STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP001104-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROY S. ANDERSON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Michael J. Piontek Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

2013 Wisconsin Act 79[1] created multiple statutes relating to searches by law enforcement officers of individuals on parole, extended supervision, or probation for certain offenses. 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 this case, officers searched Mr. Anderson pursuant to Act 79, finding approximately 0.3 grams of cocaine in his pocket. At the time, the arresting officer believed that Mr. Anderson had been released to probation five months earlier but did not know what the probation was for or how long it was to last. Additionally, within the two-and-a-half weeks prior to the stop, a confidential informant told the officer that Mr. Anderson was selling narcotics in the area.

1. Did the arresting officer know that Mr. Anderson was subject to the reduced search provisions of Act 79 at the time he conducted a warrantless search of Mr. Anderson's person?

Both the circuit court and the Court of Appeals answered yes.

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[1] App. 139-140.

2. Even assuming that police had sufficient knowledge that Mr. Anderson was subject to Act 79, did they have reasonable suspicion to search him?

Both the circuit court and Court of Appeals answered yes.

STATEMENT OF THE CASE

Facts Relevant to the Search of Mr. Anderson

On August 25, 2015, at about 4:00 p.m., Officer Michael Seeger observed Mr. Anderson riding his bicycle on a sidewalk, in violation of a city ordinance, near 16th Street and South Memorial Drive in Racine. (24:5-8; App. 113-116). According to Officer Seeger this area was a "high drug trafficking area." (24:9; App. 117). Officer Seeger knew Mr. Anderson from prior police contacts and had seen him in that area several times before. (24:7, 10; App. 115, 118).

Officer Seeger, who was in an unmarked police vehicle, 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.[2] (24:7-8; App. 115-116). Mr. Anderson made a right-hand turn down the back alley of South

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

Memorial Drive but he did not change his speed or pace. (24:8, 13; App. 116, 121).

Officer Seeger also saw Mr. Anderson put his left hand into his left front jacket pocket. (24:8-9; App. 116-117). Officer Seeger surmised that Mr. Anderson could conceivably grab contraband and drop it out of his pocket as he was pedaling away. (24:13; App 121). However, Officer Seeger never viewed Mr. Anderson attempt to drop anything. (24:13-14; App. 121, 122).

When the officers made contact with Mr. Anderson, they ordered him to stop and he complied. (24:11; App. 119). Officer Seeger then searched Mr. Anderson, finding currency, two cell phones, and two individual bags of suspected crack cocaine with a total weight of 0.3 grams. (24:11; App. 119). Officer Seeger searched Mr. Anderson "[p]er Act 79." (24:14; App. 122). Officer Seeger did not have a warrant authorizing this search. (*See generally* 24).

In addition to the above-listed observations, during the two-and-a-half weeks prior to his search and arrest of Mr. Anderson, Officer Seeger testified that he received two tips "from a reliable and credible confidential informant" that Mr. Anderson was selling narcotics in the alley behind 1619 South Memorial Drive. (24:10; App. 118). 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. 118, 122). The record is devoid of any evidence supporting the assertion that Officer

Seeger's confidential informant was reliable or credible, and there was no evidence as to the informant's basis of knowledge. (*See generally* 24).

As to Officer Seeger's knowledge regarding Mr. Anderson's supervision status, he testified that at the time of the stop he believed Mr. Anderson was on probation,[3] and therefore subject to Act 79.[4] (24:14-15, 19; App. 122-123, 127). At the hearing on Mr. Anderson's motion to suppress, Officer Seeger testified as follows:

> THE 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.

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[3] Mr. Anderson was not on probation but was on extended supervision. (11:9).

[4] 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. 139-140). This brief refers to the statutes collectively as "Act 79" because that is how they have been referenced by all parties throughout the history of this case, 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.

> THE 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.
>
> THE COURT: Do you know how long his probation was?
>
> OFFICER SEEGER: That I do not know.
>
> THE 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. 127). Officer Seeger was also unclear regarding whether he knew the offense for which Mr. Anderson was on probation:

> THE 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; App. 126). There was also no evidence regarding Officer Seeger's knowledge of specific terms of Mr. Anderson's probation. (*See generally* 24).

Trial Court Proceedings

As a result of the drugs found in his pocket, the State charged Mr. Anderson with one count of possession of cocaine, one gram or less, with intent to deliver (second or subsequent offense), in violation of Wis. Stat. §§ 961.41(am)(cm)1g and 961.48(1)(b). (1:1). He challenged the police stop and search in a pretrial suppression motion. (7:1).

After an evidentiary hearing, the trial court denied Mr. Anderson's motion to suppress. (24:27; App. 135). In so doing, the trial court found that police were justified in stopping Mr. Anderson because he was violating a city ordinance by riding his bicycle on a city sidewalk. (24:24; App. 132). The court further found that when Mr. Anderson initially saw the officers, he placed his hand into his pocket. (24:25; App. 133). The trial court also found that Officer Seeger knew that Mr. Anderson was on "parole or probation from or extended supervision from" his arrest on a prior possession with intent to deliver cocaine case. (24:25; App. 133).

Additionally, the trial court found that although the information was "dated," Mr. Anderson

was found in the area that the informant reported he was selling cocaine in, and that the tip from the informant was not limited in time, implying a "continuing activity." (24:26; App. 134). 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. 134). 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 Mr. Anderson was subject to Act 79, and officers had reasonable suspicion to search him. (Id.).

Mr. Anderson subsequently pled 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. 107).

Proceedings in the Court of Appeals

Mr. Anderson appealed the circuit court's denial of his suppression motion, arguing that under Act 79, Officer Seeger did not have sufficient knowledge of Mr. Anderson's supervision status and that he did not have reasonable suspicion that Mr. Anderson was engaged in criminal conduct at the time of the search.

The Court of Appeals affirmed the decision of the circuit court. *State v. Anderson*, No. 17AP1104-CR, ¶ 9, (Ct. App. September 12, 2018)(unpublished per curiam); (App. 104). The court concluded that, "Seeger had sufficient basis to believe that Anderson was subject to Act 79" because he was familiar with him, "having arrested him before for possession of cocaine," and was reasonable in his belief that the community supervision he knew Mr. Anderson to be on as of March 2015 was still in effect as of August 2015. *Id*., ¶ 9; (App. 104). The court concluded that the officer had reasonable suspicion to conduct a search. *Id.,* ¶ 10; (App. 104).

This Court subsequently granted Mr. Anderson's petition for review.

ARGUMENT

I. The warrantless search of Mr. Anderson was illegal because Officer Seeger did not have sufficient knowledge that he was subject to Act 79, and there was no reasonable suspicion that he was engaged in criminal conduct.

A. Introduction.

At the time that he stopped and searched Mr. Anderson, Officer Seeger knew only that Mr. Anderson had been arrested for possession with intent to deliver in 2012 and that in March of 2015 Officer Seeger learned that he had been "released on

probation." (24:18-19; App. 126-127). This information is vague and does not amount to any reasonable level of certainty that Mr. Anderson was subject to the reduced search requirements of Act 79. This Court should not uphold the use by police of Act 79 to bypass constitutional protections based on such speculative information about whether the statute applies.

When an intrusion into a person's clothing or home that would otherwise violate the Fourth Amendment is allowable based on a particular factual predicate, an officer cannot be allowed to guess whether or not that factual predicate is present. If this Court sanctions police searches pursuant to Act 79 based on vague and uncertain information such as that possessed by Officer Seeger at the time that he searched Mr. Anderson, it will encourage officers to forgo a simple records check to determine the supervision status, and instead rely on generalized assumptions that they might possess about people within the community. In certain communities, police know that high percentages of the people that live there are on community supervision. A rule allowing warrantless searches based on generalized assumptions that a person has recently been on supervision will encourage officers to take their chances when deciding whether to conduct a warrantless search. Such intrusions on the Fourth Amendment rights of individuals, however, cannot be so casually made.

Furthermore, even if this Court finds that Officer Seeger had sufficient knowledge that Mr. Anderson was subject to Act 79 based on his supervision status, he did not reasonably suspect that Mr. Anderson was committing, was about to commit or had committed a crime. The only facts that Officer Seeger could rely on to form reasonable suspicion were that Mr. Anderson was in a high crime area, he acknowledged police presence, and he put his hand in his pocket, a set of facts that has been previously found not to constitute reasonable suspicion. *State v. Gordon*, 2014 WI App 44, 353 Wis.2d 468, 846 N.W.2d 483.

B. 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 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 (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).

C. Officer Seeger did not know that Mr. Anderson was subject to the reduced search requirements of Act 79 when he conducted the warrantless search.

2013 Wisconsin Act 79 created multiple statutes relating to searches by law enforcement officers of individuals on probation, parole, or extended supervision. Regardless of whether it is probation, parole, or extended supervision, the statutes 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 enforcement search based on reasonable suspicion: the probation must be 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(1)(d).

"[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 (1978)(emphasis added). *See also Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)(emphasis added) (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…that the suspect has committed…an offense."); *State v. Washington,* 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305(emphasis added) (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.).

Other courts have previously addressed the question of what quantum of evidence the police must have before engaging in a warrantless search of an individual on community supervision under a relaxed standard based on that status. Those courts have concluded that officers must know the person's community supervision status exposing them to a reduced search standard before the search is conducted.

For example, in *United States v. Williams*, 702 F.Supp.2d 1021 (N.D. Ill. 2010), police received information from an informant that Williams and another man, Austin, had committed multiple bank robberies. *Id.* at 1023. Police began surveillance of an apartment where they believed Austin to be located and ultimately entered and searched that apartment without a warrant. *Id.* at 1025. At least one officer knew that Austin was on parole at the time but did not testify about his awareness of any conditions of that parole. *Id.* at 1024,1031.

At the time of the search, Austin was in fact on mandatory supervised release (parole) from the Illinois Department of Corrections and one of the conditions of his supervision was that he must consent to a law enforcement search of his person, property or residence under his control. *Id.* at 1026. This condition of supervision is mandatory under Illinois law. *Id.* at 1031.

The federal district court ordered the evidence suppressed. *Id.* at 1031. In doing so, it stated:

> The government fails to recognize, however, that there is a knowledge component to a valid parole search, that is, the officers conducting the search must have knowledge of the elements that validate the search. In order to satisfy the knowledge component in this case, the government must show that the officers had knowledge of the following three things: (1) Austin was on parole, (2) his [parole] agreement contained a search condition; and (3) [the apartment] was Austin's residence.

Id. at 1030.

The court held that, while at least one officer was aware that Austin was on parole prior to the search, this was insufficient because there was no evidence that the officers knew that Austin's parole included a search condition. *Id.* at 1031.

Similarly, in *People v. Sanders,* 31 Cal 4th 318, 73 P.3d 496 (Calif. 2003), police responded to a reported disturbance at an apartment building. *Id.* at 322. When they arrived they heard yelling inside an apartment, which stopped when they knocked on the door. *Id.* Sanders then opened the door, and officers entered the apartment. *Id.* Officers saw another resident, McDaniel, place something metal behind a couch and they conducted a protective sweep of the house, resulting in the discovery of drugs. *Id.* at 323. After discovering the drugs, one of the officers learned that McDaniel was on parole and could be

searched without a warrant. *Id.* The officers then conducted a parole search of the apartment and seized the drugs. *Id.* The defendants were charged and pled guilty to drug crimes after the trial court denied their motion to suppress the evidence based on an illegal search. *Id.*

The California Supreme Court held that the search was unlawful because the officer was unaware of the parole search condition at the time of the initial search. *Id.* at 335. In doing so that court noted that a conclusion to the contrary would be "without precedent in *any* jurisdiction [and would] give[] police an incentive to make searches even without probable cause because, should it turn out that the suspect is a probationer, the evidence will be admissible nonetheless." *Id.* at 328 (citing La Fave, *Search and Seizure* (3d ed.1996) § 10.10(e), p. 792). Furthermore, that court stated:

> [W]hile society generally has an interest in having all probative evidence before the court, in circumstances such as these a *knowledge-first requirement* is appropriate to deter future police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable searches and seizures.

Id. at 330 (emphasis added). That court also pointed out if they were to hold that the evidence was admissible even though police did not know of McDaniel's parole status at the time of the search, it "would legitimize unlawful police conduct" and that such a rule would have the greatest impact on high

crime areas "where police might suspect probationers live." *Id.* at 335.

Other jurisdictions are in accord. *See also People v. Coleman*, 2013 Il App (1st) 130030, ¶¶ 15, 21, 2 N.E.3d 1221, 377 Ill.Dec. 940 (2013)(holding that police officer must *know* of a person's status as a parolee at the time of a search); *State v. Donaldson*, 221 Md.App. 134, 145, 108 A.3d 500 (2015)(holding "that a constitutionally defective search cannot be justified after the fact by information *unknown* to the officer at the time of the warrantless search" and that this is consistent with the policy goal of discouraging police misconduct underlying the exclusionary rule); *Moreno v. Baca,* 431 F.3d 633, 639 (9th Cir. 2005)(holding that parole search cannot be considered reasonable if the officer is *unaware* of the parole status); *Riccardi v. Perini*, 417 F.2d 645, 648 (6th Cir. 1969)(holding that a police stop and search was unconstitutional because the officers did not *know* that the defendant was on parole or that a crime had been committed at the time of the stop).

In this case, the facts Officer Seeger knew at the time of his search of Mr. Anderson were insufficient to justify a conclusion that he was subject to Act 79. Officer Seeger knew that Mr. Anderson had been arrested for possession with intent to deliver in 2012. (24:18; App. 126). And, based on a record check sometime around March of 2015, Officer Seeger knew that Mr. Anderson had been "released on probation"

on March 17, 2015.[5] (24:19; App. 127). These facts fail to support a reasonable belief that Mr. Anderson was subject to Act 79 at the time Officer Seeger searched him.

Further, Officer Seeger did not indicate that he knew what type of offense Mr. Anderson was on probation for, nor did he know the length of the probation or when it was scheduled to terminate. (24:18-19; App. 126-127). This is important because not all probationers are subject to Act 79. *See* Wis. Stat. § 973.09(1)(d). Only people on probation for felonies, or Ch. 940, 948, or 961 crimes can be searched under the Act. *Id.* Also, probation can last for less than five months in some cases and it can be terminated early. *See* Wis. Stat. §§ 973.09(2)(a)1r and 973.09(3)(d). Further, when a person receives a jail sentence while they are on probation, the jail sentence must run concurrently, such that a person released from jail can have a very short term of probation left to serve. *State v. Maron*, 214 Wis. 2d

[5] Although Officer Seeger made the conclusory assertion during his testimony that he knew Mr. Anderson was on probation in August of 2015 and knew that he was subject to Act 79, the only actual facts that he testified to in support of those conclusions were that he arrested Mr. Anderson in 2012 for possession with intent to deliver and that he was released on probation in March of 2015. (24:18-19; App. 126-127). To the extent that the circuit court found that Officer Seeger knew anything beyond these two facts, that finding was clearly erroneous. (24:25; App. 133).

384, 395, 571 N.W.2d 454 (Ct. App. 1997)(a sentence cannot be made consecutive to a term of probation).

Furthermore, allowing police officers to rely on vague and uncertain information as Officer Seeger did in this case is troubling public policy. In some communities in this State, large percentages of people are under community supervision.[6] Allowing officers to search citizens and their homes based on generalized assumptions would encourage officers to "play the odds" in these communities. It is the goal of the exclusionary rule to prevent this kind of police overreaching. *See, e.g., United States v. Calandra,* 414 U.S. 338, 347–348 (1974)(purpose of exclusionary rule is "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

A police officer who seeks to rely on Act 79 to conduct an otherwise unconstitutional search should be required, when possible, to simply run a records check to determine an individual's supervision status prior to conducting a search. This requirement is reasonable given the fundamental constitutional

[6] In 2013, an estimated 42.3% of black males between the ages of 25 and 34 in the 53206 Milwaukee zip code were either on some form of community supervision or incarcerated in state prison. *See* Levine, Marc V., "Milwaukee 53206: The Anatomy of Concentrated Disadvantage in an Inner City Neighborhood, 2000-2017" (2019) at 56. Center for Economic Development Publications, *available at* https://dc.uwm.edu/ced_pubs/48.

rights at stake, and given the potential for abuse of Act 79 to further damage already strained police-community relations in many urban neighborhoods.

And, whether a record check is required or not, an officer must have knowledge that a person's status exempts him from constitutional protections before embarking on a search that would otherwise violate those protections. Officer Seeger did not have that knowledge here. He acted on vague information and suppositions when current, accurate information was readily available.

D. Even if this Court concludes that Officer Seeger had sufficient knowledge that Mr. Anderson was subject to Act 79, the warrantless search in this case was still illegal because there was insufficient reasonable suspicion that Mr. Anderson was committing, was about to commit or had committed a crime.

As discussed in the context of investigatory seizures, courts have explained that to establish reasonable suspicion "the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot." *State v. Rutzinski*, 2001 WI 22, ¶ 14, 241 Wis. 2d 729, 623 N.W.2d 516. 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.

Here, the information that Officer Seeger had before searching Mr. Anderson does not amount to reasonable suspicion that he was committing, was about to commit, or had committed a crime.[7] That information can be broken down into two categories: (1) the information related to the alleged tip that Officer Seeger received about Mr. Anderson selling drugs, and (2) Officer Seeger's observations of Mr. Anderson on the day of the stop and search.

1. The tip does not provide reasonable suspicion.

Information from informants may justify police action in some circumstances. *Rutzinski*, ¶ 17. Informants' tips vary greatly in reliability, and as a result police must consider a tip's reliability and content before making a search or seizure. *Id.* Tips must be viewed in the totality of the circumstances and must exhibit "reasonable indicia of reliability." *Id.*, ¶ 18. Due weight must be given to the informant's veracity and to their basis of knowledge. *Id.* "A deficiency in one consideration may be

[7] There is no evidence that Mr. Anderson was committing, was about to commit, or had committed a violation of his rules of supervision. *See generally* 24; App. 109-138.

compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 233 (1983)(internal quotes omitted)).

Information police receive from the public can be broken down into three categories: (1) citizen informants, (2) confidential informants, and (3) anonymous informants. *Rutzinski*, ¶¶ 19, 22, 27; *See also State v. Kolk*, 2006 WI App 261, ¶ 12, 298 Wis. 2d 99, 726 N.W.2d 337. In Mr. Anderson's case, it is unclear into which of these categories the tip Officer Seeger received falls. However, none of them justifies relying on that tip to establish reasonable suspicion.

Citizen informants are important to our system of justice and they enjoy a "relaxed test of reliability" that focuses mostly on the observational reliability of the information they provide. *Kolk*, ¶ 13. Citizen informants' reliability is judged from "the nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." *Id.* Typically, in order to be deemed reliable, citizen informants must say how they know the information that they are providing to police. *Id.*, ¶ 15.

Confidential informants are different from citizen informants in that they usually have a criminal past themselves and are assisting the police specifically for the purpose of identifying and catching criminals. *Id.*, ¶ 12. Confidential informants'

reliability must be judged by whether they have provided truthful information to police on previous occasions. *Id.*

An anonymous tip can be deemed reliable where independent police investigation corroborates the information provided and it indicates that the tipster possesses "inside information." *Rutzinski*, ¶ 22. If a tip provides "virtually no indication of the informant's veracity or basis of knowledge" then "something more than the tip [is] required." *Id.*, ¶ 23 (citing *Alabama v. White*, 496 U.S. 325, 329 (1990)(internal quotes omitted)). The tip must contain something more than just "easily obtainable facts such as the defendant's whereabouts or the type of car she drove." *Id.*, ¶ 24.

In Mr. Anderson's case, the tip Officer Seeger received is not reliable under any of the three types of informant information. First, if this was a citizen informant there is no evidence in the record providing the basis of the informant's knowledge.

In *Kolk*, police received information from a citizen informant, who was identified, that Kolk was driving to Milwaukee that day to buy drugs. *Id.*, ¶ 2. Police were able to corroborate that the informant correctly provided them Kolk's identity, what kind of car he drove and that he would drive that car, possibly on the way to Madison. *Id.*, ¶ 17. In holding that this information did not amount to reasonable suspicion, the *Kolk* court concluded that "[w]here an informant does not give some indication of how he or

she knows about the suspicious or criminal activity reported…it bears significantly on the reliability of the information." *Id.*, ¶ 15.

Similarly, in this case, we do not know how the informant knew about any suspicious or criminal activity in which Mr. Anderson was involved. As the *Kolk* court stated, it "might have been based on first-hand knowledge, but it might also have been the product of rumor or speculation. We do not know, either because the informant did not tell the police or because the police did not tell the circuit court." *Id.* What we are left with then is an analysis of any predictive information that the informant provided. In this case, there was none. The only information provided was that Mr. Anderson could be found in a certain location. Such easily obtainable facts as a defendant's whereabouts do not suffice. *See White*, 496 U.S. at 332.

There is even less of a basis to rely on the informant here as a confidential informant, as Officer Seeger did not testify this informant had provided truthful information in any prior cases. *See Kolk*, ¶ 12. And, the reliability of confidential informants, typically criminals themselves, is judged by a more stringent standard and requires prior instances of verified truthful information to establish credibility. *Id.*

Finally, if Officer Seeger's information was based upon an anonymous tip, it would require independent police corroboration of predictive

information indicating that the informer had inside information. *Rutzinski*, ¶ 24; *White*, 496 U.S. at 332. As noted above, in this case, there was no predictive information contained within the informant's tip. In that way, this case is comparable to *Florida v. J.L.*, 529 U.S. 266 (2000). In that case, police received an anonymous tip that a young black male wearing a plaid shirt was standing at a particular bus stop and he was carrying a gun. *Id.* at 268. Police located the young man, stopped him and located a gun concealed on his person in violation of Florida law. *Id.* at 268-269. The United States Supreme Court held that the stop was unconstitutional because police did not verify any information that tended to indicate the informant's basis of knowledge about the illegal behavior. *Id.* at 271-272, 274. In that case police only corroborated easily obtainable information about the suspect's identity and location. *Id.* at 272.

In Mr. Anderson's case the record is devoid of any evidence as to the alleged informant's veracity or basis of knowledge. For that reason alone the informant's tip fails under the theory that the tipster was either a citizen informant or confidential informant. Officer Seeger's conclusory statement that his informant was "reliable and credible" is not sufficient to establish that fact. *State v. Mansfield*, 55 Wis. 2d 274, 279-280, 198 N.W.2d 634 (1972). Finally, the information cannot establish reasonable suspicion as an anonymous tip because it provided no predictive information that the police verified. Therefore, none of the information contained in

Officer Seeger's informant's tip can be used in the reasonable suspicion calculus.

2. Officer Seeger's observations of Mr. Anderson do not amount to reasonable suspicion.

Mr. Anderson's behavior just prior to the stop does nothing to make up for the inadequate testimony regarding the informant. The Court of Appeals has previously concluded that behavior very similar to Mr. Anderson's in this case does not amount to reasonable suspicion in *State v. Gordon*, 2014 WI App 44, 353 Wis.2d 468, 846 N.W.2d 483.

In *Gordon*, police were driving in a marked squad car in the evening hours when they saw Gordon and two friends walking in the same direction. *Id.*, ¶ 3. 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"[8] 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

[8] 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*, 2014 WI App 44, ¶ 4.

to flee. *Id.* Officers approached and asked to see their hands. *Id.*, ¶ 6. They complied, and police frisked Gordon, finding a gun, crack cocaine, and marijuana. *Id.*

The *Gordon* court concluded 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. That court held these components, "either taken separately or added together, [did] not equal the requisite objective 'reasonable suspicion' that 'criminal activity' by Gordon was 'afoot.'" *Id.*

Here, Officer Seeger's observations of Mr. Anderson just before the stop and search are indistinguishable from those in *Gordon*: (1) Officer Seeger found Mr. Anderson in a high crime area, (2) Mr. Anderson saw the police and made "several glances over his shoulder" at them, and (3) upon seeing officers Mr. Anderson put his hand in his pocket. (24:7-9; App. 115-117). Officer Seeger also testified that Mr. Anderson made a single turn on his bicycle but he did not increase his speed and he stopped immediately upon being requested to do so. (24:13; App. 121).

Thus, both *Gordon* and this case add up to the defendant being in a high crime area, acknowledging police presence and touching a pocket. This was insufficient to justify the search in *Gordon* and is insufficient here. Additionally, the police in *Gordon*

arguably had more facts supporting reasonable suspicion, because the officer in that case testified that his training and experience indicated that the specific touch that Gordon executed was for the purpose of checking the security of a concealed weapon. In this case, Mr. Anderson simply put his hand in his pocket. Although Officer Seeger testified that this concerned him because sometimes people with concealed contraband will try to discard it, Mr. Anderson made no such attempts.

Therefore, considering the totality of the circumstances, the facts that Officer Seeger had at the time his search of Mr. Anderson did not create a reasonable suspicion that he was committing, was about to commit or had committed a crime. Thus, Officer Seeger was not justified in searching Mr. Anderson pursuant to Act 79.

CONCLUSION

The warrantless search of Mr. Anderson in this case was illegal because officers did not know that he was subject to Act 79 and because they lacked a reasonable suspicion that Mr. Anderson was committing, was about to commit, or had committed a crime. This Court should reverse the decisions of the Court of Appeals and the circuit court, vacate Mr. Anderson's conviction, and remand with instructions to suppress any evidence obtained pursuant to that unlawful search.

Dated this 9th day of May, 2019.

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 5,897 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 9th day of May, 2019.

Signed:

JAY PUCEK
Assistant State Public Defender

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 including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of May, 2019.

Signed:

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APPENDIX

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