STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP001583-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

MARQUE D. CUMMINGS,

Defendant-Respondent.

ON NOTICE OF APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED ON JULY 13, 2017, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE HANNAH DUGAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

1. Did the initial contact between Cummings and police, before the warrant for Cummings's arrest was discovered, constitute a seizure under the 4th Amendment?

   Trial court answered: The trial court did not make findings as to whether, and when, Cummings was seized under the Fourth Amendment. Implicitly, by ordering suppression, the trial court found that a seizure had occurred before the warrant was discovered.

2. Did the trial court err in determining that the officers lacked the requisite reasonable suspicion to seize Cummings?

   Trial Court Answered: The trial court did not make specific findings, but, by ordering suppression of the evidence, implicitly ruled that the officers did not have reasonable suspicion to seize Cummings.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on those issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not meet the criteria for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On July 30, 2016, Marque D. Cummings was charged with possession of tetrahydrocannabinols (THC), contrary to Wis. Stat. § 961.41(3g)(e), in Milwaukee County circuit court case number 16CM002516, as a result of an arrest made by Milwaukee police officers Joseph Lanza and Francisco Cartagena.[1] (R1; App. 101-102) In very brief form, the complaint alleged that the officers had encountered Cummings on the street, determined that there was a felony warrant for his arrest from Ozaukee County for escape, searched Cummings incident to his arrest for that warrant, and found 23.84 grams of marijuana in the backpack he had with him. (*Id.*)

The case was assigned to Milwaukee County Circuit Court Branch 31, the Honorable Hannah Dugan, presiding. On May 2, 2017, Cummings filed a motion to suppress, alleging that the officers lacked the requisite reasonable suspicion to

[1] Officer Cartagena spelled his name "Cartagena" at the beginning of his testimony. (R22:20: App. 132) However, he is referred to as "Cartegena" throughout the transcript. (R22; App. 113-156)

conduct a stop of Cummings. (R9; App. 103-107) The State responded in writing, arguing that the contact between the officers and Cummings was not a seizure as defined by the Fourth Amendment, and—in the alternative—that if a seizure had occurred, it was lawful and supported by reasonable suspicion. (R10; App. 108-111). On June 12, 2017, a hearing was held on the motion. (R22; App. 113-156)

Officer Lanza and Officer Cartagena were the only witnesses at the suppression motion. They testified that on July 27, 2016, they were on duty as Milwaukee police officers, working in a marked squad car. (R22:6, 8; App. 118, 120) Officer Lanza was a newer officer; Officer Cartagena was his "field training officer," a more senior officer who was helping to make sure he got exposure to, and experience in, a variety of different police investigations. (R22:5-6; App, 117-118)

At about 2:25 a.m., the officers were in their squad car, pulled over to the curb, facing north, directly under a streetlight at the southeast corner of 15th and Greenfield, in Milwaukee. (R22:6-7, 8; App. 118-119, 120) They were simply keeping an eye on things: because the area of 15th and Greenfield is a high crime area, the officers would try to get over to the area, park, and observe the area. (R22:8; App. 120) The neighborhood around 15th and Greenfield was one of the officers' "busiest areas," (R22:10; App. 122) with particular problems related to prostitution, drug trafficking, gun shots fired, entries into cars (R22:9-10; App. 121-122), and robberies. (R22:24; App. 136) It was a warm night: Officer Lanza estimated it was 75 to 85 degrees out (R22:19; App. 131); Officer Cartagena, estimated that it was 80 degrees. (R22:28; App. 140)

At about 2:25 a.m., the officers observed the man they later identified as Cummings walking eastbound on Greenfield Avenue. (R22:7, 8, 12; App. 119, 120, 124) Cummings was wearing a hooded sweatshirt with the hood up over his head, which stood out because it seemed "awkward for the weather." (R22:7, 15, 19, 22; App. 119, 127, 131, 134) He also wore a bandana around his neck, with his chin tightly tucked into his chest. (R22:7; App. 119) The bandana covered the lower part of Cummings's face. (R22:14, 23, 27; App. 126, 135, 139) Officer Lanza indicated that it was covering, "about up to his

lower lip;" (R22:14; App. 126); Officer Cartagena described it as covering the bottom half of Cummings's face, so that he could not see Cummings's mouth. (R22:22-23; App. 134-135) Cummings was carrying a backpack. (R22:9, 24; App. 121, 136)

Officer Lanza observed that Cummings looked directly over at the squad car, then immediately "completely changed direction," turned left, heading north. (R22:7-8, App. 119-120)

After Cummings changed course, Officer Lanza turned the car on and drove across a little over a city block, to where Cummings was located. (R22:8-9; App. 120-121) The officers "just wanted briefly to speak with him, identify him and talk with him." (R22:9; App. 121) Specifically, Officer Lanza was concerned that there was possibly some criminal activity going on, given the time of night, the nature of the neighborhood, the fact that Cummings's clothing seemed out of place given the weather, the fact that he seemed to be trying to hide his face, and the fact that he seemed to immediately change direction as soon as he noticed the officers' presence. (R22:9-10, 15; App. 121-122, 127) Given the hour of night, the bandana that was covering the lower half of Cummings's face, and the fact that the area was known for robberies, Officer Cartagena was concerned that a robbery was about to occur. (R22:26-27; App. 138-139)

Officer Lanza pulled up to Cummings in an alley. (R22:8, 11) The officers did not remember whether the squad's emergency lights or siren were activated. (R22:13, 23; App. 125, 135). Both officers exited the squad car, and they spoke with Cummings at the front of the squad. (R22:10; App. 122) They did not touch him; they did not draw their weapons; and they did not order him to raise his hands. (R22:11; App. 123) They asked him his name, where he was going, and whether he was from the area. (R22:12; App. 124) They asked him to set his backpack on the ground, and Cummings did so. (R22:18; App. 130) In Officer Lanza's view, Cummings was free to leave, and the officers would have allowed him to leave if he had wished. (R22:15-16, 18; App. 127-128, 130)

Cummings provided his identification to the officers, (R22:26; App. 138) and Officer Cartagena ran that information through the computer. (*Id.*) The check came back that Cummings had a felony warrant outstanding for his arrest. (R22:12; App. 124) In Officer Cartagena's opinion, Cummings was free to leave until the warrant was discovered. (R22:18; App. 130) Once the warrant was discovered, the officers placed Cummings under arrest, searched his backpack incident to that arrest, and found 23 grams of marijuana in his backpack. (R22:12; App. 124) Before the warrant was discovered, one of the officers had asked Cummings for consent to search the backpack; he had refused, and the officers did not search it until after Cummings had been placed under arrest. (R22:17-18; App. 129-130)

At some point as Lanza and Cartagena were speaking to Cummings, two other officers arrived on scene. (R22:25; App. 137) At some point, Cummings was asked to put the contents of his pockets on the hood of the squad, (R22:25-26; App. 137-138) but the testimony did not establish whether those things occurred before or after the warrant was discovered. (R22:16-17, 26; App. 128-129, 138) The only contraband recovered was the marijuana found in Cummings's backpack. (R22:12; App. 124)

At the conclusion of the testimony and following arguments from the attorneys, Judge Dugan granted the defendant's motion to suppress. (R22:42; App. 154) Judge Dugan found that the officers' testimony was generally consistent, although there was a slight inconsistency in regard to how Cummings was wearing the bandana. (R22:41; App. 153) She also found that there was uncertainty as to whether the squad's emergency lights had been activated. (*Id.*) She found that the officers identified the area as a high crime area, and that Cummings was wearing a hooded sweatshirt and it, "might have seemed strange to have the hoody on in the heat and so forth." (R22:41; App. 153). She then ruled,

> THE COURT: This also is not a wellness check. I heard one of the officers say that Mr. Cummings told him he was homeless. Therefore, given the totality of the circumstances and the fact that they did not -- there was not any testimony there was a concern about a crime had

> been committed but they were concerned about might be committed without articulating any facts of what type of crime given that nobody was present in the area --
>
> ATTORNEY SITZBERGER: Well
>
> THE COURT: -- which distinguishes it from Matthews, I'm granting the Defense's motion.
>
> ATTORNEY SITZBERGER: Judge, Officer Cartegena (sic) said he was afraid a robbery was about to occur. I asked him that directly because I knew the Court would have that concern.
>
> THE COURT: Of whom? There's no particularized facts about that. He also said that the bandana was on the face which is inconsistent with the other officer's testimony
>
> ATTORNEY SITZBERGER: Well one said it went up to below
>
> THE COURT: I'm granting the Defendant's motion.

(R22:42; App. 154)

Judge Dugan entered a written order granting suppression on July 13, 2017. (R:13, App. 112) This appeal follows.

It is the State's position that Judge Dugan erred in granting Cummings's motion to suppress. The State argues, first, that the initial encounter between Cummings and the police did not constitute a seizure under the Fourth Amendment, and that Cummings was not seized for Fourth Amendment purposes until after the warrant was discovered. Second, the State believes that at the time of the initial contact, the officers possessed particularized facts which would have justified a seizure of Cummings.

STANDARD OF REVIEW

Whether a person has been seized, and whether evidence should be suppressed as a result, are questions of constitutional fact. *State v. Young*, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W. 2d 729. *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86,

700 N.W.2d 899. The reviewing court will accept the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous, but will determine independently whether or when a seizure occurred, and whether those facts constitute reasonable suspicion. *Young*, 294 Wis. 2d 1, ¶ 17, 717 N.W.2d 729.

ARGUMENT

I. BECAUSE THE INITIAL ENCOUNTER BETWEEN CUMMINGS AND POLICE WAS NOT A SEIZURE, NO CONSTITUTIONAL JUSTIFICATION WAS REQUIRED FOR THE CONTACT.

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures.[2] Therefore, any analysis regarding whether the Fourth Amendment protections have been breached must begin with whether a search and seizure occurred. Because Fourth Amendment rights are personal rights which cannot be vicariously asserted, in litigating a motion to suppress, it is a defendant's obligation to establish that a seizure occurred. *State v. Macho,* 2011AP001841-CR, (WI App. May 23, 2012) (unpublished), citing *Gray v. State*, 243 Wis. 57, 63, 9 N.W.2d 68 (1943) (App. 157-162). If he or she does so, the burden shifts to the State to establish that the seizure was reasonable. *See*, *Macho*, 2011AP001841-CR, (WI App. May 23, 2012) (unpublished) (App. 159); see also *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634.

Because not all police-citizen contacts constitute a seizure, many such contacts do not fall within the safeguards afforded by the Fourth Amendment. *See Terry v. Ohio,* 392 U.S. 1, 13, 88 S. Ct. 1868 (1968); *State v. Williams,* 2002 WI 94, ¶ 20, 255 Wis. 2d 1, 646 N.W.2d 834. The Supreme Court has repeatedly declined to hold that all questioning of

[2] Typically, this court interprets Article I, Section 11 of the Wisconsin Constitution in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court. *State v. Griffith*, 2000 WI 72, ¶24, n. 10, 236 Wis. 2d 486, 613 N.W.2d 72.

individuals by police officers constitutes a seizure. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). Instead, a person is seized for the purposes of the Fourth Amendment only "when an officer, by means of physical force or show of authority, restrains a person's liberty." *State v. Kelsey C.R.,* 2001 WI 54, ¶ 30, 243 Wis. 2d 422, 626 N.W.2d 777. As applicable here, a seizure has occurred within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). That is, "[a]s long as a reasonable person would have believed he was free to disregard the police response and go about his business, there is no seizure[.]" *Young,* 294 Wis. 2d 1, ¶ 18, 717 N.W.2d 729.

Our Supreme Court has explained,

> *Mendenhall* is the correct test "for situations whether the question is whether a person submitted to a police show of authority because under all the circumstances surrounding the incident, a reasonable person would not have felt free to leave." If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure. As this court noted in Williams, "most citizens will respond to a police request," and "the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Williams*, 255 Wis. 2d 1, ¶ 23 (quoting *Delgado*, 466 U.S. at 216).

Young, 294 Wis. 2d 1, ¶ 37, 717 N.W.2d 729.

Given that standard, the evidence adduced at the suppression hearing does not support a finding that Cummings was seized by the officers before the warrant was found.

The evidence at the hearing showed that officers Lanza and Cartagena saw a person they thought was suspicious under the particular circumstances; they drove a little over a block and stopped next to him in an alley. (R22:11; App. 123) The court did not make a finding that that the squad's emergency lights or siren had been turned on, (R22:41; App. 153) and there was no evidence that the officers blocked Cummings's

path or physically prevented him from walking on. The officers got out of the squad and spoke with Cummings. (R22:11; App. 123) They did not touch him; they did not draw their weapons; they did not order him to raise his hands. (R22:11; App. 123) There was no evidence that they issued any commands to him, ordered him to stop, or even *asked* him to stop. (R22; App. 113-156) They asked his name, where he was going, and whether he was from the area. (R22:12; App. 124) They asked Cummings to set his backpack on the ground, but there was no evidence that they touched it or took control of it until after he had been placed under arrest pursuant to the warrant (R22:17-18; App. 129-130), and they honored his refusal to give consent to search it until after the arrest. (*Id*.)

Essentially, the evidence established that the two officers drove up to Cummings and spoke with him. The testimony was devoid of evidence of any physical force or any show of authority, or any restraint on Cummings's liberty during that initial encounter. A reasonable person, under those circumstances, would have felt free to leave.

At some point, Cummings was asked to put the contents of his pockets on the hood of the squad car, (R22:25-26) but that cannot be held to have converted the consensual encounter into a seizure. First, the testimony did not establish, and the court did not find, that that happened before the warrant was discovered, or before the steps which led to its discovery had been undertaken. (R22:16-17, 26; App. 128-129, 138) Second, even if the warrant had not yet been discovered, or his name not yet provided to the officers, the testimony was that the officers *asked* Cummings to put the contents of his pockets on the hood of the squad, not that they demanded, ordered, or even instructed that he to do so. (R22:25-26; App. 137-138) As noted above, the fact that a person complies with an officer's request does not eliminate "the consensual nature of the response." *Young,* 294 Wis. 2d 1, ¶ 37, 717 N.W.2d 729.

Because Cummings was not seized by police before the warrant for his arrest was found, no Fourth Amendment justification was required for the encounter. The trial court therefore erred in finding that the officers needed—and lacked—reasonable suspicion for their contact with Cummings, and erred in granting the motion to suppress.

II. AT THE TIME OF THEIR ENCOUNTER WITH CUMMINGS, OFFICERS POSSESSED THE REQUISITE REASONABLE SUSPICION NECESSARY TO STOP HIM.

As argued above, the State asserts that Cummings was not seized under the Fourth Amendment until he was arrested on the outstanding warrant and that the officers did not, therefore, need reasonable suspicion for their contact with him. However, it is also the State's position that if their contact with Cummings is interpreted as a seizure, the officers possessed a reasonable suspicion that Cummings had engaged in, was engaging in, or was about to engage in criminal activity, as set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

Consistent with the Fourth Amendment, police may conduct an investigatory stop if they have a reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, supra; *State v. Post*, 2007 WI 60, ¶¶10-13, 301 Wis. 2d 1, 733 N.W.2d 634. In the context of an investigatory stop, reasonable suspicion is established by the presence of specific and articulable facts, and rational inferences drawn from those facts, which, under the totality of the circumstances, would lead a reasonable police officer to suspect the stopped individual of criminal activity. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681, 684; *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). It is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence; it requires a minimal level of objective justification for making the stop. *Illinois v. Wardlow***,** 528 U.S. 119, 124; 120 S. Ct. 673, 676 (2000); *United States v. Sokolow,* 490 U.S. 1, 7, 109 S. Ct. 1581 (1989). To satisfy the standard, an officer must articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. *Wardlow***,** 528 U.S. at 124, citing *Terry*, *supra,* 392 U.S. at 27. However, "police officers are not required to rule out the possibility of innocent behavior before initiating a stop. *State v. Anderson,* 155 Wis. 2d 77, 84, 454 N.W.2d 763, 766 (1990).

As the *Anderson* court explained,

> [S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

Anderson, 155 Wis. 2d at 84, 454 N.W.2d at 766 (internal citations omitted).

In determining whether the reasonable suspicion standard is met, the reviewing court must consider the facts known to the officer at the time the stop occurred, together with rational inferences and inferences drawn by officers in light of policing experience and training. *See State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305; *see also State v. Seibel, 163* Wis. 2d 164, 183, 471 N.W.2d 226 (1991). It is a common sense test: the crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. *Anderson,* 155 Wis. 2d at 83–84, 454 N.W.2d 763; *Waldner,* 206 Wis. 2d at 56, 556 N.W. at 684.

Here, the information known to officers Lanza and Cartagena, together with the rational inferences they drew in light of their professional experience, satisfied the reasonable suspicion standard.

The officers saw Cummings walking alone at about 2:30 in the morning (R22:6-7; App. 118-119); the night was warm to hot, but he wearing a hooded sweatshirt with the hood raised up over his head. (R22:7, 15, 19, 22; App. 119, 127, 131, 134) Cummings wore a bandana which partially obscured his face, at least up to the lower portion up to his chin. (R22:14, 23, 27; App. 126, 135, 139) When he saw the officers parked directly underneath a streetlight, he immediately and noticeably changed direction, walking away from. (R22:7-8; App. 119-120) Unprovoked flight from officers can, alone, constitute the requisite suspicion to conduct a Terry stop. *See*, *State v.*

Anderson, *supra*. While Cummings did not run from the officers, his effort to avoid them certainly was unusual and was a factor the officers were entitled to consider when evaluating the circumstances of the event.

These were articulable and particularized observations: it was late at night, or early morning; Cummings was dressed incongruously with the weather in a manner which obscured his appearance; he seemed to be trying to hide his face; when he saw the presence of the police, he immediately tried to avoid them. (R22:9-10, 15; App. 121-122, 127) This all occurred, in an area which the officers knew to have a high prevalence of criminal activity, including robberies (R22:24; App. 136). There was no requirement that the officers connect Cummings's behavior to a particular reported crime, or even a particular type of criminal activity, *see Anderson*, 155 Wis. 2d at 86, 454 N.W.2d 763, but, here, they were able to do so: based on particularized observations and his professional experience, Officer Cartagena, at least, suspected that a robbery was about to occur. (R22:26-27; App. 138-139)

Under such circumstances, it was "the essence of good police work" "to briefly stop the individual in order to maintain the status quo temporarily while obtaining more information." *See*, *State v. Waldner*, 206 Wis. 2d at 61; *State v. Williamson,* 58 Wis. 2d 514, 518, 206 N.W.2d 613 (1973). The officers would have been remiss in their duty to have acted otherwise.

CONCLUSION

Because Cummings was not seized until after the officers found a felony warrant outstanding for his arrest, no constitutional justification was required for their contact with him. Nonetheless, officers Cartagena and Lanza would have been authorized to detain Cummings before they learned of the warrant, because they were aware of particularized and articulable facts which would have led a reasonable officer in the circumstances to suspect Cummings was involved in criminal activity. Because the contact with Cummings before the warrant was discovered was lawful, his arrest on the warrant and search incident to that arrest were lawful.

For the reasons herein, the State asks that this court reverse the trial court's order granting the motion to suppress.

Dated this _____ day of November, 2017.

Respectfully submitted,

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_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3,909.

_____ _____

Date

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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 s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

_____ _____

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