STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 17AP774 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Courtney C. Brown,

Defendant-Appellant.

ON APPEAL FROM THE DECISION OF THE TRIAL COURT DENYING DEFENDANT'S MOTION FOR SUPPRESSION OF EVIDENCE IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE DALE ENGLISH, CIRCUIT JUDGE, PRESIDING.

BRIEF OF THE DEFENDANT - APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

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STATEMENT OF THE ISSUE(S)

I. Did the officer have the requisite level of reasonable suspicion to extend the detention beyond issuing a seat belt citation?

Trial court answered: Yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

It is not necessary that the Court of Appeals publish this decision, nor is it necessary that oral argument be provided.

STATEMENT OF THE CASE/FACTS

On November 15, 2013, the State filed an Information. (9:1). The count, possession with intent to deliver cocaine (<=5G), contrary to Wis. Stat. 961.41(1m)cm)1r, carried a maximum penalty of 12 years and six months incarceration; however, because he was also charged as a repeater and as a second and subsequent offense, contrary to Wis. Stat. 939.62(1)(b) and 961.48(1)(b), the maximum penalty could be increased by not more than eight years. (9:1).

On June 16, 2016, Brown filed a motion to suppress evidence. (33:1). In doing so, he argued the police improperly prolonged the traffic stop beyond the purpose of the initial stop, and thus all evidence derived thereafter should be suppressed. (33:1-5; App. 101-105).

The court thus held a hearing addressing such. At the hearing, the officer testified at 2:44 a.m., on August 23, 2013, the officer noticed a vehicle driving out of a cul-de-sac containing businesses which were closed. (64:10; App. 115). The vehicle then pulled onto a main road. (64:10; App. 115). The officer ran a check on the vehicle which indicated it was a rental vehicle – which the officer testified "people that traffic drugs often use rental cars". (64:10-11, 19; App. 115-116, 124). The officer followed the vehicle and eventually pulled over the vehicle for failing to make a complete stop at a stop sign. (64:5; App. 110). Upon conducting the traffic stop, the officer noticed Brown did not have his seatbelt on. (64:12; App. 117). The officer asked Brown where Brown came from and where Brown was going, and Brown indicated he was coming from "Speedway", and he was going to a friend's house. (64:12; App. 117). The officer believed Brown was lying because the officer saw Brown pull out of the cul-de-sac that did not contain a "Speedway".[1] (64:12; App. 117). The officer then obtained Brown's driver license, went back to the officer's vehicle, wrote out a seatbelt violation, and checked if there was a canine on duty – which there was not. (64:17; App. 122). The officer also ran a check on Brown, which came back that Brown was from Milwaukee and had a prior record involving drugs, and the officer testified that Milwaukee is a source city for drugs. (64:17-19; App. 122-124). The officer noted there were no factors to lead

[1] Brown testified he turned into the dead end to turn around and change directions". (64:45; App. 150).

Brown had any guns. (64:29; App. 134). The officer then went came back to Brown's vehicle. (64:17; App. 122). At that time, the officer did not see drugs, did not smell drugs, and did not see any signs of drug use; nonetheless, the officer had Brown step out of the vehicle. (64:17-18, 29, 38-39; App. 122-123, 134, 43-144). Brown testified in doing so, the officer opened Brown's door in making the request to step outside the vehicle. (64:47; App. 152). The officer testified, at this point, the officer had Brown walk to the officer's vehicle. (64:17-18; App. 122-123). In doing so, Brown testified the officer had Brown place his hands behind his back "like they were handcuffed". (64:48; App.153). Upon arriving by the officer's vehicle, the officer testified he asked Brown if he could search him, it was disputed whether Brown gave permission, and the officer searched Brown and found the drugs that resulted in the charge. (64:17-18, 29, 38-39, 49; App. 122-123, 134, 143-144, 154). The officer noted the officer's emergency lights were on during the entire transaction, that he probably did not give Brown his driver's license back or seatbelt violation at the time Brown was searched, and that Brown was never told he was free to go. (64:34, 39-40, 66; App. 139, 144-145, 171).

After hearing the evidence, the court rendered its ruling. In doing so, it stated the following:

> Here's how I analyzed this: First of all, the court previously ruled that there was probable cause for the initial stop, based upon the officer's observation of Mr. Brown failing to come to a complete stop. So that is the basis that the court allowed the initial stop.
>
> It's clear, from the testimony today, that the scope of the stop and the length of the stop were extended due to the officer's suspicious of drug possession of drug activity. It's clear that Mr. Brown was still seized when Officer Deering asked that he step out of the car and either walk back to in front of Officer Deering's squad, if you take Officer Deering's testimony, or was led by his hands behind his back to the front of Officer Deering's squad. It's just a matter of what version you believe, but he was still seized. He wasn't free to go. Officer Deering still had his license and Officer Deering still had the warning ticket.
>
> There's an issue of fact which is not to be addressed this afternoon, as to whether Mr. Brown consented to the search. The court is going to assume, solely for the purpose of this analysis, that Mr. Brown consented to the search. If Mr. brown didn't consent to the search, then we have a whole different issue as far as whether there was a constitutional - - or an exception to the requirement of probable cause in a search warrant to search, but that is for a different day.

So the issue then becomes whether there was reasonable suspicion for Officer Deering to extended the initial stop or seizure to pursue what he - - pursue his suspicions of some sort of drug activity or drug possession. The Hogan case, H-o-g-a-n, 364 WIs.2d at - - 364 Wis.2d at 67, at Paragraph 35, provides that after a justifiable stop is made, which the court ruled previously occurred here, that an officer may expand the scope of the inquiry, only to investigate additional suspicious facts that come to the officer's attention. It goes on to say in that same paragraph, that the legal extension of a traffic stop is essentially the carrying investigatory stop. And then in Paragraph 36, it provides that the focus of an investigatory stop is unreasonableness and that although officers sometimes will be confronted with behavior that has a possible explanation, a combination of all factors - - strike that, a combination of behaviors, all of which may provide the possibility of innocent explanation, can give rise to reasonable suspicion.

I looked at the Vetow case, V-e-t-o-w, 226, Wis.2d 90, at Pages 94 and 95 where the court of appeals indicated that once a justifiable stop is made, the scope of the officer's inquiry may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention, keeping in mind that these factors, like the factor that justified the stop in the first place, must be particularized and objective. It goes on to say on that same page, that if during a valid traffic stop the officer becomes aware of additional auspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun, which then brings me back to the - - brings me to the Waldner case, W-a-l-d-n-e-r, 206 Wis.2d 51, which is the Seminole case on reasonable suspicion in investigatory stops.

At page 56, in that case, the test for determining whether - - and I guess in this instance it would be an extension of the stop is reasonable is an objective test that a law enforcement officer may only infringe on an individual's interest and be free of a stop and detention, if he has suspicion grounded and specific articulable facts and reasonable inferences from those facts, that the individual has omitted or was committing a crime, and that an un-particularized suspicion or hunch will not suffice.

It goes on to indicate on Page 56 that the test is a common sense test and issues what would a reasonable police officer reasonably suspect in light of, in this case, his training and experience. It was then indicated on Page 57 that the law allows a police officer to make an investigatory stop or, in this case, to extend a stop based on observations of lawful conduct so long as a reasonable inference is drawn from a lawful conduct or that criminal activity is applied.

So when you look at what the testimony was - - and this is, I have to say, maybe the closest case that I've had either in the 20 years I've been doing this or in a long time. There are factors that go both ways here.

The officer testified that what gave rise to suspicion on his part were the following things: That Mr. Brown was driving a rental car. That Mr. Brown was from Milwaukee, and he testified that Milwaukee is a source city for drugs up here in Fond du Lac. That Mr. Brown had prior drug arrests. That Mr. Brown was coming from a cul-de-sac which contains businesses that were closed at that time of night, and that drug deals could take place in that dark cul-de-sac. And that the officer believed that Mr. Brown lied about where he was coming from. The officer, based on his observations, didn't believe Mr. Brown's statement that he was coming directly from Speedway. So those are the - - that's the basis for the extension of the stop, those things.

On the other hand, on cross examination the officer testified that he didn't notice any impairment on the part of Mr. Brown. That he didn't smell any drugs when he approached the vehicle. He didn't observe any bad driving, and he didn't observe any furtive movements of Mr. Brown when he was in the vehicle before the officer asked him to step out.

So it all boils down to whether the officer's observations would lead a reasonable police officer, in light of his training and experience, to suspect that there had been some drug activity afoot there. The court does look at the training and experience of the officer, in which case, Officer Deering testified that he was trained - - let me see here. He did receive drug enforcement training, I think, was the way he phrased it. And I would not that all of the things Officer Deering testified to, other than the fact that the vehicle was coming from a dark cul-de-sac, the rental car, and Mr. Brown was from Milwaukee, his prior record, and that he believed Mr. Brown was lying, all – those things all became apparent after the initial stop. But the fact that he was coming from the cul-de-sac was known prior to the stop.

You know when I was thinking about this, some of these - - some of the factors Officer Deering testified about could have innocent - - innocent reasons as well. You know, renting a car in Milwaukee, driving up here, is not in and of itself - - doesn't lead one to suspect criminal activity, in general, but that's not the test. The test is - - I mean, there are - - I think, Waldner even says that. Let me just go to the next page. Page 58. The Waldner court says that any of the facts testified in Waldner's statement alone, might be insufficient. They might actually reflect innocent conduct. But that's not the test. The court is to look at the totality of the facts, taken together. That the building blocks, in fact, accumulate, and as they accumulate reasonable inferences, a cumulative effect can be drawn. And that the point is reached where the sum of the whole is greater than the sum of its individual parts.

I guess the bottom line here - - I think there was - - there was barely enough for the Officer to have a reasonable suspicion of possible drug activity to extend the stop. And I think - - again, this is real close, because there are factors that go both ways here, but that's not the test. It's not a balancing - - you know, I'm not deciding the case. What I'm deciding is

> whether the rental car, Mr. Brown being from Milwaukee, which the Officer testified was a source city for drugs, where he was coming from at the time of night, and the officer believes he lied about where he was coming from, is that enough to allow the extension for further investigation. And I think - - I think it barely is enough.
>
> So again, assuming for the purpose of the analysis that Mr. Brown consented, which he as testified he did not, the court is going to find that - - that the stop was properly extended, that the officer had reasonable suspicion, such that if Mr. Brown did consent, that the consent was constitutionally valid. So at this point, based on the issues before the court today, the court is denying the motion to suppress. There's a separate issue as to whether Mr. Brown actually consented to the search, and if he did not, whether the search of him was constitutionally valid. But that's an issue for a different day, with potentially additional witnesses.

(64:65-72; App. 170-177).

Afterwards, Brown accepted a universal plea deal. (65:2). Pursuant to its terms, Brown agreed to enter guilty to the sole count in exchange for the enhancers being dismissed. (65:2). Further, on Case 15CF82, Brown agreed to enter guilty pleas to the two counts in exchange for the enhancers being dismissed. (65:2-3). As for disposition, the State agreed it would not recommend a total sentence consisting of more than five years initial confinement. (65:3). At sentencing, the court imposed the following sentences: on case 13CF428, two years of initial confinement followed by two years extended supervision; on case 15CF82, count one, three years initial confinement followed by three years extended supervision – consecutive to Case 13CF428; and, on case 15CF82, count two, three years initial confinement followed by three years extended supervision – consecutive to Case 13CF428, but concurrent to count one in Case 15CF82. (65:27).

Brown subsequently filed a notice of appeal to this Court. (53:1). The defendant appeals because case law indicates the police improperly prolonged the traffic stop, and thus all evidence derived thereafter should be suppressed. Ultimately, this mistake resulted in Brown's conviction on case 13CF428. For this reason, the case is on appeal before this Court.

STANDARD OF REVIEW

This court reviews a denial of a motion to suppress by first upholding the circuit court's findings of fact "unless they are against

the great weight and clear preponderance of the evidence." *State v. Jackson,* 147 Wis.2d 824, 829, 434 N.W.2d 386 (1989). However, the application of constitutional principles to the facts as found is a question of law that is reviewed *de novo*. *State v. Patricia A.P.,* 195 Wis.2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

ARGUMENT

I. THE TESTIMONY ADDUCED AT THE MOTION HEARING WAS INSUFFICIENT TO ESTABLISH THAT THE OFFICER POSSESSED REASONABLE SUSPICION TO EXTEND THE DETENTION BEYOND ISSUING A SEAT BELT CITATION.

Here, the court determined the officer had sufficient reason to conduct the traffic stop due to the officer observing Brown roll through a stop sign. (64:5). Brown does not dispute such. Further, the court determined Brown was still seized at the time the officer asked Brown to search his person. (64:59). This issue is also not disputed by Brown.[2] Furthermore, case law indicates a defendant cannot consent to a search or seizure if he is illegally seized. *State v. Jones,* 2005 WI App 26, P9, 278 Wis.2d 774, 693 N.W.2d 104. Considering the above, the issue on appeal is solely whether the officer could legally extend the seizure beyond the purpose of the initial stop.

Case law indicates a police officer may stop a vehicle that the officer reasonably believes has violated a law. *State v. Betow,* 226 Wis.2d 90, 93, 593 N.W.2d 499 (1999). Upon conducting the traffic stop, the officer may ask questions reasonably related to the nature of the stop. *Id.* If during the investigatory detention, an officer becomes aware of facts sufficient to give rise to a reasonable suspicion that the person has committed or is committing a distinct offense, the purpose of the stop may expand and the length of the stop may be properly extended to investigate the new suspicion. *State v. Colstad,* 2003 WI App 25, P11-13, 260 Wis.2d 406, 659 N.W.2d 394. In such case, the new investigation on the distinct offense is tested under the same criteria as the initial stop. *State v. Betow,* 226 Wis.2d 90 at 95. In

[2] Notably, previous courts have determined that the fact that an officer did not provide an individual his or her ticket or license back is a key factor in determining whether the person is still seized; further, even a temporary detention of an individual during a traffic stop, even if only for a brief period of time and for a limited purpose, is considered a seizure. *State v. Malone,* 2004 WI 108, P24, 274 Wis.2d 540, 683 N.W.2d 1; *State v. Luebeck,* 2006 WI App 87, P16, 292 Wis.2d 748, 715 N.W.2d 639.

determining whether reasonable suspicion exits, the court considers the totality of the circumstances. *State v. Williams,* 2001 WI 21, P22, 241 Wis.2d 631, 623 N.W.2d 106.

Here, the trial court indicated it felt the facts were awfully close to an improper seizure. (64:71; App. 176). Ultimately, however, the following evidence was enough to tip the pendulum for the trial court: 1) the officer noticed Brown driving out of a cul-de-sac late at night – which is a place the officer indicated a person could sell drugs; 2) the officer knew Brown had a history of drugs; 3) the officer learned Brown was from Milwaukee –which the officer indicated was a source city for drugs; 4) the officer learned Brown was driving a rental vehicle – which the officer indicated was used by people transporting drugs; and, 5) the officer did not believe Brown since Brown said Brown was coming from a "Speedway" even though the officer saw Brown come from a cul-de-sac which did not contain a "Speedway". (64:19, 69; App. 124, 174).

In reviewing the factors the trial court relied on, however, there does not appear more than a hunch that drug activity was afoot. First, as for the officer seeing Brown pulling out of a cul-de-sac with closed businesses late at night, this fact should add little to nothing to any analysis that drug activity just occurred. Perhaps suspicions of burglary activity, but not drug activity. Furthermore, the fact that Brown was pulling out of a dark area should have no impact. In *State v. Betow,* this court stated "The State has not referred us to any case that stands for the proposition that drugs are more likely to be present in a car at night than at any other time of day", and Brown believes such is still true today. *State v. Betow,* 226 Wis.2d 90, 96, 593 N.W.2d 499 (Ct. App. 1999).

Second, the fifth factor should have little to no weight in determining Brown possessed drugs. Here, the officer testified he saw Brown pull out of a cull-de-sac that did not contain a "Speedway", and then turn onto Johnson Street. (64:31; 63:6). At that time, the officer could see Brown was "continuously looking at him in the rear view mirror" and thus "aware" the officer was following him. (63:6). Eventually, when the officer pulled Brown over and asked where Brown was directly coming from, Brown responded he was coming from "Speedway" - even though the officer could tell "Speedway" was not in the cul-de-sac that Brown pulled out of. (64:31, 69). In response, a reasonable person would conclude Brown meant he came from "Speedway" and perhaps turned around in the cul-de-sac or briefly

stopped in the cul-de-sac. It is unreasonable to conclude anything else. Consequently, such statement appears to shed little to no light on whether Brown was dealing drugs.

Third, we are left with three other facts: 1) the officer knew Brown had a prior drug record; 2) the officer knew Brown was driving a rental vehicle - which is sometimes used by drug dealers; and, 3) the officer knew Brown was from Milwaukee – a source city for drugs. (64:69). If this was the mere criteria an officer needed, a convicted drug offender would have little rights on the street. This seems contrary to prior case law "even convicted felons, have a right to walk down a street without being subjected to unjustified police stops. *State v. Washington,* 2005 WI App 123, P17, 284 Wis.2d 456, 700 N.W.2d 305. Considering the circumstances, it does not appear the officer had reasonable suspicion.

This court may also wish to consider a case with similar facts. In *State v. Gammons,* the officer detained the defendant for drug activity based on the following:

> [T]he vehicle was stopped in a "drug-related" or "drug crime" area; it was 10:00 p.m.; the vehicle was from Illinois; Fahrney had knowledge of prior drug activity by each of the three men in the vehicle and Gammons appeared be nervous and uneasy;

State v. Gammons, 2001 WI App36, P21, 241 Wis.2d 296, 625 N.W.2d 623. In reaching its conclusion, the court cited a previous case:

> Again, a comparison to Betow is helpful. In Betow, the State argued that similar circumstances supported the existence of reasonable suspicion, and we disagreed. Betow, 226 Wis.2d at 95-98, 593 N.W.2d 499. The State pointed to the following facts, arguing they formed the basis for a reasonable suspicion; the defendant's wallet had a picture of a mushroom on it, which the State argued indicted drug activity; the defendant was stopped late at night; the defendant appeared to be nervous; the defendant was returning to Appleton from Madison, a city the State claimed was well known for its drug traffic; and the defendant's story about what he had been doing in Madison seemed implausible to the police officer. *Id.* at 95-97, 593 N.W.2d 499. We concluded that, under those circumstances, the officer could not have formed a reasonable suspicion of drug activity justifying further detention of the defendant for a drug investigation. *Id.* at 98, 593 N.W.2d 499.

Id. at P22. It then concluded the officer did not have reasonable suspicion to further detain the defendant, and it ruled any further evidence gathered should be suppressed. *Id.* at 24.

Considering the above, it appears Gammons would also support the fact the officer in Brown's situation did not have reasonable suspicion to further detain Brown for a drug investigation. In *Gammons,* the vehicle was stopped in a drug crime area; here, that was not the case. In both cases it was late at night – but as alluded to earlier – that means little to nothing. In one case, a vehicle was from Illinois, and another case the driver was from Milwaukee. In both cases, the officer had knowledge of prior drug history – although in *Gammons* – the officer personally knew of drug activity in that particular area. In *Gammons,* the defendant appeared to be nervous and uneasy, while here, the officer unreasonably believed Brown was not telling the truth that he came from a "Speedway".

For the above reasons, it does not appear there was enough evidence for the officer to detain Brown for a drug investigation after the seatbelt citation was written up.

CONCLUSION

Because the officer did not have the requisite level of reasonable suspicion to continue to detain Brown once the seatbelt citation was created, the trial court erred when it denied Brown's motion to suppress evidence. Thus, the court should reverse the trial court's decision and judgment of conviction.

August 11, 2017

Signed:

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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 § 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.

August 11, 2017

Signed:

_____

TIMOTHY O'CONNELL

CERTIFICATE AS TO FORM AND 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 3995 words.

August 11, 2017

Signed:

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TIMOTHY O'CONNELL

APPENDIX TABLE OF CONTENTS

PURSUANT TO THE WISCONSIN RULES OF APPELLATE PROCEDURE, THE FOLLOWING ITEMS ARE REPRODUCED IN THIS APPENDIX: