

STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

State of Wisconsin,
Plaintiff-Respondent,

Case No. 2017AP000331 CR

V.

Michael A. Johnson,
Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON NOTICE OF APPEAL FROM THE ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS EVIDENCE
CALUMET COUNTY CIRCUIT COURT
THE HONORABLE JEFFREY S. FROHLICH, PRESIDING

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I. Issue presented for review

a) Whether the trial court erred by denying the Defendant-Appellant's motion to suppress evidence?

II. Statement on Oral Argument and Publication

The Defendant-Appellant is neither requesting the publication of nor the opportunity to orally argue this matter.

III. Statement of the Case

On December 19, 2015, law enforcement stopped the vehicle driven by the Defendant-Appellant, Michael Johnson, while in the City of New Holstein for failure to dim its bright lights. A (Appendix) 2. The officer, Robert Baldwin, made contact with Mr. Johnson and eventually asked him to step out from the vehicle so that paperwork could be issued. *Id.* Upon completing that task, Officer Baldwin informed Johnson that he was free to go. *Id.* Johnson was returning to his vehicle when the officer asked Mr. Johnson whether he had any drugs, weapons, or alcohol in the vehicle which Johnson denied. *Id.* Officer Baldwin then asked Mr. Johnson whether he could conduct a search of the vehicle, which Johnson refused, in-part because the vehicle did not belong to him. *Id.* Officer Baldwin again requested to search the vehicle, and again Johnson refused. This

exchange briefly continued before Johnson eventually acquiesced and allowed the officer to search the vehicle.

Id.

While searching the vehicle, Officer Baldwin discovered some "greenish plant flakes" within the vehicle's center console. *Id.* Shortly thereafter, Officer Baldwin asked Johnson whether he wanted to wait in the squad while the remainder of the search was conducted. Johnson accepted, however, was first patted down before entering the squad. *Id.* The officer subsequently discovered two plastic bags containing suspected marijuana in Mr. Johnson's pants pockets while conducting the pat-down. *Id.*

Johnson was arrested and transported to the Calumet County Jail where he informed law enforcement that he possessed a marijuana pipe at his residence. *Id.* Law enforcement traveled to Johnson's residence and discovered numerous items of interest, including several pipes, bongos, and a grinder. A3.

Consequently, Johnson was charged with misdemeanor Possession of THC and Possession of Drug Paraphernalia-PTAC. On 2/26/16, Johnson filed a motion seeking the suppression of evidence due to an illegal seizure and search. A5. On 6/1/16, the circuit court denied Johnson's

suppression motion following a hearing, and on 9/26/16 Johnson pled to a single count of Possession of THC and was sentenced to 30 days jail.

The Defendant-Appellant now timely appeals.

IV. Argument

a) The trial court erred by denying Michael Johnson's motion to suppress evidence.

Though Mr. Johnson disagrees with the circuit court's ultimate ruling, he nevertheless agrees that the case law cited by the court is applicable in the immediate case. Furthermore, the trial court was correct when it characterized Officer Baldwin's actions as constituting a classic *Badger* stop. A6.

The seminal Wisconsin case addressing *Badger* stops, and which was aptly cited by the court here, is State v. Williams, 255 Wis. 2d 1; 646 N.W.2d 834 (2002). In *Williams*, following the completion of a routine traffic stop, an officer shook hands and wished the driver, Lawrence Williams, a good day. Almost immediately thereafter, the officer paused and asked Williams whether there were any guns, knives, drugs, or large sums of money in his vehicle. Williams denied possessing any. The officer then requested to search the vehicle and Williams

consented. The officer subsequently located a firearm and heroin within said vehicle.

In analyzing *Williams*, the Wisconsin Supreme Court utilized a two-part standard of review, noting that the circuit court's findings of fact were to be upheld unless clearly erroneous. *Williams* at 10, P17. The second issue, whether Williams had been "seized" for Fourth Amendment purposes, the Court reviewed de novo. *Id.*

In the immediate case, the circuit court found Mr. Johnson's testimony not "necessarily accurate," A7, mainly as it pertained to the reason for the stop and the length of the encounter. Nevertheless, this writer does not believe that the discrepancies were so great that the second prong of the previously mentioned test is rendered meaningless. Rather, the differences in testimony are secondary to the primary issue which is whether Michael Johnson was seized for Fourth Amendment purposes when Officer Baldwin requested to search Johnson's vehicle. In addressing that issue, the trial court referred to the United States Supreme Court decision in United States v. Mendenhall, 446 U.S. 544 (1980). A8. In *Mendenhall*, the Court stated:

"We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances

surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554-55.

Johnson acknowledges that some dispute exists with regards to how many times Officer Baldwin asked to search his vehicle. Officer Baldwin testified that he asked Mr. Johnson at least twice to search his vehicle, although conceded it could have been more as he did not recall for sure. A9-10. Regardless the exact number of requests made by the officer, the fact remains that Johnson initially declined the officer's request, and it was only after repeated requests that Johnson finally permitted the search.

The operative question then becomes whether a reasonable person, faced with similar circumstances, would have shared Mr. Johnson's belief that he was not free to leave. Moreover, Michael Johnson believes that a reasonable person would have shared this belief. Recalling the *Mendenhall* factors, it is undisputed that more than one officer was present when Officer Baldwin requested to search Johnson's vehicle. A10. More importantly, and overlooked by the trial court, however, was the officer's

use of language. Specifically, this writer argues that Officer Baldwin's repeated requests to search Johnson's vehicle distinguish the immediate case from the facts in *Williams*.

In *Williams*, the defendant immediately acquiesced to the officer's request to search his vehicle. Alternatively here, Michael Johnson testified that he refused Officer Baldwin's request three times before eventually agreeing to the search after being asked a fourth time. All. Johnson further testified that he "didn't feel like he (Officer Baldwin) was going to stop asking. I didn't feel like I could leave. I felt like I was pretty much trapped there." *Id.*

In *State v. Jones*, 2005 WI App 26; 278 Wis. 2d 774; 693 N.W.2d 104, the Wisconsin Court of Appeals ruled that a consensual search is valid unless consent is obtained while an individual is illegally seized. *Jones* at P9. Michael Johnson believes that an otherwise routine traffic stop transformed into an illegal seizure when, without reasonable suspicion, Officer Baldwin refused to accept Johnson's initial refusals to search his vehicle.

V. Conclusion

For the reasons stated above, Mr. Johnson respectfully requests that this court reverse his conviction, set aside his sentence, and further suppress any evidence and statements collected following the illegal seizure and search of Mr. Johnson and his vehicle.

Dated at Oshkosh, Wisconsin, this _____ day of May,
2017.

Jeffrey A. Mann
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 7 pages.

I further certify pursuant to Wis. Stat. § 809.19(b) (12) (f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief, ***other than the appendix material is not included in the electronic version.***

I further certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 the record is 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 including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that on the date of signature I routed this brief to our office station for first class US Mail Postage to be affixed and mailed to:

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Dated this _____ day of May, 2017 at Oshkosh,
Wisconsin by:

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