See *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). This court reviews the former under the clearly erroneous standard, and the latter, de novo. See *Id.*

## ARGUMENT

### I. OFFICER DILLMAN HAD SUFFICIENT REASONABLE SUSPICION TO STOP AND FRISK MR. TALLY-CLAYBORNE

To make an investigatory stop of a person, officers must have reasonable suspicion that criminal activity is afoot. *State v. Allen*, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999). In evaluating whether a stop is supported by reasonable suspicion, the court considers whether “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the stop. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The court determines the reasonableness of the stop based on the totality of the circumstances. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. “The determination of reasonableness is a common sense test.” *Id.* “The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *Id.* An officer may stop an individual with a reasonable inference of unlawful conduct, even if other innocent inferences can be drawn. *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

A weapons frisk is governed by the same objective test of reasonableness that attends an investigative stop, and requires consideration of the totality of the circumstances. *State v. Johnson*, 2007 WI 32, ¶21, 299 Wis. 2d 675, 729 N.W.2d 182; *State v. Williams*, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106.

As *Terry* makes clear, police officers face critical dangers every time they perform their investigative duties, and should not be expected to take unnecessary risks in the performance of those duties. *Terry*, 392 U.S. at 23-24. It is clearly unreasonable to deny officers the power to take necessary measures to determine whether suspects are carrying weapons, and to neutralize the threat of physical harm to themselves or others. *Id.*

An officer is authorized to conduct a protective search of the outer clothing of a person to determine whether the person is armed during an investigative stop if the officer is able to point to specific and articulable facts together with rational inferences from those facts reasonably warrant the intrusion. *State v. Sumner*, 2008 WI 94, ¶ 21, 312 Wis. 2d 292, 752 N.W.2d 783 (citations omitted).

The purpose of a protective search is to determine if the person is carrying a weapon and to neutralize the threat of physical harm. *Id.* The court gives due weight to specific reasonable inferences that the officer is entitled to draw from the facts in light of his experiences. *Id.*

The reasonableness of a protective search for weapons is an objective standard . . . whether a reasonable prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger because the individual may be armed with a weapon and dangerous.

*Id.* ¶ 22.

Here, it is clear that Officer Dillman had reasonable suspicion to stop Mr. Tally-Clayborne. Officer Dillman heard two gunshots coming from about a block away to the northeast. Officer Dillman then drove directly towards where he believed the gunshots came from and, within 20-25 seconds, saw Mr. Tally-Clayborne and his friends. Officer Dillman did not see anyone other than Mr. Tally-Clayborne and his two friends. Looking at the totality of circumstances, because Mr. Tally-Clayborne and his friends were the only people around the area where officers had just heard gun shots, Officer Dillman had reasonable suspicion to believe Mr. Tally-Clayborne had committed a crime.

Furthermore, Officer Dillman had reasonable suspicion to believe that Mr. Tally-Clayborne was armed with a dangerous weapon. The very reason Officer Dillman conducted the stop of Mr. Tally-Clayborne and his friends is because Officer Dillman heard two gunshots. Because there was no one else around the area where officers heard the gun shots, it is reasonable to believe that the shots came from Mr. Tally-Clayborne or one of his two friends. Additionally,



Officer Dillman observed Mr. Tally-Clayborne walk away and grab at his waistband area. All these facts taken together show that Officer Dillman had reasonable suspicion to believe Mr. Tally-Clayborne was armed with a dangerous weapon, thus justifying a weapons frisk. Accordingly, Judge Dee properly denied Mr. Tally-Clayborne's motion to suppress.

### CONCLUSION

For the foregoing reasons, the State respectfully asks this court to uphold the decision of the circuit court denying Mr. Tally-Clayborne's motion to suppress evidence.

Dated this \_\_\_\_\_ day of February, 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 word count of this brief is 1,390.

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Date

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

\_\_\_\_\_  
Date

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