STATE OF WISCONSIN

C O U R T O F A P P E A L S

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Officers did not have lawful authority to search Mr. Anderson's person.

A. Officer Seeger did not have sufficient knowledge to believe that Mr. Anderson was subject to Act 79 at the time of the search.

The State argues that Officer Seeger reasonably believed Mr. Anderson was subject to Act 79's reduced search requirement at the time of the search (State's Brief at 6) and that his belief is supported by the entirety of the record (State's Brief at 8). However, as argued in the initial brief, the search must be evaluated within the context of what Officer Seeger knew about Mr. Anderson's status at the time of the search. (Initial Brief at 10). That knowledge was insufficient to establish status under Act 79.

The crux of Officer Seeger's understanding of Mr. Anderson's supervision status under Act 79 was (24:11):

- Officer Seeger had arrested Mr. Anderson in 2012 for possession with intent, crack cocaine. (24:18).

- Mr. Anderson was released on probation after that case. (Id.).

- He conducted a record check, implying he did so around Mr. Anderson's March 17, 2015 release, and "knew that he felony[sic] under Act 79." (24:19).

- He did not know when Mr. Anderson's probation would term. (Id.).

Officer Seeger's actions must be evaluated "in light of the facts and circumstances then known to him"[1] Mr. Anderson's *actual* supervision status at the time is of no consequence, except to the extent that the officer knew about it. The officer's knowledge of Mr. Anderson's supervision status was inadequate to rely on the reduced search standards under Act 79.

However, the State argues that the "totality of the circumstances point to the overwhelming likelihood that Anderson was on supervision" at the time of the search, because, per the presentence investigation report (PSI), he "had been convicted of two felony counts of possession of cocaine, 2nd offense, and was released from imprisonment on March 17, 2015" to extended supervision. (State's Brief at 7). But there is no evidence in this record that the officer was aware of the information in the presentence report.

The State relies on a footnote in ***State v. Begicevic,*** 2004 WI App 57, ¶ 3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293, for the proposition that the Court is not "confined to the testimony at the suppression hearing in determining the reasonableness of a search." (State's Brief at 9). That footnote is in turn based on a footnote in ***State v. Gaines,*** 197 Wis. 2d 102, 107 n. 1, 539 N.W.2d 723 (Ct. App. 1995), wherein this Court indicated in evaluating the issuance of a warrant that it pulled facts from the preliminary hearing, suppression hearing, "the trial court's summary of the testimony taken to support issuance of the search warrant," and trial. These cases do not indicate that this Court dispensed with the requirement that a Fourth Amendment violation is to be evaluated in the context of the facts and circumstances known to the officer at

[1] *See* ***Scott v. U.S.,*** 436 U.S. 128, 137, 98 S.Ct. 171 (1978).

the time of the intrusion. Rather, the Court may reference the entire record to ascertain what the officer's knowledge was at the time of the evaluated conduct. *See* ***State v. Griffin,*** 126 Wis. 2d 183, 199, 376 N.W.2d 62 (Ct. App. 1985) (witness said at suppression hearing that she was told defendant "may have had guns," but then testified at trial to more definitive statement that defendant "had [a gun] in his possession at his residence" and Court relied on the latter in evaluating the trial court's suppression ruling).

B. Even assuming Act 79 applied, Officer Seeger did not have reasonable suspicion.

The State argues that Officer Seeger's conclusory statements as to the reliability of his informant should be taken at face value, and that under ***State v. Rutzinski,*** 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, his "confidence as to the informer's veracity" reduces the need to show the tipster's basis of knowledge. (State's Brief at 11). However, in order to rely on a reduced need for "indicia of the informant's basis of knowledge," there must be a corresponding "strong indicia of an informant's veracity." ***Rutzinski***, ¶ 21.

One end of the informant "spectrum" are cases where police receive a tip from someone whom "they are reasonably justified in believing to be truthful" and therefore may not require as much corroboration– i.e. ***Adams v. Williams,*** 407 U.S. 143, 92 S.Ct. 1921 (1972), where the officer personally knew the informant, the informant had provided information in the past, and the tip was immediately verifiable because the informant came to the officer personally to convey the tip just

moments before the seizure.[2] ***Rutzinski,*** 241 Wis. 2d 729, ¶ 19. On the other end of the spectrum are cases where a totally anonymous informant provides a tip that "independent police investigation or other corroboration[] indicates that the informant possesses inside information" or "similar verifiable explanation[s] of how the informant came to know of the information in the tip[.]" ***Id.***, ¶ 22, 25 (internal quotations omitted).

So while "strong indicia of an informant's veracity" may indeed "reduce[] the need to show the informer's basis of knowledge," there is no such strong indicia of veracity in this case. (State's Brief at 11). There is only the conclusory statement that the informant was "reliable and credible" and no testimony regarding why the officer believed that. And the only corroboration of the tip itself— location— did not demonstrate any inside information or basis for knowledge. Officer Seeger found Mr. Anderson precisely where he himself thought he resided, which was the same exact place he saw him on several occasions prior to the search. The only thing that Officer Seeger "corroborated" was what he already knew: that Mr. Anderson hung-out and potentially resided in the area of 16th and Memorial.

The State posits that even though Officer Seeger did not indicate how he knew the informer was reliable or credible, he was not cross examined as to that point. (State's Brief at 11). "The state bears the burden of proving that an exception applies to any given search." ***State v. Hajicek,*** 2001 WI 3, ¶ 35, 240 Wis. 2d 349, 620 N.W.2d 781. There was no

[2] That case also involved a tip that the defendant had a concealed weapon, meaning officers had the additional consideration of "ample reason to fear for [] safety" in justifying the intrusion. ***Adams,*** 407 U.S. at 148.

question that the State was tasked with demonstrating reasonable suspicion (7:1), which per the State's own witness hinged substantially on the tip.[3] The onus was on the State to establish grounds for the warrantless search via the establishment of reasonable suspicion per Act 79.

Finally, as argued in his initial brief, Mr. Anderson's behavior prior to the search does not cure the defects. There is nothing in the record to show that Mr. Anderson knew police were tailing him – at the most the record evinces that he knew someone was following behind him and looked back, but that someone was in an unmarked car at an unspecified distance. (24:7-8). He did not flee or change his speed. (24:13). He put his hand in his pocket but did not attempt to dispose of anything. (24:9, 14). These observations led to no more than a hunch, lacking the requisite "specific articulable facts" needed to make a reasonable suspicion. ***State v. Gammons,*** 2001 WI App 26, ¶ 6, 241 Wis. 2d 296, 625 N.W.2d 623.

[3] Officer Seeger testified "I believe I searched Anderson because it was I had reasonable suspicion based off the reliable and credible information I received from the confidential informant." (24:15).

CONCLUSION

Officers lacked sufficient knowledge to believe that the reduced search requirement of Act 79 applied to Mr. Anderson. If it did, 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 14th day of December, 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 1,347 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 14th day of December, 2017.

Signed:

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