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.

---

# REPLY BRIEF OF DEFENDANT-APPELLANT

---

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

## TABLE OF CONTENTS



## CASES CITED

## CONSTITUTIONAL PROVISIONS AND STATUTES CITED

<u>United States Constitution</u>

## OTHER AUTHORITIES

## ARGUMENT

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

At the outset of its brief, the state condemns Mr. Neal's arguments as "irrelevant components" of a stop it believes was perfectly lawful. (State's brief p.2). It "reframes" the issue by arguing that the only relevant questions are whether the police had reasonable suspicion for the initial stop, and if so, whether the ordinary inquiries of a traffic stop should have been completed in the minute and fifteen seconds[1] before Neal's flight from police. (State's br. p.1).

However, the state fails to understand the significance of the chain of illegalities: without lawful justification to frisk the occupants or to conduct a protective search of the vehicle, the extension of the investigatory stop to conduct those tasks went beyond the time necessary to fulfill the purpose of the purported non-traffic ordinance violation stop. ***United States v. Sharpe***, 470 U.S. 675, 684-85 (1985); *see also* ***State v. Griffith***, 2000 WI 72, ¶54, 236 Wis. 2d 48, 613 N.W.2d 72. Thus, even though nothing was recovered during the frisk of Mr. Neal, the officers unlawfully extended the initial seizure by performing a suspicionless frisk and a suspicionless protective search of the car. Only after this series of unlawful

---

[1] The state also asserts that the total time from when the officers activated their emergency flashers to the beginning of Mr. Neal's struggle with police was one minute and fifteen seconds, citing to Exhibit 1, from 0:15 to 1:46, which is actually one minute and thirty-one seconds. (State's br. p.3).

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.

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

The state asserts the circuit court's determination that the Toyota was parked in a manner that would "hinder" the passage of other cars was correct. (State's br. p.11-12). However, the state's argument sorely suffers from the absence of testimony about the initial seizure, and from the lack of audio to supplement the squad video. As Mr. Neal argued in his initial brief, without testimony or audio, there is no reasonable suspicion that the Toyota was violating the law. (*See* Neal brief-in-chief p.12). Simply put, the circuit court erred when it found that the state met its burden to show the Toyota was blocking traffic, thereby creating reasonable suspicion to justify the traffic seizure. The circuit court made this determination before it had even watched the squad video, and without the benefit of any testimony from officers present at the scene about the width of the alley, the Toyota's location, or whether another car could pass by. (45:12-13, App.111-12). Accordingly, the circuit court's finding was clearly erroneous. *See* ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615.

The state nevertheless asserts that the Toyota was parked in a manner "that blocked traffic in one direction" and that a vehicle does not have to "completely block traffic in both directions in order to 'obstruct' it." (State's br. p.12). By the state's own admission, though, the circuit court's decision seems to have been grounded in its belief that cars could not travel both directions in this alley because of the Toyota's location. (State's br. p.11). According to the state's definition,

the ordinary, dictionary meaning of "obstruct" is to "block or close up by an obstacle." (State's br. p.11; https://www.merriamwebster.com/dictionary/obstruct). If this Court determines that another vehicle could pass the Toyota, it follows that the alley was not obstructed, because it was not "block[ed] or close[d] up by" the Toyota's placement. (Id.). Likewise, if another vehicle could pass the Toyota, traffic would not be "hinder[ed] from passage." (Id.).

Further, can a driver never pause in an alleyway, to wait for a garage door to close, without violating the ordinance? To get out to move a neighbor's errant trash can? To wait while the passenger runs back for the coffee mug left on the kitchen counter? Again, these questions circle back to the problem caused by the lack of facts in the record, because the record does not indicate whether the Toyota was turned off or was running at the time of the seizure. (*See* 16:1-2; 45:8-9; App.107-09).

This Court should review the squad video, where it will see for itself that the seizure was not supported by reasonable suspicion that the Toyota was blocking traffic in violation of Milwaukee City Ordinance § 101-24.2. As this Court will be able to see, there was room for another vehicle to pass the Toyota, and therefore, it was not parked or left standing "in a such a manner as to obstruct traffic." (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:18).

B. The extension of the seizure was illegal and there was no reasonable suspicion justifying the frisk or protective search.

This Court must first determine whether the seizure here was justified at its inception, and second, it must determine whether the seizure was reasonably related in scope to the circumstances which justified the interference in

the first place. ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968). "The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last *no longer than is necessary to effectuate the purpose of the stop*. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." ***Florida v. Royer***, 460 U.S. 491, 500 (1983)(emphasis added). The United States Supreme Court has further explained that, "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." ***Illinois v. Caballes***, 543 U.S. 405, 407 (2005). The state has the burden to show that any seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope. ***Royer***, 460 U.S. at 500. The state did not carry its burden in this case.

Here, the scope of the detention was not carefully tailored to the underlying justification that the Toyota was illegally blocking the alley. The officers could have seized the Toyota on the basis of the suspected ordinance infraction, asked the occupants questions, and even asked them to get out of the vehicle. However, without additional articulable suspicion, they were not permitted to frisk the occupants or to conduct a protective search of the vehicle. ***State v. Johnson***, 2007 WI 32, ¶¶41-48, 299 Wis. 2d 675, 729 N.W.2d 182; ***State v. Moretto***, 144 Wis. 2d 171, 423 N.W.2d 841 (1988). They needed to issue the citation and let the occupants go. That is not what happened here. There is no articulable reasonable suspicion in the record, and no particular facts that justified the restrictive measures taken—the instantaneous frisks, the protective search, and moving the occupants to the back of the Toyota—whether for officer safety or for other

concerns. *See* ***State v. Pickens***, 2010 WI App 5, ¶¶32-33, 323 Wis. 2d 226, 779 N.W.2d 1.

The state notes that an officer's authority to seize an individual "ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." ***Rodriguez v. United States***, 135 S.Ct. 1609, 1614 (2015). (State's br. p.14). The state repeatedly asserts that the time frame of this encounter was "long before the ordinary inquiries of the traffic stop 'reasonably should have been' completed." (State's br. p.2, 13, 14). However, the officers were not engaged in "ordinary inquiries" or "mission of the stop" activities; they were illegally frisking and searching the occupants and the vehicle. There were three officers and two occupants of the seized vehicle. (Exhibit 1 from the July 12, 2016 motion hearing; App.127at 11:06:18; 11:06:33). There is no reason that checking identification cards and issuing a citation could not have been done in a timely fashion. The record does not indicate that any of the officers were running background or DOT checks or checking licenses. The squad video, instead, indicates that the three officers stood by the Toyota as the occupants exited the vehicle, and then instantaneously patted them down, with no basis in the record as justification. (Exhibit 1 from the July 12, 2016 motion hearing; App.127 at 11:06:33-40, 11:06:58-07:16).

Similarly, there is no basis in the record to justify the protective search that occurred after the occupants were taken to the back of the Toyota. As such, those activities were outside the scope of a seizure whose underlying basis was an ordinance violation, were not "negligibly burdensome precautions," and were not "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *See* ***Rodriguez***, 135 S.Ct. at 1616; ***Royer***, 460 U.S. at 500. The police's foray outside the

carefully tailored scope of the ordinance violation here accordingly "exceed[ed] the time needed to handle the matter for which the stop was made, [and] violates the Constitution's shield against unreasonable seizures." ***Rodriguez***, 135 S.Ct. at 1612. While the timeframe of this seizure was brief, it is alarming when considering all that occurred during that time and the speed with which the officers moved to frisk the occupants and search the car without any articulated basis in the record for doing so. ***Royer***, 460 U.S. at 498 (officers may not detain a person "*even momentarily* without reasonable, objective grounds for doing so.")(emphasis added).

Police cannot circumvent the Fourth Amendment's rules by waiting to investigate the underlying basis for a seizure and to perform their "mission of the stop" activities, until after they conduct illegal investigations unrelated to the underlying basis for the traffic stop. ***Sharpe***, 470 U.S. at 686 (in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation."). By engaging in unjustified activities not related to permissible "mission of the stop" activities, the officers illegally prolonged the duration of the seizure past the time reasonably required to complete the investigation of the traffic violation and to issue a citation. *See* ***Caballes***, 543 U.S. at 407; ***Royer***, 460 U.S. at 500. As a result, the police no longer had authority to seize Mr. Neal at the time he ran. *See* ***Rodriguez*** 135 S.Ct. at 1614.

Importantly, in the state's "Statement of the Case," it asserts a number of facts unsupported by the record that this Court must not take into account. It asserts that the driver of the silver Toyota was named David Kendle, and he was "known" to police for carrying firearms. (State's brief p.3). In support of this "fact," the state cites to its own suppression response. However, as this Court is by now well aware, there

was no testimony taken at the suppression hearing to establish this information, and no audio or other means exist to establish this information in the record. The state had the burden of proof at the suppression hearing and may not rely on their suppression response filing when they declined to present testimony that would have been subject to the circuit court's credibility determinations in order to be properly in the record.[2]

Likewise, the state asserts that the officers asked Mr. Neal and the driver whether they had any guns, and that both men said no. (State's brief p.3). Perhaps that could be inferred from watching the video, but again, without audio from the stop or testimony from the suppression hearing, that information is not in the record. Again, the same goes for the state's sentence: "While Dillman and Kulenovic were talking to Neal and the driver, Mahnke found a gun under the front passenger seat." (State's brief p.3). That is not in the record because there was no testimony and because a viewer cannot see what the searching officer found or where it was located. (Exhibit 1 from the July 12, 2015 motion hearing; App.127).

The state nevertheless uses those unsubstantiated facts in its argument, positing, "Here, particular facts 'justif[ied] the measure for officer safety or similar concerns.' The officers were familiar with Kendle and knew he frequently

[2] Mr. Neal referenced facts from his own original suppression filings in his brief-in-chief to support his argument of the absence of odors of intoxicants, strange behavior, excessive nervousness, statements admitting to guns or drugs, anonymous tips or alleged drug transactions previously observed. Mr. Neal, however, did not have the burden of proof at the hearing, and he cited the motion allegations to show that the state would have known that there was no documentation of odors, strange behavior, nervousness, etc, and that they provided nothing to suggest otherwise at the hearing to develop the record.

carried guns and associated with people who carried guns. Kendle and Neal had just lied to them about having a gun." (State's br. p.15, quoted source omitted). This argument is meritless as it rests wholly on unconfirmed information. The state had every opportunity to present testimony from the officers to explain their basis for the seizure, frisk, and protective search, and the defense specifically requested to take testimony to establish the sequence of events and details of what occurred. The state did not choose to present testimony, despite having the burden to prove that the traffic stop was reasonable. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634; (State's br. p.10). Therefore, the state's unsupported allegations must not be considered now.

As the state pointed out, "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." ***Rodriguez***, 135 S.Ct. at 1614 (citation omitted); (State's br. p.13). By failing to take testimony from the officers and without the benefit of audio from the squad video, the state cannot meet its burden to show that the investigatory seizure was reasonable or that there were any "related safety concerns" needing to be addressed as part of the seizure's mission. ***Id.***

Returning, then, to the extension of the seizure, officers may not expand the scope of an initial traffic seizure and begin unrelated inquiries *without additional facts* to create reasonable suspicion. The police's actions here were unreasonable because they failed to diligently pursue their investigation related to the underlying basis for the stop but

instead frisked Mr. Neal and searched the car[3] without appropriate justification. *See* ***Caballes***, 543 U.S. at 407 (A seizure justified solely by the interest in issuing a warning ticket *can become* unlawful if it is prolonged beyond the time reasonably required to complete the mission). During an investigatory stop, officers may not detain a person "*even momentarily* without reasonable, objective grounds for doing so." ***Royer***, 460 U.S. at 498 (emphasis added). Reasonable, objective grounds simply do not exist in this record.

[3] As a passenger in a stopped vehicle, Mr. Neal has standing to challenge police conduct during a stop that violated his Fourth Amendment rights. ***State v. Harris***, 206 Wis. 2d 243, 255-56, 557 N.W.2d 245 (1996). He challenges the protective search insofar as it resulted in an illegal extension of the initial seizure.

## CONCLUSION

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

Dated this 4th day of December, 2017.

Respectfully submitted,

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

## 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 2,583 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 4th day of December, 2017.

Signed:

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant