STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 17AP1104-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROY S. ANDERSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Michael J. Piontek, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did police have sufficient knowledge regarding Mr. Anderson's supervision status to warrant a search of his person pursuant to Act 79?

2. Even assuming Mr. Anderson was subject to Act 79, did police have the requisite reasonable suspicion to warrant a search of his person?

2013 Wisconsin Act 79[1] created multiple statutes relating to searches by law enforcement officers of individuals on probation, parole, or extended supervision. The statutes allow an officer to search a defendant who is placed on any one of these forms of supervised release if the officer "reasonably suspects that the person is committing, is about to commit, or has committed a crime" or a violation of a condition of his release. In Roy Anderson's case, officers stopped him as he was riding his bicycle on a sidewalk and then searched him, finding approximately .3 grams of cocaine in his pocket. At the time, the lead officer claimed to have known that Mr. Anderson was released to probation five months earlier. Additionally, within two-and-a-half weeks of the stop, a confidential informant told the officer that Mr. Anderson was selling narcotics in the area. Mr. Anderson filed a motion to suppress challenging the stop, detention, and search.

The circuit court found that the stop, detention, and search were lawful.[2]

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[1] App. 131-32.

[2] In this appeal, Mr. Anderson challenges only the legality of the search.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be welcomed if it would be helpful to the court. Publication is not warranted, as this is a fact-specific case requiring the application of established legal principles.

STATEMENT OF CASE AND FACTS

On August 26, 2015, Mr. Anderson was charged with one count of possession of cocaine, one gram or less, with intent to deliver (second or subsequent offense), in violation of Wis. Stats. §§ 961.41(am)(cm)1g and 961.48(1)(b). (1:1). Mr. Anderson filed a pretrial suppression motion alleging that he was illegally stopped, detained, and searched. (7:1). The following was elicited at a hearing on the motion:

On August 25, 2015, at approximately 4:00pm, Officer Michael Seeger observed Mr. Anderson riding his bicycle on a sidewalk, in violation of a city ordinance, around 16th Street and South Memorial Drive in Racine. (24:5-8; App. 104-07). Officer Seeger testified that he knew Mr. Anderson from prior police contacts and had seen Mr. Anderson in that area several times before. (24:7, 10; App. 106, 109). Officer Seeger also testified that the area was a "high drug trafficking area." (24:9; App. 108).

Officer Seeger received information "from a reliable and credible confidential informant" twice over the preceding two-and-a-half weeks that Mr. Anderson was selling narcotics in the alley behind 1619 South Memorial Drive. (24:10; App. 109). These tips were undocumented and Officer Seeger received the last of the two tips at least eight days prior to the stop. (24:10, 14; App. 109, 113). The State did not elicit

testimony about why Officer Seeger thought the informant was "reliable and credible," such as prior dealings with the informant, nor was there any testimony as to whether the tip was based on firsthand knowledge or rumor. (*generally* 24).

Officer Seeger also testified that at the time of the stop he believed Mr. Anderson was on probation, and therefore subject to Act 79.[3] (24:14-15, 19; App. 113-14, 118). The following testimony was elicited:

> COURT: And when you say Act 79, were you aware was he on probation on August 25th, 2015.
>
> OFFICER SEEGER: Yeah. Once he was released on probation, I ran him out. I did a record check of him and knew that he felony [sic] under Act 79.
>
> COURT: Do you know what period his probation was, when it ended or anything like that? Or did you just know in August that he was on probation?
>
> …..
>
> OFFICER SEEGER: I knew Mr. Anderson was released on probation on March 17, 2015 which is after the date that Act 79 went into effect.
>
> COURT: Do you know how long his probation was?
>
> OFFICER SEEGER: That I do not know.

[3] 2013 Wis. Act 79 created a number of different statutes that only require reasonable suspicion for a law enforcement search of people on community supervision, thereby creating a statutory exception to the warrant requirement. (App. 131-32). Mr. Anderson will refer to the statutes collectively as "Act 79" because that is how the parties in the circuit court action referred to it, although an offender would only be subject to a reduced search requirement pursuant to one of the specific statutes created via 2013 Wis. Act 79.

> COURT: You said August of what of '15 he was put on probation?
>
> OFFICER SEEGER: He was put on probation March 17, 2015.

(24:19; App. 118). Officer Seeger also did not directly testify to the offense for which Mr. Anderson was purportedly on probation:

> COURT: Tell me what you knew him from, how you knew him and so forth.
>
> OFFICER SEEGER: Okay. Back in I believe 2012 I previously arrested Mr. Anderson for possession with intent crack cocaine. This was in a different area. […]
>
> Even prior to that […] I've heard his name brought to my attention through other cooperative witnesses in 2012.
>
> Then once he was released on probation after that case, I frequently seen him around 16th and Memorial.

(24:18; *generally* 24; App. 117). There was also no testimony regarding specific terms of Mr. Anderson's probation. (*generally* 24). The trial court found that Mr. Anderson had previously been arrested for possession with intent to deliver and was "on parole or probation from or extended supervision from that arrest."[4] (24:24; App. 123).

[4] A pre-sentence investigation report was ultimately filed with the court prior to sentencing, but after the suppression hearing. (*generally* 11). It indicates he was sentenced on October 29, 2013 to 1 year initial confinement and 2 years of extended supervision for Racine County case 12CF114, possession of cocaine (second or subsequent)(11:9).

Officer Seeger made a U-turn and Mr. Anderson looked back and "continued to make several glances over his shoulder" at the officers as they were driving toward him.[5] (24:7; App. 106). The officers were in an unmarked vehicle, and there is nothing in the record to indicate that officers were in uniform or otherwise identifiable as law enforcement. (24:8; App. 107). Officer Seeger testified that he was concerned about Mr. Anderson glancing at them because "individuals involved in criminal activity … will be overly curious about police's position and will also attempt to evade them as they attempt to approach." (24:7; App. 106). Mr. Anderson did not change his speed or pace and made a right-hand turn down the back alley of South Memorial Drive. (24:8, 13; App. 107, 112). Officer Seeger took this to be an attempt to evade the officers. (24:8; App. 107).

Officer Seeger saw Mr. Anderson put his left hand into his left front jacket pocket. (24:9; App. 108). He thought this was significant because people involved in criminal activity "will attempt to hide or destroy or conceal illegal narcotics when they have police interaction." (*Id*.). Specifically, Officer Seeger surmised that Mr. Anderson could conceivably grab the contraband and "slowly drop it out of his pocket as he[] [was] pedaling away." (24:13; App 112). However, Officer Seeger never viewed Mr. Anderson attempt to drop anything. (24:9, 14; App. 108, 113).

Officers ordered Mr. Anderson to stop and to get off his bicycle, and he complied. (24:11; App. 110). Officer Seeger then searched Mr. Anderson, finding two individual bags of suspected crack cocaine with a total weight of .3

[5] While not specifically discussed, from the testimony it appears that a second officer accompanied Officer Seeger. Only Officer Seeger testified at the suppression hearing.

grams, currency, and two cell phones. (*Id*.). The officer said he searched Mr. Anderson "[p]er Act 79." (24:14; App. 113). There is no indication in the record of any warrant. (*generally* 24).

The State's sole basis in support of the search was that the information provided by the confidential informant was sufficient to form reasonable suspicion, which was all that was required under Act 79. (24:20; App. 119).

In response, Mr. Anderson argued that under a totality of the circumstances, there was no reasonable suspicion to believe that he was committing, had committed, or was about to commit a crime. (24:23-24; App. 122-123). As to the confidential informant, Mr. Anderson argued that not only was the information provided stale, but that there was no information regarding the basis of the confidential informant's knowledge and no testimony regarding why the informant was reliable or credible. (24:22-24; App. 121-123). Mr. Anderson also argued that nothing about his conduct was suspicious. (24:23; App. 122).

The trial court found that Mr. Anderson's riding of his bicycle on a sidewalk, a violation of the city ordinance, gave officers the right to come in contact with Mr. Anderson. (24:24; App. 123). The trial court also ruled that "[p]robationers do not enjoy the same rights that those who are not on probation do," and "when you're in a probationary status, still on paper, parole, extended supervision, agents can search your home without a search warrant. They can search you without a search warrant." (24:25; App. 124).

The trial court found that although the information was "dated," Mr. Anderson was found in the area that the informant said he was selling cocaine in, and that the tip from the informant was not limited in time, implying a "continuing

activity." (24:26; App. 125). The trial court also took issue with the fact that Mr. Anderson did not stop immediately upon seeing officers, but instead had to be "verbally instructed to stop." (24:26; App. 125). Finally, the trial court relied on the officer's testimony that it was a "high drug area in terms of drug sales and purchases." (*Id.*). The trial court found that he was subject to Act 79 and officers had reasonable suspicion to search him. (*Id.*).

Mr. Anderson ultimately pleaded no contest to possession of cocaine, one gram or less, with intent to deliver (second or subsequent offense). (25:4; 9:1-2). The sentencing court imposed a sentence of 10 years imprisonment, comprised of five years initial confinement and five years extended supervision. (26:24; 14:1; App. 123, 129).

Mr. Anderson appeals.[6]

ARGUMENT

I. The Warrantless Search of Mr. Anderson Was Illegal and the Evidence Recovered Should Have Been Suppressed.

A. Principles of law and standard of review.

Both the United States and Wisconsin constitutions guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11. "The Fourth Amendment to the United States Constitution is the securing anchor of the right of persons to

[6] Wis. Stat. § 971.31(10) permits appeals of an order denying a motion to suppress notwithstanding the fact that judgment was entered pursuant to a guilty or no contest plea.

their privacy against government intrusion." ***State v. Gordon***, 2014 WI App 44, ¶11, 353 Wis.2d 468, 476, 846 N.W.2d 483.

A search of a person requires a warrant, and a warrantless search is considered unreasonable unless it falls within an exception to the warrant requirement. ***State v. Hajicek***, 2001 WI 3, ¶ 36, 240 Wis.2d 349, 620 N.W.2d 781; ***Missouri v. McNeely,*** 569 U.S. 141, 133 S. Ct. 1552 (2013). The state bears the burden of proving an exception to the warrant requirement. ***State v. Pallone***, 2000 WI 77, ¶ 29, 236 Wis.2d 162, 613 N.W.2d 568.

This Court applies a two-part test when reviewing the denial of a motion to suppress. ***State v. Popp***, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471. A circuit court's findings of fact are upheld unless clearly erroneous, but the application of constitutional principles to the facts are reviewed de novo. ***Id***.

Where an unlawful search or seizure occurs, the remedy is to suppress the evidence produced. ***State v. Carroll***, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963).

B. Officers did not have sufficient basis to believe that Mr. Anderson was subject to Act 79.

The circuit court accepted Officer Seeger's representations that Mr. Anderson was on an Act 79 qualifying form of supervision. (24:25; App 124). However, Officer Seeger's knowledge of Mr. Anderson's supervision status at the time of his search was insufficient to rely on any of the statutes created by Act 79. As such, officers needed a warrant, or another exception to the warrant requirement, to search Mr. Anderson's person. Officers did not have a

warrant, and therefore the search was invalid and any obtained evidence should be suppressed.

Officer Seeger testified that he searched Mr. Anderson "[p]er Act 79." (24:14; App. 113). 2013 Wisconsin Act 79 created multiple statutes relating to searches by law enforcement officers of individuals on probation, parole, or extended supervision. (App. 131-32). Regardless of whether it is probation, parole, or extended supervision, the statutes[7] generally read as follows:

> A person released under this section, his or her residence, and any property under his or her control may be searched by a law enforcement officer at any time during his or her period of supervision if the officer reasonably suspects that the person is committing, is about to commit, or has committed a crime or a violation of a condition of [release to extended supervision, parole, or probation]. Any search conducted pursuant to this subsection shall be conducted in a reasonable manner and may not be arbitrary, capricious, or harassing.

The statute pertaining to probation is more restrictive in that a person on probation is not *always* subject to a law

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[7] Wis. Stats. §§ 302.043(4)(release of inmates serving risk reduction sentences), 302.045(3m)(e)(release to extended supervision after completion of the challenge incarceration program), 302.05(3)(c)4.(release to extended supervision after completion of the Wisconsin substance abuse program), 302.11(6m)(mandatory release), 302.113(7r)(release to extended supervision for felony offenders not serving life sentences), 302.114(8g)(release to extended supervision for offenders serving life sentences), 304.02(2m)(special action parole release), 304.06(1r)(paroles from state prisons and house of correction), 973.09(1d)(release to probation).

enforcement search based on reasonable suspicion: the probationer must be on probation for (1) a felony, or (2) a violation of ch. 940 (crimes against life and bodily security), 948 (crimes against children), or 961(uniform controlled substances act). Wis. Stat. § 973.09(1d).

"[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." ***Scott v. U.S.***, 436 U.S. 128, 137, 98 S.Ct. 1717 (1978). To arrest someone on probable cause, the "facts and circumstances within the officer's knowledge [must be] sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." ***Michigan v. DeFillippo,*** 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). Similarly, to seize a suspect based on reasonable suspicion, "facts known to the officer at the time of the stop," along with rational inferences in the totality of the circumstances, must support that reasonable suspicion. ***State v. Washington,*** 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305.

In ***State v. Kassube,*** 2003 WI App 64, 260 Wis.2d 876, 659 N.W.2d 499, this Court found a traffic stop was reasonable where an officer believed a driver's license was suspended based on a record check from 11 months earlier. In that case, the officer also knew that the defendant had not had a valid driver's license during the preceding 9 to 12 years. ***Id***., ¶3. In ruling that the earlier record check was sufficient to create reasonable suspicion, this Court declined to follow ***Boyd v. State***, 758 So.2d 1032, 1033 (2000). In ***Boyd,*** the Mississippi Court of Appeals found that an officer's knowledge that a driver's license had been suspended eight

years prior to the stop was insufficient to create a reasonable suspicion that the driver was still suspended. ***Id.*** ¶6. This Court noted that ***Boyd,*** and cases on which it relied, dealt with temporary suspensions where the driver may have reinstated his privileges in the interim. ***Kassube,*** 260 Wis.2d 876, ¶8. In Kassube's circumstance, he had never had a license so officers could reasonably suspect that he still did not have a license at the time of the stop. ***Id.***

Consistent with ***Kassube,*** and consistent with the above principles that an officer's conduct is evaluated within the context of what is known at the time of an alleged Fourth Amendment violation, an officer who seeks to rely on Act 79 to avoid a warrant and search a person on the street should have sufficient knowledge at the time of the type of supervision and whether, if probation, it is for a qualifying offense. *See* ***Moreno v. Baca,*** F.3d 633, 644 (9th Cir. 2005)(the United States Court of Appeals found that police officers could not "retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole condition." 431); *see also* ***People v. Sanders,*** 31 Cal 4th 318, 335 73 P.3d 496, 507-08 (2003)(held that an otherwise unlawful search of a parolee's residence cannot be justified by showing that the suspect was subject to a parole search condition where the officer was unaware of said condition).

In Mr. Anderson's case, Officer Seeger knew that Mr. Anderson had been arrested in 2012 for a possession with intent to deliver. (24:18-19; App. 117-18). The officer believed that Mr. Anderson was released on probation on March 17, 2015, becoming aware of his probation status after conducting a record check at some point after his release. (Id.). However, he did not clearly testify as to whether the probation was for the 2012 possession arrest, some other

matter such as a term of probation consecutive to the 2012 sentence, or something new and unrelated altogether. Officer Seeger did not specifically testify as to when the record check occurred, but the implication is that the check was done "once he was released on probation," which again, was in March, whereas the stop was in August. (24:18-19; App. 117-18). The officer did not know the length of the term of Mr. Anderson's probation, or when it was scheduled to terminate. (*Id*.).

To the extent the circuit court made a finding that at the time of the stop, Mr. Anderson was on "parole or probation from or extended supervision" from the earlier possession with intent to deliver, that finding is clearly erroneous. (24:25; App. 124). Officer Seeger did not directly testify to any knowledge of the basis for Mr. Anderson's supervision. (*generally* 24). Moreover, Officer Seeger repeatedly referenced the supervision as "probation." (24;14, 18-19; App. 113, 117-18). The State in argument referenced the statute that pertains specifically to parole searches.[8] (24:21; App. 120). To the extent that Officer Seeger specifically testified that Mr. Anderson was on probation, Wis. Stat. § 973.09(1d) authorizes a search based on reasonable suspicion only where the probation is for (1) a felony, or (2) a violation of Ch. 940 (crimes against life and bodily security), 948 (crimes against children), or 961(uniform controlled substances act). Officer Seeger never specifically testified whether Mr. Anderson was on probation for an Act 79 qualifying offense. (*generally* 24).

[8] The State specifically said "Section 304.01(2m) which is actually the parole section." Mr. Anderson presumes that this was in error, and that the State possibly intended to reference Wis. Stat. § 304.02(2m), which pertains specifically only to special action parole release.

Additionally, varying forms of community supervision are hardly permanent. This Court in ***Kassube*** validated the search because the officer had grounds to believe the offender's driver license status that existed during a previous encounter 11 months earlier was still in effect at the time of the stop. In contrast, to the extent that the testimony indicates the Officer Seeger's record check occurred around the time of Mr. Anderson's release from prison in March 2015, there is no corresponding testimony to indicate that Mr. Anderson was still on supervision status at the time of the stop in August 2015. Moreover, Officer Seeger testified that he did not know the termination date or duration of Mr. Anderson's probation. (24:19; App. 118).

Because Officer Seeger's knowledge at the time of Mr. Anderson's search was insufficient to establish that any of the statutes created by Act 79 applied to him, the police search of his person required a warrant. ***McNeely,*** 133 S.Ct. 1552, 1558. Therefore, all evidence recovered pursuant to the warrantless search must be suppressed.

C. Assuming Mr. Anderson was subject to a search based on Act 79, officers had insufficient reasonable suspicion to believe he had committed, was in the process of committing, or was about to commit a crime.

The circuit court found that the confidential informant's tips, combined with Mr. Anderson's behavior, were sufficient to form reasonable suspicion for a search pursuant to Act 79's reduced threshold requirement. (24:26). However, despite superficial characterizations that he was acting "suspicious," Mr. Anderson was cooperative and compliant with officers. The information purportedly from a "reliable and credible" confidential informant was never

shown to be either of those two things, and was stale. As such, there was no objectively reasonable basis to believe Mr. Anderson had committed, was about to commit, or was committing a crime,[9] and the search was unlawful.

As discussed in the context of investigatory seizures, the courts have explained that reasonable suspicion must be "grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. Reasonableness is not gauged by an officer's "inchoate and unparticularized suspicion or 'hunch'[.]" ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). The test focuses on an objectively reasonable officer and "simple good faith on the part of the arresting officer is not enough." ***State v. Pugh***, 2013 WI App 12, ¶11, 345 Wis. 2d 832, 826 N.W.2d 418.

Whether an informant's tip can form reasonable suspicion is a matter of reliability under the totality of the circumstances. *See* ***State v. Hogan,*** 2015 WI 76, ¶51, n. 7, 364 Wis.2d 167, 868 N.W.2d 124. Considerations include the informant's veracity, reliability, and basis for knowledge. ***State v. Rutzinski,*** 2001 WI 22, ¶18, 241 Wis.2d 729, 623 N.W.2d 516; ***Illinois v. Gates,*** 462 U.S. 213, 230, 103 S.Ct. 2317 (1983). Reliability is not established simply by a

[9] Wis. Stat. § 939.12 defines crime as "conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by forfeiture is not a crime." A citation for riding a bicycle on a sidewalk is only punishable by forfeiture, and therefore it is not a crime. Racine Wis. Ch. 66 Art. XXVI Sec. 66-707, 66-709. So while the bicycle infraction justified initial police contact, it could not be grounds for the search. There is nothing in the record to indicate that Mr. Anderson was ever cited for the bicycle infraction.

conclusory statement that an informant is reliable; an informant's observation and the underlying circumstances are evaluated. *See* ***State v. Mansfield,*** 55 Wis.2d 274, 279-80, 198 N.W.2d 634 (1972)("The mere naming of the informant or the bald conclusory statement that he is reliable is not sufficient to establish reliability.")

Wisconsin courts have defined a confidential informant as someone, often with a criminal past himself, who assists police in identifying and catching criminals and who "may be trustworthy where he or she has previously provided truthful information." ***State v. Kolk,*** 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337. A confidential informant's reliability is subject to a higher standard than a citizen informant, who is someone who "happens upon a crime … and reports it to police." ***Id.*** Citizen informants receive a "relaxed test of reliability that shifts from a question of 'personal reliability' to one of 'observational reliability.'" ***Id.***, ¶13.

In ***Hogan,*** officers extended a traffic stop in part because of "tips" that Hogan, the driver, cooked methamphetamines. 364 Wis.2d 167, ¶51**.** That, combined with observations that the driver was nervous and had restricted pupils, led to officers to conduct field sobriety tests after completing the seatbelt citations that led to the initial stop**.** ***Id***., ¶17-19. The Wisconsin Supreme Court discounted the significance of the tips in that case because of the lack of information establishing the reliability of the source. ***Id.***, ¶51. As the Court indicated:

> To assess the reliability of an anonymous tip, a totality of the circumstances test is used. Courts must take into account the quantity and quality of information received during this analysis. The quantity and quality are inversely proportionate: if one is relatively low, the other

> must be relatively high for the tip to be deemed reliable. Courts consider such factors as awareness of the informant's identity, an officer's past interactions with the informant, and predictive information offered in the tip.
>
> [The officer's] informant may not have been anonymous and may have been completely reliable, but any such facts are not in evidence.

Id., ¶51, n. 7 (internal citations omitted).

Similarly, this Court rejected a citizen informant's tip as grounds for reasonable suspicion in ***Kolk***. There, an identified citizen informant, who had previous dealings with the officer, told police when and where Kolk would unlawfully obtain Oxycontin. ***Kolk,*** 298 Wis. 2d 99***,*** ¶2-3. Officers ultimately witnessed Kolk speeding in his vehicle, headed in the general direction that the informant indicated, stopped his vehicle, and relied on the informant's tip as grounds to continue detaining him. ***Id.,*** ¶11.

This Court emphasized the lack of information regarding how the informant came to know of the illegal activities, calling it a "significant consideration in determining the 'observational reliability' of the tip." ***Id.*** ¶15. This Court found the lack of information regarding the source of information significant, because while the tip could have been based on first-hand knowledge, it also could have been the simple product of "rumor or speculation." ***Id.*** Additionally, the corroboration offered was insignificant because of the nature of information - namely identity, type of vehicle, and direction of travel. ***Id.*** ¶17. This Court described such information as "widely available and less significant" than situations in which an informant provides specific information about witnessed drug transactions. ***Id.***

The informant's information does not establish reasonable suspicion in Mr. Anderson's case. Officer Seeger baldly asserted that the informant was reliable and credible, but did not offer any basis for that characterization. He did not testify to prior interactions with the informant or prior tips that proved to be reliable. ***Id.,*** ¶12 ("a confidential informant may be trustworthy where he or she has previously provided truthful information"). The Wisconsin Supreme Court in ***Hogan,*** 364 Wis.2d 261, ¶51, n. 7, clearly said that a lack of information regarding reliability is pivotal — so while it is quite possible that Officer Seeger's informant was indeed reliable, the record certainly does not establish it.

Just as in ***Kolk,*** the lack of information regarding just how the informant came to know of the information is also problematic here. In ***Kolk,*** this Court called the lack of information on basis of knowledge a "significant consideration." 298 Wis. 2d 99, ¶15. Here, there was no testimony distinguishing whether the informant claimed first-hand knowledge, or simply repeated a rumor. And, the information corroborated by police in Mr. Anderson's case was insignificant and readily available to anyone, also similar to ***Kolk***. The only corroborated information was that Mr. Anderson was found in the place where the informant said he was selling drugs over eight days prior. But officers had regularly seen him in that area, to the point that they listed it as his address. (24:17; App. 116). Therefore, the only corroboration was that Mr. Anderson was in a place that officers already believed he at least frequented and probably resided. The corroboration was utterly meaningless in the context of reasonably confirming suspected criminal conduct.

Mr. Anderson's behavior just prior to the stop does nothing to make up for the inadequate testimony regarding the informant. In ***Gordon,*** 353 Wis.2d 468, ¶3, officers were

driving in a marked squad car in the evening hours when they saw Gordon and two friends walking in the same direction. The area was "very well-lit" but was also an "area of high crime" with "a lot of gun violence," where two days earlier a woman had been shot in her car. ***Id.***, ¶¶3, 9. Officers testified that Gordon looked "nervous" and made a "security adjustment"[10] after recognizing police, touching the outside of his pocket with his hand. ***Id.***, ¶4. Officers saw no bulges in Gordon's jeans, and there was no indication that Gordon or his friends were attempting to flee. ***Id***. Officers approached Gordon and his friends and asked to see their hands. ***Id.***, ¶6. They complied, and police frisked him, finding a gun, crack cocaine, and marijuana. ***Id.***

This Court found that the circuit court's findings boiled down to three components: (1) the stop occurred in a high-crime area, (2) Gordon "recognized the police presence" and he consequently (3) "patted the outside of his pants pocket." ***Id.***, ¶14. This Court found that these components, "either taken separately or added together, [did] not equal the requisite objective 'reasonable suspicion' that 'criminal activity' by Gordon was 'afoot.'" ***Id.***

In evaluating the claim that the area in which police encountered Gordon was a "high crime area," this Court emphasized that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." ***Id.*** (citing ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000)). As to the significance of the "security

[10] A "security adjustment" was defined as a "conscious or unconscious movement that an individual does when… confronted by law enforcement when they're typically carrying a weapon" in order to verify a weapon is secure. ***Gordon,*** 353 Wis.2d 468, ¶4.

adjustment," this Court also recognized that "many folks, most innocent of any nefarious purpose, may occasionally pat the outside of their clothing to ensure that they have not lost their possessions." ***Id.***, ¶17. This Court emphasized that while additional facts, such as flight or attempted flight, might support objective reasonable suspicion, without such added support, the simple fact of a high crime area and the recognition of a police car were "far too common" to provide the necessary reasonable suspicion to support a stop under the Fourth Amendment. ***Id.***

Officer Seeger's observations and resulting suspicions of Mr. Anderson are indistinguishable from the hunch deemed unlawful in ***Gordon***. Officer Seeger saw Mr. Anderson put a hand in his pocket. (24:10; App. 109). He then surmised this meant he was looking to "hide or destroy or conceal illegal narcotics," but never actually saw Mr. Anderson attempt to dispose of anything. (24:9, 13; App. 112). And while Officer Seeger assumed that this was a response to identifying police, Officer Seeger was in an unmarked squad car, there is no testimony that officers were in uniform, and Mr. Anderson maintained a constant riding speed on his bicycle. (24:8, 13; App. 107, 112). Even assuming his behavior was in response or recognition of police presence, this Court in ***Gordon*** found that an innocuous physical response to a police presence does not create reasonable suspicion, even within the context of a "high crime area":

> [R]ecognition of "police presence" would be in almost every case where police executed a ***Terry*** stop. Looking at police officers driving through one's community certainly adds nothing by itself (that is, for example, without flight or attempted flight [.])
> …

> [T]he circuit court's main rationale in denying Gordon's suppression motion was what it found was Gordon's "security adjustment." […] [T]he "security adjustment" could, given additional facts (such as, for example, flight or attempted flight), support an objective "reasonable suspicion," the additional facts here—high crime area and recognizing the police car as a police car—are far too common to support the requisite individualized suspicion here.

Gordon, 353 Wis.2d 468, ¶16-17.

The fact that the officer called this a "high drug trafficking area" does not cure what a hand in a pocket fails to establish. (24:9; App. 108). Mr. Anderson's hand was in his pocket — an otherwise innocuous activity that Officer Seeger had a suspicion may be nefarious, but that lacks any actual degree of specificity inside or outside a drug trafficking area. *See also* ***Brown v. Texas,*** 443 U.S. 47, 52, 99 S.Ct. 2637 (1979)(Supreme Court did not find reasonable suspicion where defendant was in an alley within a neighborhood "frequented by drug users," finding that the defendant's activity "was no different from the activity of other pedestrians in that neighborhood").

CONCLUSION

Officers lacked sufficient knowledge to believe that the reduced search requirement of Act 79 applied to Mr. Anderson. To the extent that the State attempts to argue that Act 79 did indeed apply to Mr. Anderson, officers also lacked an objectively reasonable suspicion to search him. This Court should reverse the decision of the circuit court, vacate Mr. Anderson's conviction, and remand with instructions that the circuit court suppress any evidence obtained pursuant to the unlawful search.

Dated this 7th day of September, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,264 words.

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.

Dated this 7th day of September, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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 § 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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.

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