STATE OF WISCONSIN

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

DISTRICT I

Case No. 2017AP001397-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LINDSEY DAWAYNE NEAL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered
in the Milwaukee County Circuit Court,
the Honorable Timothy M. Witkowiak, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

At Mr. Neal's suppression hearing, where the State relied solely on the squad video, did the State meet its burden to show the traffic seizure, frisk, protective search, and extension of the seizure were lawful?

The State presented only the squad video and the foundational testimony necessary to enter the squad into evidence. The circuit court found the State met its burden and denied Mr. Neal's suppression motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Neal welcomes oral argument if it would be helpful to the court. As this case involves facts applied to settled law, publication is likely not warranted.

STATEMENT OF FACTS AND CASE

A. Introduction.

This case centers on a motion to suppress filed after a traffic stop. Mr. Neal challenged the basis for the seizure, the duration of the seizure, a frisk, and his arrest, which resulted in charges of possession with intent to deliver cocaine and obstructing an officer. The purported basis for the seizure was that the car was illegally blocking traffic in an alley.

At the hearing on the motion to suppress, the State insisted it could meet its burden solely with a squad video. The circuit court permitted the State to introduce only the video and heard testimony from one officer solely for the

purpose of admitting the squad video into evidence. Ultimately, the circuit court denied Mr. Neal's motion to suppress.

As Mr. Neal will argue more fully below, by relying only on the squad video, the State failed to meet its burden to prove that the seizure, frisk, protective search, and extension of the seizure did not violate the Fourth Amendment's provisions.

B. Allegations of the criminal complaint.

On April 25, 2016, Mr. Neal was charged with one count of possession with intent to deliver cocaine (>1-5g), in violation of WIS. STAT. § 961.41(1m)(cm)1r, and with one count of obstructing an officer, in violation of WIS. STAT. § 946.41(1).

According to the criminal complaint, on April 21, 2016, at approximately 11:07 p.m., Milwaukee police officers Sean Mahnke, Mark Dillman, and Ismar Kulenovic were on patrol in uniform and in a marked police squad car. (1:1). While driving south in an alley in the 2700 block of North Buffum Street and North Richards Street, the officers reportedly observed a silver Toyota Solara parked with its lights off in the middle of the alley behind 2722 N. Richards Street, seemingly blocking traffic. (1:1-2).

Officer Mahnke activated the squad's emergency lights to investigate the parking violation. (1:2). The complaint indicates the officers made contact with the occupants and asked them to exit the vehicle. (1:2). Mr. Neal was sitting in the front passenger seat. (1:2). According to the complaint, after the occupants got out of the car, Mahnke saw

a firearm underneath the front passenger seat.1 (1:2). Mahnke attempted to gain control of Mr. Neal to place him in handcuffs, but Mr. Neal pulled away and tried to leave. (1:2). Dillman and Kulenovic "direct[ed] the defendant to the ground, where [Mr. Neal] continued to resist the officers' attempts to take him into custody." (1:2). While Dillman and Kulenovic were on top of him, Mr. Neal stood up and ran northbound. (1:2). Kulenovic deployed his Taser, hitting Mr. Neal in the lower back, after which officers handcuffed him. (1:2). After Mr. Neal was handcuffed, Mr. Neal stated that he had cocaine in his pants pocket. (1:2).

C. Motion to suppress and suppression hearing.

Mr. Neal filed a motion to suppress evidence obtained as a result of the seizure, arguing the police violated his Fourth Amendment rights. (7:1). He challenged the reasonable suspicion for the seizure, the police frisk, the extension and duration of the seizure, and his arrest. (7:3-5). After the State filed a written response, an initial motion hearing was held, and then additional briefing followed before the court rendered its oral decision. (8; 13; 14; 16; 17).

The circuit court conducted an initial hearing on the motion on July 12, 2016. (45; App.101). The State argued the matter could be resolved through argument only. (45:4; App.103). Though defense counsel insisted testimony was

[1] Although the complaint indicates that a gun was discovered underneath the passenger seat, there is no evidence in the record regarding the gun, because the only evidence introduced at the hearing was the squad video, which did not have sound and does not actually depict the discovery of the gun. (Exhibit 1 from the July 12, 2016 motion hearing; App.127).

necessary, the squad video was the only evidence the State presented. (45:4, 15, 17-18; App.103, 114, 116-17).

Thus, State's Exhibit 12, the squad video, depicted the following:

- The squad activates its spot lamp (11:06:14) and its emergency lights (11:06:18) within seconds after the Toyota comes into view (11:06:07)
- The Toyota's lights are off; there are two visible occupants (11:06:18)
- From the viewpoint of the video, the Toyota is on the left half of the alley; there is space on the driver's side of the alley for traffic to pass by (11:06:18)
- Neither occupant moves as the squad approaches, head-on. (11:06:18-30)
- Three officers surround the Toyota. (11:06:33-40)
- Each officer is in uniform and each carries a flashlight. (11:06:33-40)
- While one officer speaks to the driver, the other two officers shine their flashlights into the

[2] Undersigned counsel moved to supplement the record with the video exhibit, (49:1-2), and this Court granted the request on September 18, 2017. (50; App.126). The video exhibit does not have its own number in the supplemental appellate record index, and upon counsel's inquiries, she was told by the Milwaukee Clerk of Court's office, who had checked with the Court of Appeals, that it could be referred to exactly as the "CTO" stated: Exhibit 1 from the July 12, 2016 motion hearing. Therefore, for citation purposes, counsel will refer to it in that way, followed by the video's timestamps. In addition, counsel has attached a copy of the exhibit in the appendix of her brief. (Exhibit 1 from the July 12, 2016 motion hearing; App.127).

backseat, from the driver's side and passenger side. (11:06:40-48)

- The officer at the driver's door opens the driver's side door and motions for the driver to exit. (11:06:48-52)

- The driver steps out and the second officer immediately pats down the driver. (11:06:58-11:07:08)

- The third officer, standing on the passenger side, opens the passenger door[3] and the passenger gets out. (11:07:01)

- The passenger is immediately patted down. (11:07:06-16)

- Officers direct both occupants to the back of the Toyota. (11:07:09; 11:07:16)

- The passenger side officer bends over and searches inside the Toyota, at one point,

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[3] As the squad video clearly depicts, officers opened both the driver's side and passenger doors. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:48, 11:07:01). Currently, the Wisconsin Supreme Court is deciding a case in which, during a traffic stop, a police officer opened a passenger door to communicate with the driver. ***State v. Smith***, 2016 WI App 80, 372 Wis. 2d 184, 888 N.W.2d 22, review granted, 2017 WI 20, 373 Wis. 2d 643, 896 N.W.2d 360. Smith argued, in part, that the officer violated his Fourth Amendment rights by opening his door because that action was not the least intrusive investigative means, but was an intrusive action taken to illegally force Smith's compliance with police investigation, was not *de minimus*, and constituted an illegal search. Oral arguments took place, but no decision has yet been issued. *See* Wisconsin Supreme Court and Court of Appeals access page, available at: https://wscca.wicourts.gov/appealHistory.xsl;jsessionid=D1DBA603A37954B4A5223FC28774BB34?caseNo=2015AP000756&cacheId=B87CE0CEA63CF7BBA5330E3AAEFC74E4&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC

> squatting or kneeling to search further. (11:07:18-31)
>
> - When the officer stands up and walks toward the back of the car, and seemingly attempts to place the passenger in custody, the passenger resists (11:07:35); he flees off-camera (11:07:48).

(Exhibit 1 from the July 12, 2016 motion hearing; App.127).

The State argued that the vehicle was parked "in a manner as to obstruct traffic," in violation of Milwaukee city traffic ordinance § 101-24.2, "Blocking Traffic," which states: "It shall be unlawful for any vehicle to be parked or left standing on a highway in such a manner as to obstruct traffic." (45:5; App.104). The defense argued the vehicle was not violating the ordinance because there was no traffic to obstruct, and because there was in fact room for other vehicles to drive around the car. (45:6-10; App.105-109).

Without hearing any testimony and prior to reviewing the squad video, the court found that the Toyota was parked so as to obstruct traffic in violation of § 101-24.2. (45:11; App.110). As a result, the court found the officers had reasonable suspicion to stop the Toyota. (45:11; App.110).

After the court made its initial finding that the seizure was supported by reasonable suspicion, it reviewed the squad video. (45:12-13; App.111-12). At the end of the hearing, the State called police office Sean Mahnke, who testified the squad video was a fair and accurate depiction of the incident. (45:17-18; App.116-17). The State moved to admit the video, and the circuit court received the video as State's Exhibit 1. (45:18; App.117). The defense argued the officers' actions after the initial stop were illegal, and asked to take testimony. (45:15; App.114). The State objected to taking additional testimony, insisting the squad video resolved the legal

arguments raised. (45:15; App.114). In response, the court said:

> Counsel, what we'll do is I'm going to make a finding that based upon what I have here both parties agree that video is accurate, then I'm going to make a finding that unless counsel can come up with case law indicating to me again a passenger can't be stopped even for that short period of time I don't know that we need to take any testimony in this case at all.

(45:16; App.115).

In subsequent briefing, the defense argued the police officers' actions after the initial stop were unreasonable incremental intrusions because officers had no reasonable belief that Mr. Neal was armed or dangerous, and thus, his continued detention was unjustified. (13:3-4). In addition, the defense compared the facts of Mr. Neal's case to the Seventh Circuit's now-vacated decision[4] in ***United States v. Johnson***, 823 F.3d 408 (7th Cir. 2016), a case in which Milwaukee police seized a vehicle on the basis of an ordinance violation that requires vehicles to park at least fifteen feet from a crosswalk. (16:2-4).

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[4] Oral argument took place November 17, 2015, and on May 17, 2016, the Seventh Circuit affirmed the district court's decision denying the suppression motion, with one judge dissenting. The Seventh Circuit granted Johnson's petition for a rehearing en banc, and vacated the opinion on August 8, 2016. *See* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D08-08/C:15-1366:J:PerCuriam:aut:T:fnOpW:N:1824399:S:0. Oral argument was again held on November 30, 2016. *See* http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=15&casenumber=1366&listCase=List+case%28s%29. At the time of this filing, the court had not yet issued its decision.

The court rendered its final decision in a hearing on September 27, 2016. (46; App.121). It did not rule on the particularities of the defense's argument, specifically, regarding the frisk of Mr. Neal and the search of the car, but denied the motion, concluding:

> The Court already did make a finding relating to the fact that the officers did have cause to stop the vehicle itself.
>
> ***
>
> And the question is whether [the stop] justified the [detention] of the defendant itself [sic.] There is case law that indicates that on a stop, a passenger too can be stopped as long as the initial stop is legal. The only issue is the duration, the duration of the stop itself can't be extended. In this case it was not a very long stop. The defendant did then, after a short period of time, decided [sic] to leave the scene. The Court is going to find that the stop itself, it was of reasonable duration, and that, therefore, the Court will deny the defense motion.

(46:2-3; App.122-23).

D. Plea and sentencing hearings.

Mr. Neal pled guilty to the two counts as charged in the criminal complaint: one count of possession with intent to deliver cocaine between one and five grams, and one count of obstructing an officer. (47:3-4, 11-12). On the drug offense, the court imposed and stayed a prison term of two and a half years of initial confinement and two and a half years of extended supervision, and placed Mr. Neal on probation for three years, with five months condition time. (48:21-22). On the obstructing charge, the court imposed a consecutive one-month term in the House of Correction. (48:22).

Additional facts will be included as necessary below.

ARGUMENT

I. The State Failed to Meet Its Burden to Support the Seizure, Frisk, Protective Search, and Extension of the Seizure.

A. Standard of review and general legal principles.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches and seizures." ***State v. Washington***, 2005 WI App 123, ¶12, 284 Wis. 2d 456, 700 N.W.2d 305. Whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. This Court defers to the circuit court's findings of historical fact unless clearly erroneous, but independently applies the relevant constitutional standards to those facts. ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182. And, in construing the Wisconsin Constitution, this Court consistently follows the United States Supreme Court's interpretation of the Fourth Amendment. ***State v. Betterley***, 191 Wis. 2d 407, 417, 529 N.W.2d 216 (1995).

It is the State's burden to prove that a warrantless search or seizure was reasonable and in conformity with the Fourth Amendment. ***State v. Quartana***, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997). Under the totality of the facts and circumstances, the State cannot meet its burden to establish that the seizure, frisk, protective search, and extension were reasonable. ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973); ***Florida v. Royer***, 460 U.S. 491, 500 (1983).

If this Court finds that the officers' actions here violated the Fourth Amendment, the remedy is to suppress the evidence obtained. ***State v. Washington***, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305; ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963).

B. There was no reasonable suspicion for the initial seizure.

While the Wisconsin Supreme Court has held that an officer may conduct an investigatory stop of a vehicle based on a reasonable suspicion of a non-traffic civil forfeiture offense, *see* ***State v. Iverson***, 2015 WI 101, ¶¶54-55, 365 Wis. 2d 302, 871 N.W.2d 661, in this case, the police did not have reasonable suspicion to justify their investigatory stop.

Citing a recent decision, the supreme court noted it had "reasoned that the brief nature of traffic stops, 'weighed against the public interest in safe roads'" warranted the court's conclusion that, "'[i]n at least some circumstances, reasonable suspicion that a non-traffic-related law has been broken may also justify a traffic stop.'" ***Id.***, ¶52, citing ***State v. Houghton***, 2015 WI 79, ¶30 n.6, 364 Wis. 2d 234, 868 N.W.2d 143. In this case, as the passenger in the stopped vehicle, Mr. Neal possessed a reasonable expectation of privacy to travel free from unreasonable government intrusion. ***State v. Harris***, 206 Wis. 2d 243, 258, 557 N.W.2d 245 (1996).

"In order to justify an investigatory seizure, '[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.'" ***State v. Colstad***, 2003 WI App 25, ¶7, 260 Wis. 2d 406, 659 N.W.2d 394, citing ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. What constitutes reasonable

suspicion is "a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience[?]" ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

No testimony was taken at the suppression hearing to establish reasonable suspicion, grounded in specific, articulable facts and reasonable inferences from those facts, that the Toyota was violating the law. If another vehicle could pass the Toyota, traffic would not be blocked, and therefore there would be no basis for the police seizure. The parties disputed whether another vehicle could pass the Toyota, such that no traffic was blocked by it. (45:5-6, 8-11; App.104-05, 107-10). In addition, trial counsel argued that no traffic was blocked by the Toyota at the time of the police seizure, and had asserted in her motion that Mr. Neal and the driver would testify that the car was not parked, but rather, was temporarily standing while waiting to pick up a passenger. (16:1-2; 45:8-9; App.107-09).

The circuit court erred when it found that the State met its burden to show the car was blocking traffic, thereby creating reasonable suspicion to justify the traffic seizure. Because the squad video was admitted into evidence, this Court may make its own review like any other evidence in the record. *See* ***State v. Billings***, 110 Wis. 2d 661, 671, 329 N.W.2d 192 (1983). To the extent the circuit court made findings regarding the contents of the video, this Court reviews those under the clearly erroneous standard of review. *See* ***State v. Walli***, 2011 WI App 86, ¶¶14-17, 334 Wis. 2d 402, 799 N.W.2d 898. However, because the parties did not dispute the accuracy of the contents of the squad video, the video is akin to historical fact, and this Court may review it independently. *See* ***State v. Jimmie R.R.***, 2000 WI App 5,

¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (1999); (45:16; App.115).

Thus, this Court should review the squad video and find that the traffic seizure was not supported by reasonable suspicion that the Toyota was blocking traffic in violation of § 101-24.2. The video shows that the alley is relatively wide; it is clearly wider than the width of one vehicle. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:18). It shows that, from the perspective of the squad video, the Toyota is unquestionably positioned on the left half of the alley. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:18). In addition, there appears to be sufficient space for traffic to drive around the Toyota on the driver's side. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:18). Last, the video clearly shows there was no traffic in the area being blocked by the Toyota. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:07-18). Accordingly, this Court should conclude that the traffic seizure was not supported by reasonable suspicion the Toyota was blocking traffic because there was sufficient room for another vehicle to pass and because there was no traffic being blocked at the time of the traffic seizure.

In the alternative, if this Court believes additional testimony was necessary to determine whether the Toyota was blocking traffic due to its position in the alleyway, then Mr. Neal submits that the court's finding, made without the benefit of any testimony, and made before the court watched the squad video, is clearly erroneous. *See* ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615.

C. There was no basis for the frisk of Mr. Neal's person or the protective search of the vehicle.

In order to frisk a person for weapons, an officer needs "reason to believe that the subject is armed and dangerous." ***Johnson***, 299 Wis. 2d at ¶¶41-48; WIS. STAT. § 968.25. WISCONSIN STAT. § 968.25 permits an officer to search the passenger compartment of a vehicle for weapons if an individual who recently occupied the vehicle is stopped under s.968.24 ("temporary questioning without arrest") and the officer "reasonably suspects that he or another is in danger of physical injury." ***State v. Moretto***, 144 Wis. 2d 171, 423 N.W.2d 841 (1988). Whether an officer's beliefs are reasonable is an objective standard. ***Johnson***, 299 Wis. 2d at ¶21.

In this case, the record lacks any basis from which the court could find that the officers had reason to believe that the vehicle's occupants were armed and dangerous. The squad video clearly shows that neither occupant "dipped," "made furtive movements," or otherwise moved in such a way to signal the presence of a weapon when the Toyota was stopped. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:18-30). When the officers approached the occupants, the video does not show any indication of a lack of cooperation; rather, both occupants stepped out immediately after the officers opened the passenger and driver's side doors and submitted to the frisks before walking toward the back of the vehicle while the third officer searched inside the passenger compartment. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:48-11:07:31). In the motion to suppress, the defense noted that there were no documented odors of intoxicants, strange behavior, excessive nervousness, statements admitting to guns or drugs, or anonymous tips or alleged drug transactions previously

observed. (7:4). In addition, the squad video clearly shows the immediacy with which the officers moved to frisk both Mr. Neal and the driver, in a manner suggesting the actions were a matter of course, rather than based on specific and articulable facts justifying a frisk. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:48-11:07:16). From the video, it is clear that there was no time for reasonable suspicion to even develop, given the speed with which the officers moved from opening the Toyota's doors to frisking Mr. Neal and the driver. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:48-11:07:16).

The officers did not have the authority to frisk the occupants, or to search the passenger compartment of the vehicle. *See* ***State v. Buchanan***, 2011 WI 49, ¶9, 334 Wis. 2d 379, 799 N.W.2d 775; *see also* ***Michigan v. Long***, 463 U.S. 1032, 1049 (1983). In ***Long***, two police officers observed the defendant's car traveling erratically at an excessive speed, and after it swerved into a ditch, the officers stopped to investigate. 463 U.S. at 1035. The officers believed the defendant "appeared to be under the influence of something" and, when they followed him to his car, the car door was open and officers saw a hunting knife on the floor board. ***Id.***, at 1036. Accordingly, officers frisked the defendant, and subsequently conducted a limited search of the interior after making the additional observation of something protruding from under the arm rest. ***Id.*** The United States Supreme Court that "[t]he circumstances of the[e] case clearly justified Deputies Howell and Lewis in their reasonable belief that Long posed a danger if he were permitted to reenter his vehicle." ***Id.***, 1050. The court emphasized specific and articulable facts that justified the frisk of the defendant and the subsequent search of the vehicle, including the fact that the defendant was not frisked until the officers observed there was a large knife in the interior of his car. ***Id.***

In ***Buchanan***, the officer testified he observed the defendant's vehicle speeding, and after he activated his squad's lights to initiate a stop, he saw Buchanan moving his arm and shoulder as if he was placing something beneath his feet. 334 Wis. 2d at ¶¶1, 10. In addition, the car began weaving as it slowed to pull over, and the officer testified that Buchanan appeared very nervous and his hands were noticeably shaking. ***Id.*** Under those facts and their accompanying rational inferences, the Wisconsin Supreme Court concluded the officer had a reasonable suspicion that Buchanan was armed and a threat to the officer's safety, which justified a frisk of Buchanan and the area inside the car within his reach. ***Id.***, ¶¶18-19.

Unlike in ***Long*** and ***Buchanan***, here, there are no specific and articulable facts that justified the frisk of Mr. Neal or the protective search of the vehicle.[5] Thus, ***State v. Kyles***, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449, is an instructive case for determining whether officers nevertheless had reasonable suspicion to justify the frisk and protective search of the vehicle. There, the Wisconsin Supreme Court determined the totality of the circumstances did not support the conclusion that the officer had reasonable suspicion to justify the protective search for weapons on the defendant. ***Id.***, ¶¶68, 72.

The supreme court explained, "In determining whether a frisk was reasonable, *a court may look 'to any fact in the record*, as long as it was known to the officer at the time he conducted the frisk *and is otherwise supported by his*

[5] As noted in the fact section, no evidence regarding the gun was introduced at the suppression hearing. In addition, the gun is not shown on the squad video, and the squad video does not have sound. (Exhibit 1 from the July 12, 2016 motion hearing; App.127).

testimony at the suppression hearing.'" ***Kyles***, 269 Wis. 2d at ¶10 (emphasis added). In ***Kyles***, an officer pulled over a vehicle for the traffic violation of operating a vehicle without headlights after dark. ***Id.***, ¶11. Like Mr. Neal, the defendant was a passenger in the vehicle. ***Id.*** The supreme court considered "six factors that compose[d] the totality of the circumstances":

> (1) The officer testified that he 'didn't feel any particular threat before searching' the defendant;
>
> (2) The defendant, during a four-to-eight-second interval, at least twice inserted his hands into and removed his hands from his coat pockets after being directed by the officer to remove his hands from his pockets;
>
> (3) The defendant wore a big, fluffy down coat in which a weapon could be secreted;
>
> (4) The defendant appeared nervous;
>
> (5) The stop occurred at night; and
>
> (6) The officer testified, in response to a question about the criminal activity in the area of the stop, that it was 'pretty active.'

Id., ¶17.

After examining each of the above-listed factors separately and considering them in their totality, the court explained:

> We conclude that the officer could not, as a matter of law, have reasonably suspected that the defendant was armed and dangerous. The officer's belief under the circumstances of this case that the defendant was armed and dangerous was more "an inchoate and

> unparticularlized suspicion or 'hunch'" than a reasonable inference. *There was not sufficient articulable, objective information to provide the officer with reasonable suspicion that the defendant was armed and dangerous to the officer or others.*

Id., ¶72 (emphasis added). It concluded the protective search for weapons was not based on reasonable suspicion that the defendant was armed and dangerous to the officer or to others, and held the frisk was not reasonable.

Here, without testimony supporting a reasonable belief that Mr. Neal was armed and dangerous, the State did not meet its burden and the court could not find the frisk was lawful. *See* ***Johnson***, 299 Wis. 2d 675, ¶¶41-48; WIS. STAT. § 968.25. The squad video fails to supply sufficient evidence to support that the officers had a reasonable belief that Mr. Neal was armed and dangerous, and therefore, the frisk was not reasonable. Similarly, based solely on the squad video that the State relied upon, the State also failed to meet its burden to establish the lawfulness of the police search of the vehicle. *See* ***Moretto***, 144 Wis. 2d 171; WIS. STAT. § 968.25. The squad video alone was simply insufficient to establish the objective reasonable suspicion necessary to justify a protective search of the vehicle. *See* ***Kyles***, 269 Wis. 2d at ¶¶10, 72.

D. There was no basis for the extension of the seizure.

A person is seized when a police officer restrains a person's liberty by means of physical force or a show of authority, such that a reasonable person under the circumstances would not feel free to leave. ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996); ***State v. Williams***, 2002 WI 94, ¶23, 255 Wis. 2d 1, 646 N.W.2d 834.

Here, the State stipulated Mr. Neal was seized when he exited the vehicle at the officers' command. (45:15-16; App.114-15).

Officers may detain a person in the course of investigating a routine traffic violation only for as long as necessary to complete the investigation of the violation. *See* ***Knowles v. Iowa***, 525 U.S. 113, 117 (1998). A traffic seizure "exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." ***Rodriguez v. United States***, 135 S.Ct. 1609, 1612 (2015). In this case, the officers detained Mr. Neal and the vehicle's driver past the time necessary to complete the investigation for the alleged parking violation, thereby violating Mr. Neal's Fourth Amendment rights. *See* ***Royer***, 460 U.S. at 498 (During an investigatory stop, officers may not detain a person "even momentarily without reasonable, objective grounds for doing so.").

An investigation for "blocking traffic" is straightforward: an officer may ask the driver to move the vehicle, or the officer may decide to issue a citation for the ordinance violation. While officers may order vehicle occupants out of a car pursuant to ***Pennsylvania v. Mimms***, 434 U.S. 106 (1977), the police officers' subsequent conduct here, frisking Mr. Neal and doing a protective search of the car, was wholly unjustified. Without lawful justification to frisk the occupants or search the vehicle, the extension of the investigatory stop to conduct those tasks went beyond the time necessary to fulfill the purpose of this purported non-traffic ordinance violation stop. ***United States v. Sharpe***, 470 U.S. 675, 684-85 (1985); *see also* ***Griffith***, 236 Wis. 2d 48, ¶54.

As a result, the circuit court erred in denying the suppression motion, as the record lacks any legal basis for the officers' actions. Notably, this case presents a series of officer-created problems. The Toyota was not blocking any traffic when the officers approached it based on an alleged ordinance violation. The record does not support their conclusion that another car could not pass by, between the Toyota and the garages on the right side of the alley. The officers were not justified in opening the Toyota's doors, frisking either occupant, or doing a protective search of the vehicle. Only after this series of unlawful actions: seizure, frisk, and search—did Mr. Neal flee, thereby creating probable cause for his arrest, at which point police seized illegal drugs in the search incident to his arrest.

Accordingly, this Court should reverse the circuit court's order denying Mr. Neal's suppression motion, and should remand with instructions that the circuit court order the evidence obtained pursuant to Mr. Neal's subsequent arrest suppressed. ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963).

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's order denying Mr. Neal's suppression motion.

Dated this 16th day of October, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,031 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 16th day of October, 2017.

Signed:

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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 first names and last initials 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 16th day of October, 2017.

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