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, PRESIDING.

REPLY BRIEF OF THE DEFENDANT - APPELLANT

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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 seatbelt citation.

The State filed a brief making two arguments: 1) the officer had the requisite reasonable suspicion of drug activity, and, 2) the officer did not unlawfully extend the stop. Brief of Plaintiff-Respondent: i-ii. As a result, Brown will address each of these arguments.

Before doing so, however, Brown needs to correct facts the State relied on in its argument. First, the State indicated this Court should accept as fact that Brown consented to a search. Brief of Plaintiff-Respondent:2. In addressing such, Brown must first cite the facts: Brown filed a motion to suppress evidence. (33:1). In doing so, he argued the police improperly prolonged the stop beyond the purpose of the initial stop, and thus all evidence derived thereafter should be suppressed. (33:1-5). The court addressed said issue, and denied such. (64:65-72). In doing so, it explicitly noted it was not making a factual determination regarding the disputed testimony concerning whether Brown consented to a search since that issue was not in front of it, and the court did not see relevance in doing so. (64:66, 72). Subsequently, Brown accepted an universal plea deal, but again raised the argued issue to this Court. Brief of Defendant-Appellant:6.

In the State's response, it indicates this Court should accept as fact that Brown consented to a search of his person. Brief of Plaintiff-Respondent:2. In support, it cites to *A.O. Smith Corp. v. Allstate Ins. Co.,* which it indicates stands for the following: an issue raised in the trial court, but not raised on appeal is deemed abandoned". Brief of Plaintiff-Respondent:2. It then insinuates the case stands for the idea that since Brown did not raise a suppression argument regarding whether he consented to a search of his person, he ultimately waived his right to argue this fact on appeal; thus, this Court should make a factual finding that Brown consented to a search of his person. Brief of Plaintiff-Respondent:2.

In reply, first, as noted above, Brown's argument at the trial level as well as here is whether the officer had the requisite level of reasonable suspicion to extend the detention beyond the scope of the seatbelt citation. That issue has not been abandoned, nor waived. Second, Brown agrees suppression issues regarding whether there was consent need to be argued in the trial court if they are to be raised in the appellate court; however, he has not raised said issue on appeal. Nonetheless, it appears the State is asking this Court to go beyond preventing Brown from raising issues not previously raised, to now asking this Court to make a factual finding on disputed testimony that is irrelevant to the issue on hand and that was never addressed by the trial court.[1] *A.O. Smith Corp. v. Allstate Ins. Co*. does not support this

[1] The factual matter whether Brown consented to the search is moot since the argument on appeal is whether the extension was properly prolonged, and the law

additional request, and Brown is unaware of any law permitting such. *A.O. Smith Corp. v. Allstate Ins. Co*., 222 Wis.2d 475, 588 N.W.2d 285. (Ct. App. 1998).

Second, the State writes the officer had Brown walk to the back of Brown's vehicle. Brief of Plaintiff-Respondent:3. In reviewing the transcript, the officer had Brown walk to the officer's vehicle. (64:17).

The officer did not have the requisite reasonable suspicion of drug activity to prolong the traffic stop.

The State argues the officer had reasonable suspicion of drug activity to prolong the traffic stop. In supporting its argument, it relies on four facts. First, Brown was observed at 2:44 a.m. exiting a cul-de-sac surrounded by closed businesses. Brief of Plaintiff-Respondent:7-8. It notes it is not aware of any case addressing the nexus of drug activity to cul-de-sacs or the lateness of the hour, but it believes it is reasonable to infer "curiosity, if not suspicion". Brief of Plaintiff-Respondent:8. In response, Brown has already addressed this factor:

> 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.

Brief of Defendant-Appellant:8. Thus, this factor is not helpful to the State.

Second, the State highlights the fact that Brown was driving in a rental car, and a rental car is sometimes used by drug dealers, and when you add a cul-de-sac and the lateness of the hour – it enhances suspicion. Brief of Plaintiff-Respondent at 8. In other words it is adding little to no value from the previous paragraph to someone driving a rental car. By doing so, the State is still far short of reasonable suspicion.

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is clear that a defendant cannot consent to a search or seizure once the officer unlawfully prolonged the stop. State v. Jones, 2005 WI App 26, P9, 278 Wis.2d 774, 693 N.W.2d 104.

Third, the State indicates it believes Brown's home residence is a suspicious factor, and so was his version of where he was going and where he had been. Brief of Plaintiff-Respondent:8-9. In response, Brown concedes his hometown can be considered. Brief of Plaintiff-Respondent:8-9). As for where he was going, the State takes issue that Brown did not know his girlfriend's last name or her specific address. Brief of Plaintiff-Respondent:8-9. In response, the fact that Brown did not know his girlfriend's last name should provide little suspicion. Clearly he was telling the truth or he would have hesitated in coming up with a name, or otherwise provided a first and last name; instead, Brown provided the information he had – which demonstrated he was early in the relationship. Further, as for not knowing his girlfriend's specific address, this cannot be used against him. Brown questions whether anyone could state an address that they do not live at or do not regularly send mail to. Finally, as for holding against Brown his explanation of where he had been, Brown addressed this in his previous brief when he explained the officer's own testimony was that Brown knew the officer saw Brown pull out of the cul-de-sac, and thus a reasonable person would conclude, when Brown was asked where he came from and he responded "Speedway", he meant he came from "Speedway" and perhaps turned around in the cul-de-sac or briefly stopped in the cul-de-sac. Brief of Defendant-Appellant:8-9. Considering such, the State has added little to nothing to the analysis, and it is far short of reasonable suspicion of drug activity.

Fourth, the State cites to the fact Brown had prior convictions regarding drugs. Brief of Plaintiff-Respondent:4, 7-9. Brown concedes this factor is something the officer could consider, but it is not enough when added to the little other information the officer possessed.

The State then tries to distinguish this case from two cases in which the court held there was not reasonable suspicion: *State v. Betow* and *State v. Gammons.* In doing so, the State argues this case threads the needle that is missing: in *Betow* – the police did not know about the prior drug history of the defendant; and, in *Gammons,* the police did not did not have the "implausible explanation of whereabouts". Brief of Plaintiff-Respondent:11.

First, in regards to *Betow,* as the State noted, there are differences: the defendant appeared nervous in Betow; the defendant's

wallet in Betow had a picture of a mushroom – which the officer testified "several people will use mushrooms to show their use of narcotics"; the defendant, here, was driving a rental car and was pulling out of a cul-de-sac rather than on a road; and, the defendant, here, had a prior history of drugs". Brief of Plaintiff-Respondent:10; *State v. Betow,* 226 Wis.2d 90, 95, 593 N.W.2d 499 (Ct. App. 1999). As for the picture of a mushroom and the prior history of drugs, it appears these facts cancel each other out. One shows a person currently has an interest in drugs, and one shows a person had an interest in drugs. Neither provide the police evidence that the defendant recently sold or bought drugs.

As for the State's other notable differences, they do not assist the State.[2] The fact the officer observed Brown pull out of a cul-de-sac by a closed business versus going to Madison, stopping at a residence, and then getting stopped on a road coming to Appleton – adds nothing. Brief of Plaintiff-Respondent:10; *State v. Betow,* 226 Wis.2d 90 at 95. In fact, if anything, it weakens its argument since the trip to Madison, a source city for drugs, provides more probable evidence that the defendant just committed the crime of buying/selling drugs than an observation of an individual pulling out of a cul-de-sac of closed businesses – in which there was no testimony that there was another individual around to sell to or buy drugs from. Further, the fact that Brown was driving a rental vehicle would be outweighed by the defendant in *Betow* - whom appeared nervous when stopped. Considering the above, *State v. Betow* does not thread the needle.

As for *State v. Gammons,* there are also differences: in *Gammons*, the defendant was stopped in a drug crime area, and the defendant appeared to be nervous and uneasy, and, here, the officer believed Brown was not telling the truth that he came from a "Speedway". State v. Gammons, 2001 WI App 36, P21, 241 Wis.2d 296, 625 N.W.2d 623. In analyzing the differences, it is clear that being stopped in a drug crime area and then being nervous and uneasy would add suspicion, and it would add more than what little suspicion the officer obtained in Brown's case. Considering the court in *Gammons* did not find there was reasonable suspicion to continue to

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[2] Brown previously showed there is no nexus to nighttime and the likeliness of a drug sale; furthermore, the State noted *Betow* and Brown both contain facts in which the stop occurred late at night. Brief of Plaintiff-Respondent:10. Considering such, Brown will not address said issue further.

detain the defendant, this Court should also not find there was reasonable suspicion to continue the detainment.

The State then raises *State v. Floyd.* As for differences, it acknowledges in *Floyd,* the officer observed air fresheners in every vent of the vehicle as well as the rear view mirror – and the officer noted air fresheners are used to mask the smell of narcotics; 2) the stop was in an area where drug dealing often occurs; 3) and, the car had tinted windows – which means very often one is attempting to conceal outside observations. Brief of Plaintiff-Respondent at 12; *State v. Floyd,* 2016 WI App. 64, P15-16, 371 Wis.2d 404, 885 N.W.2d 156. However, it argues the court found reasonable suspicion, and the facts there are less compelling. Brief of Plaintiff-Respondent at 11-12. In response, Brown disagrees. Catching one in a vehicle with tinted windows and air fresheners on every vent, and in a high drug traffic area is clearly more suspicious, and certainly more suspicious than what occurred here.

Considering the above, and considering the totality of the factors, the officer did not have reasonable suspicion to further detain the defendant.

<u>The officer impermissibly extended the traffic stop.</u>

In making its second argument, the State argues, even if the this Court determines the officer did not have reasonable suspicion to further detain Brown, "asking one quick question about whether Brown was carrying something the officer should know about, followed by asking for permission to search, does not unlawfully extend a traffic stop". Brief of Plaintiff-Respondent:13.

One case the State cites to for support is *State v. Floyd.* Brief of Plaintiff-Respondent:13. In doing so, it cites a few statements from said case: 1) "that pursuant to any valid traffic stop, the police can lawfully order the motorist out of the vehicle"; and, 2) A police officer can lawfully ask a driver if he has weapons during a routine traffic stop and ask for consent to frisk, as part of the original traffic stop mission". Brief of Plaintiff-Respondent:13-15. These statements, however, without further explanation, are taken out of context.

In *Floyd*, the defendant was pulled over since his car registration was suspended. *State v. Floyd,* 2017 WI 78 at P2. There,

the officer wrote citations, asked the defendant to step outside of the vehicle to explain the citations, asked the defendant if he could conduct a safety search for the officer's safety, the defendant responded in the affirmative, and drugs were subsequently found. *Id.* at P2-5. The court stated "Traffic stops are meant to be brief interactions with law enforcement officers, and they may last no longer than required to address the circumstances that make them necessary." *Id.* at P21. "Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." *Id.* The court further wrote that traffic stops are inherently dangerous and thus an officer can "take certain negligibly burdensome precautions in order to complete his mission safely". *Id.* at P27. In that case, therefore, it determined it was lawful for the officer to ask the defendant to step outside of the vehicle to alleviate the danger when the officer discussed the citations. *Id.* at P28. Here, however, the officer had the defendant exit the vehicle to search for drugs. (64:43-43). Thus, these cases are very different.

The State also cites to *State v. Gaulrapp* and *Ohio v. Robinette*. Brief of Plaintiff-Respondent:15-16. The State argues both cases stand for the concept that, regardless of possessing reasonable suspicion, an officer can ask a quick question regarding drugs during a traffic stop. Brief of Plaintiff-Respondent:15-16. Case law indicates it is the extension of a detention past the point reasonably justified by the initial stop, not the nature of the questions asked, that violates the Fourth Amendment. *State v. Gaulrapp,* 207 Wis.2d 600, 609, 558 N.W. 2d 696. The State then concludes, since the officer asked a quick question here, the officer's conduct was lawful. Brief of Plaintiff-Respondent:15-16.

The problem with the State's position is that there was no "quick" question. Here, the officer had Brown exit his vehicle and walk to the officer's vehicle, and then the questioning proceeded. (64:38-39). Thus, this was not a "quick" question, and these cases are different.

Next, the State compares *Betow* and *Gammons.* In doing so, it indicates the holdings in both cases show the court found it acceptable for the officer to ask quick questions, but that the court took issue with the officer continuing the detainment after the driver denied the officer's request. Brief of Plaintiff-Respondent:16-17. It then states Brown consented, and therefore concludes this case supports the officer's extended detainment. Brief of Plaintiff-Respondent:16-17.

In response, as noted previously, there is no evidence that Brown consented to a search of his person. To the contrary, Brown could not give valid consent since he was unlawfully seized. Furthermore, here, the officer did not ask a "quick" question. Instead, he had Brown exit the vehicle, walk to the officer's vehicle, and then the questioning proceeded. (64:38-39).

Subsequently, the State cites to *State v. Luebeck.* Brief of Plaintiff-Respondent:17. In doing so, it states a defendant was pulled over for a lane deviation violation, but before the officer released the defendant, the officer asked to search the defendant and his vehicle, and the defendant gave approval. Brief of Plaintiff-Respondent:17-18. The issue was whether the continued detainment was lawful since the defendant could not give consent if he was unlawfully detained, and the court concluded the continued detainment was not lawful. Brief of Plaintiff-Respondent:18. The State argues the court concluded the continued detainment was unlawful because the questions began after a 20 minute traffic investigation. Brief of Plaintiff-Respondent:18. The State then states Brown is not akin to *Luebeck* because Brown's investigation did not take as long. Brief of Plaintiff-Respondent:18. In response, first, there was no testimony as to the length of this Brown's detainment. It likely though was somewhat time consuming since the officer went back to his car, checked for a canine, ran the defendant's information, and then returned to Brown's vehicle where the officer then had Brown walk back to the officer's vehicle. (64:35-38). More importantly, though, *Luebeck* based its decision on *State v. Jones*. *State v. Luebeck,* 2006 WI App. 87, P13-14, 292 Wis.2d 748, 715 N.W.2d 639. In *Jones*, the officer asked the defendant to exit the vehicle, accompany him to the rear of the vehicle, and then asked if a search could be done; there, the Court indicated the officer improperly extended the search, and a consent could not be valid. *Id.* Ultimately, this case hurts the State's argument.

The State also addresses *Rodriguez v. United States.* Brief of Plaintiff-Respondent:18. In doing so, it states the Court dealt with an extension of an ongoing traffic stop to accommodate a dog sniff. Brief of Plaintiff-Respondent:18. Essentially the court determined this was not permitted. Brief of Plaintiff-Respondent:18-19. The State, however, argues this case is different than ours because: 1) Brown consented, unlike there; and, 2) asking about consent for a dog sniff is appreciably different than asking about consent to do a search.

Brief of Plaintiff-Respondent:19. In response, first, as noted earlier, consent was not given. Second, the State does not explain why a search for a dog sniff is appreciably different than search by a police officer, and Brown is unaware of any. Ultimately, this case supports Brown's position.

Ultimately, the officer improperly extended the traffic stop.

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.

December 7, 2017

Signed:

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CERTIFICATION AS TO FORM/LENGTH

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 length of this brief is 2995 words.

Date: December 7, 2017

Signature:_____

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. 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 Wis. Stat. 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: December 7, 2017

Signature:_____