STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP001583-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MARQUE D. CUMMINGS,

Defendant-Respondent.

On Appeal from an Order Granting a Motion to Suppress Evidence in the Milwaukee County Circuit Court, the Honorable Hannah Dugan, Presiding.

BRIEF OF DEFENDANT-RESPONDENT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUES PRESENTED

Did officers have reasonable suspicion to seize Mr. Cummings?

The trial court answered this question "no."

Marque Cummings was walking east along Greenfield Avenue in Milwaukee at about 2:30 a.m. when he turned left onto 15th Street. He was wearing a hooded sweatshirt and a bandana around his neck, the precise positioning of which was not resolved in the trial court. Officers parked at the intersection and, believing that Mr. Cummings had noticed their squad car prior to turning, seized him. The officers testified they were suspicious of the amount of clothing Mr. Cummings was wearing in the warm weather, the change in direction, the neighborhood, and the time of night. After some questioning, officers purportedly learned of a warrant, placed him under arrest, and found marijuana in his backpack.

In the trial court, Mr. Cummings moved to suppress evidence of the marijuana, arguing that officers lacked reasonable suspicion for the seizure. The trial court granted Mr. Cummings' motion. The State appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Cummings does not request oral argument or publication. This is a fact-specific case requiring the application of established legal principles.

STATEMENT OF CASE AND FACTS

Mr. Cummings filed a written motion to suppress arguing that officers lacked reasonable suspicion to seize him and that evidence of marijuana found in his backpack should be suppressed. (9). The State filed a written response arguing there was no seizure, and if there was, it was supported by reasonable suspicion. (10). Following an evidentiary hearing, the trial court granted Mr. Cummings' motion. (23:43). The following facts were elicited at the evidentiary hearing.

At approximately 2:30 a.m. on July 27, 2016, Mr. Cummings was walking eastbound on Greenfield Avenue in Milwaukee and turned left to head north on 15th Street. (23:7, 9). It was "warmer" that evening, "between 70 -- 75-85 degrees." (23:8, 20). He was wearing a hooded sweatshirt with the hood up. (23:15). Mr. Cummings had a bandana tied around his neck and he was carrying a backpack. (23:15, 18).

Meanwhile, Milwaukee Police Officers Lanza and Cartagena were parked facing north at this same intersection. (23:7-8). Officer Lanza described the area as a "high crime" area where a variety of offenses occur. (23:11). At this time, however, the officers were parked for general patrol and not investigating any specific calls or complaints. (23:22). Officer Lanza noticed Mr. Cummings' "chin tucked tightly into his chest," so it was "just covering about up to his lower lip." (23:8). Officer Cartagena testified that the bandana was covering the bottom half of Mr. Cummings' face so that his mouth was not visible (23:24). The trial court did not resolve the discrepancy.

Officer Lanza testified that Mr. Cummings looked at their squad car prior to turning left. (23:8). He did not, however, walk faster or try to flee, nor did officers observe him perform any kind of "security check" or readjust his clothing as if to hide something. (23:14-15).

Nonetheless, the officers turned on their squad vehicle and pulled up to Mr. Cummings. (23:9). As Officer Cartagena testified, "I figure why not stop him, see what's --- see what he's up to." (23:23). Neither officer could remember with certainty if they used their lights or sirens, but Officer Lanza testified that, "it is common practice to flip the light bar on to get the camera recording when we have contact with citizens." (23:10, 24). [1]

The officers directed Mr. Cummings to put his backpack on the ground so he could not access it. (23:18-19). Mr. Cummings refused the officers' request to search the backpack. (23:18). Officer Cartagena testified that Mr. Cummings would have been free to walk away at least until that point, but that the refusal to consent to a search made the "[t]he available suspicion" higher for him. (23:26).

Mr. Cummings identified himself to the officers, who asked questions about why he was in the area. (23:12-13). Officer Cartagena believed he provided an "ID or something to that sort." (23:27). Mr. Cummings told officers he was "homeless and wandering." (23:13). As officers were questioning him, two additional officers appeared on the scene. (23:26).

Officer Lanza testified "we learned he had a felony warrant." (23:13). Officer Lanza did not testify to any

[1] No video was introduced at the hearing.

specifics of the purported warrant, just "I think somebody told me or informed me that he had a warrant." (23:16). In response to defense counsel's questioning, he also testified "I guess Officer Cartagena indicated that he had a warrant, that was what you just told me." (23:16). However, Officer Cartagena in his testimony did not reference a warrant. (23:21-29). According to Officer Lanza, they arrested Mr. Cummings on the warrant, searched his backpack, and found marijuana. (23:13). No information or documentation regarding a warrant was introduced by the State.

At some point during the stop, the officers told Mr. Cummings to empty his pockets onto the hood of the squad car. (23:16-17). Officer Lanza agreed during one portion of his testimony that this occurred prior to his learning secondhand of any warrant. (23:17). However, he later testified that he did not recall if they made Mr. Cummings empty his pockets before or after the reported warrant. (23:18). Similarly, Officer Cartagena agreed that officers made Mr. Cummings empty his pockets during questioning, but could not remember "the exact details" (23:27).

The trial court noted the inconsistency in the officers' testimony regarding the bandana, the use of lights, and time of the ID check. (23:42). The court found that Mr. Cummings cooperated with officers and did not flee. (23:42). The trial analyzed the totality of the circumstances – his apparel in the weather, his turning the corner, presence in a high crime area, cooperativeness, and indication of homelessness – and ruled there was a lack of particularized facts regarding what particular crime police were concerned was going to happen, robbery or otherwise. (23:42-43). The trial court granted Mr. Cummings' motion to suppress. (23:43). The State appeals.

ARGUMENT

I. The seizure of Mr. Cummings as he was walking lawfully was in violation of his rights under the Fourth Amendment.

A. 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.

Under ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), an officer may temporarily detain an individual without running afoul of the Fourth Amendment where he "reasonably suspect[s], in light of his or her experience, that some kind of criminal activity has taken or is taking place." ***State v. Allen***, 226 Wis.2d 66, 71, 593 N.W.2d 504 (Ct.App.1999). Otherwise stated, "[l]aw enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An inchoate and unparticularized suspicion or hunch ... will not suffice." ***State v. Waldner***, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996) (citations and quotation marks omitted, brackets and ellipses in original).

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, 841-842, 826 N.W.2d 418. "[I]f it were, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." ***Pugh,*** 345 Wis. 2d at 841, citing ***Terry,*** 392 U.S. at 22.

"[T]o accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." ***Gordon***, 353 Wis.2d 468, ¶ 12, quoting ***United States v. Martinez–Fuerte***, 428 U.S. 543, 560 (1976). "[C]ircumstances must not be so general that they risk sweeping into valid law-enforcement concerns persons on whom the requisite individualized suspicion has not been focused." ***Id.,*** ¶ 12.

A reviewing 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***. In the absence of an explicit finding of fact, "if a circuit court fails to make a finding that exists in the record, an appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court's ultimate decision" where "evidence exists in the record to support the assumed fact." ***Cty. of Grant v. Vogt***, 2014 WI 76, ¶ 41, 356 Wis. 2d 343, 850 N.W.2d 253, 265 (internal quotations and citations omitted).

The burden of proving that an investigative stop was reasonable is on the State. ***State v. Post,*** 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634. Further, where an unlawful seizure occurs, the remedy is suppression. ***State v. Carroll***,

2010 WI 8, ¶ 19, 322 Wis. 2d 299, 315, 778 N.W.2d 1; ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963).

B. The State waived any argument that Mr. Cummings was not seized.

As an initial matter, the State asserts in its initial brief that Mr. Cummings failed to establish that a seizure occurred. (State's Brief at 7). However, the State conceded the issue of seizure in the trial court and cannot now levy this argument in the Court of Appeals. *See* ***State v. Huebner***, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues that are not preserved generally are not considered on appeal).

Mr. Cummings filed a written motion to suppress in the trial court, alleging that he was seized without reasonable suspicion. (9). The State filed a written response that it anticipated the evidence at hearing to show that no seizure occurred, but if the court were to find seizure, then there was reasonable suspicion. (10:2-3). However, at the hearing, the State bypassed their written challenge to seizure, called the first witness, Officer Lanza. (23:4). Mr. Cummings called Officer Cartagena to testify only after the State rested. (23:21).

Then during argument, the State seemingly abandoned the seizure issue it referenced in its early written submission:

> Judge, as I mentioned in my brief, though I don't know for certain whether this can even be considered a seizure under the Fourth Amendment with both officers not remembering whether they activated their lights and sirens, I think that's bit of a gray issue; so I won't argue strenuously that this was not even a seizure.
>
> So if this Court is going to find that it was a seizure, which seems reasonable based on, again, not being sure whether the

> lights or sirens were activated, even for a short while, the officers simply need reasonable suspicion to believe that criminal activity may be in foot to stop somebody during an investigative stop[.]"

(23:30).

Nonetheless, Mr. Cummings made a prophylactic argument regarding why this interaction constituted a seizure, emphasizing the officers' "policy to turn the lights on," the fact that Mr. Cummings was required to put down his backpack, the presence of four officers, and the requirement that he empty his pockets on the hood of the squad car and then provide identification. (23:34-35, 38-39).

The State doubled-down in its abandonment of its seizure claim, and said in response "[w]ell, there was no contraband found in whatever items he may or may not have emptied out of his pockets onto the squad car; so that's really a moot point." (23:39). This response indicates that the State had again conceded the seizure issue and was only arguing the matter of reasonable suspicion. Mr. Cummings' discussion as to when the emptying of pockets occurred was levied only to demonstrate the intrusiveness of the interaction for purposes of establishing seizure, which the State bypassed as "completely irrelevant to the Court's decision" (23:39), and continued to argue the reasonable suspicion issue (23:40-41).

The State in its opening brief cited ***State v. Macho,*** 2011AP1841-CR (unpublished), for the proposition that it was Mr. Cummings' burden to establish that a seizure occurred before the burden can shift to the State to establish reasonableness. (State's Brief at 7). The State ignores the fact that at the trial court, it never meaningfully challenged the underlying question of seizure. It now seeks to reap the

benefit of unclear factual findings regarding the use of squad lights and the precise time in which Mr. Cummings was asked to empty his pockets onto the hood of the car—factual determinations that would have been important to the seizure analysis had the State pursued such a claim in the trial court. (State's Brief at 8-9). This they cannot do, and is exactly what the waiver rule was designed to prevent. ***State v. Hayes***, 2004 WI 80, ¶ 21, 273 Wis. 2d 1, 681 N.W.2d 203 ("[f]ailure to raise an issue in the circuit court deprives both the adversary and the circuit court of the opportunity to address the issue and perhaps remedy the defect without the necessity of an appeal. The waiver rule encourages attorneys to prepare for and conduct trials more diligently and prevents attorneys from sandbagging adversary counsel and the circuit court.")

C. Mr. Cummings was nonetheless seized for purposes of the Fourth Amendment.

Even if this Court decides to reach the question of seizure, Mr. Cummings was seized for purposes of the Fourth Amendment. Under the totality of the circumstances, no reasonable person in Mr. Cummings' position would have believed that he was free to leave. ***State v. Jones***, 2005 WI App 26, ¶ 21, 278 Wis. 2d 774, 693 N.W.2d 104.

A seizure for purposes of the Fourth Amendment occurs where an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen[].]" ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980). The analysis contemplates whether a "reasonable person" would feel free to leave. ***Id.*** at 554. "As long as the person to whom the questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particular and objective

justification." ***Id.*** The subjective intentions of the law enforcement officers are not determinative. ***Id.*** at 554, n. 6.

In this case, two police officers pulled their squad car into an alleyway to stop Mr. Cummings for questioning. (23:12). The trial court did not explicitly find that squad lights were used, but Officer Lanza testified that it is "common practice to switch on the light bar" to engage the squad camera when they engage with citizens. (29:10). The testimony resulted in the trial court implicitly finding that a seizure occurred, which is consistent with the trial court's ruling, and this Court should so find. *See* ***Vogt***, 2014 WI 76, ¶ 41.

Mr. Cummings was separated from his personal property – both his backpack and his identification. Officers made Mr. Cummings put down his backpack so he could not access it. (23:18-19). Officers also obtained Mr. Cummings' identification card during the encounter. (23:27). *See* ***State v. Daniel***, 12 S.W.3d 420, 427 (Tenn.2000) ("abandoning one's identification is simply not a practical or realistic option for a reasonable person in modern society"); ***State v. Armenta***, 134 Wash.2d 1, 10, 948 P.2d 1280 (1997) (seizure occurred when police officer placed cash that defendant produced voluntarily into his patrol car); ***State v. Moralez***, 297 Kan. 397, 408, 300 P.3d 1090 (2013) (abrogated on other grounds) (officer seized defendant when he "requested and took possession" of defendant's identification card "and then retained it while running a check for outstanding warrants"); ***United States v. Johnson***, 326 F.3d 1018, 1022 (8th Cir.2003) (suspect was seized, as officer "took possession of his personal property—here, his driver's license[.]")

Finally, officers had Mr. Cummings empty his pockets on the hood of the squad car. The State argues that the

testimony "did not establish, and the court did not find, that that happened before the warrant was discovered[.]" (State's Brief at 9). However, the testimony reasonably supports a conclusion that this occurred prior to the search incident to arrest. Officer Lanza agreed at one point that this occurred prior to receiving "the signal" from Officer Cartagena that Mr. Cummings had a warrant. (23:17). He then later testified that he did not recall if they had Mr. Cummings empty his pockets before or after the discovery of a supposed warrant. (23:18). Officer Cartagena agreed that officers had Mr. Cummings empty his pockets during questioning but could not remember "the exact details." (23:27).

Practically speaking, it is unlikely that officers would have had Mr. Cummings empty his own pockets *after* discovery of the supposed warrant. Upon learning of this supposed warrant, officers searched Mr. Cummings' backpack themselves as a search incident to arrest. The State would have this Court assume that, even with this apparent basis for a search incident to arrest, four officers then nonetheless had Mr. Cummings empty his own pockets, rather than conduct the search themselves. Further, the trial court implicitly found a seizure occurred, so Mr. Cummings again asks this Court to assume findings that are consistent with the trial court's ruling. *See* ***Vogt***, 2014 WI 76, ¶ 41.

Where police stopped Mr. Cummings on the street, obtained his identification, made him set down his backpack for the express purpose of making it so he was not able to retrieve it, and then made him empty his pockets onto the hood of their squad car in the presence of four officers, he was not free to leave. As such, the stop of Mr. Cummings constitutes a seizure for Fourth Amendment purposes.

D. Officers did not have reasonable suspicion to suspect Mr. Cummings of any criminal activity, and therefore the seizure was in violation of the Fourth Amendment.

The State argues that Mr. Cummings' apparel in the context of the weather, the time of night, the neighborhood, and his "changed direction" satisfied the reasonable suspicion standard. (State's Brief at 11). The State's argument fails because it amounts to only an "inchoate and unparticularized suspicion or hunch," lacking any individualized suspicion as to Mr. Cummings. *See* ***Waldner***, 206 Wis.2d 51, ¶ 56.

Mr. Cummings' presence in a high-crime neighborhood alone did not create reasonable suspicion of criminal activity. Nor did his presence in such a neighborhood render his otherwise normal and legal behavior suspicious. The trial court found as much and suppressed the misdemeanor amount of marijuana that officers found in his backpack. This Court should do the same.

In ***State v. Diggins***, 2013 WI App 105, ¶ 3, 349 Wis. 2d 787, 837 N.W.2d 177 (unpublished decision) (App. 101-108), officers drove past Diggins, who was wearing "all black," and a companion, who was wearing lighter clothes. The men were leaning against the exterior wall of a gas station. ***Id.*** The officers drove past the two men a few times, observed that they stood there for about five minutes, and concluded the men were loitering. ***Id***. The officers said that the gas station was in a "high crime area" and that "subjects [that] are usually dressed like that ... are either committing armed robberies or ... dealing drugs." ***Id***. When the marked squad car arrived, Diggins and his companion walked to the opposite side of the street, and the officer testified it was his "impression" that Diggins saw the squad car before moving

across the street. ***Id***., ¶ 4. As two additional officers approached, officers conducted a field interview "to see if [Diggins] was [..] legally in the area, not committing any crimes or about to commit any crimes." ***Id***.

This Court ruled that "standing for five minutes while doing nothing in a place to which the public is invited, while wearing black clothing, and then moving to another equally public place, even in a high crime area, is not a basis for a ***Terry*** stop." ***Id.,*** ¶ 17. The officers' experience and opinion regarding how Diggins was dressed, without more, was not enough to establish reasonable suspicion of a crime. ***Id.,*** ¶ 23. There were no complaints or concerns that anyone in the vicinity had "cause for alarm," and this Court noted the absence of a factual finding that Diggins' walk across the street to the bus stop was indicative of flight. ***Id.*** ¶ 13-14. This Court emphasized that "[m]ore than mere presence (*i.e.,* hanging out) in a public place is required for reasonable suspicion that criminal activity is afoot." ***Id.,*** ¶ 15.

In ***Gordon,*** 353 Wis. 2d 468, ¶ 2-4, officers were driving in a marked squad car around 11:00 p.m. when they saw defendant Gordon and two friends walking. The area was an "area of high crime" with "a lot of gun violence"—two days earlier a woman was shot in her car. ***Id.***, ¶¶ 3, 9. Officers testified that Gordon looked "nervous" and made a "security adjustment"[2] after recognizing police. ***Id.,*** ¶ 4. Officers approached Gordon and his friends and said "[h]ey guys. Can we see your hands?" ***Id.*** at 473.

[2] He touched the "outside of his pocket' with the palm of his hands," interpreted as a conscious or unconscious response to police presence that may indicate the suspect is carrying weapon. ***Id.,*** ¶ 4

This Court found that the purported grounds for the stop – (1) the high-crime area, (2) Gordon's recognition of a police presence and subsequent (3) "security check – "[did] not equal the requisite objective reasonable suspicion that criminal activity *by Gordon* was afoot." ***Id.*** at 478-79 (emphasis added)(internal quotations omitted). In evaluating the "high crime area" factor, this Court emphasized that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." ***Id.*** citing ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000). This Court also found that the "security adjustment," standing alone, could not support individualized suspicion. ***Id.*** Further, the "recognition of 'police presence'" was similarly irrelevant, given that it "would be in almost every case where police executed a ***Terry*** stop." ***Id***.

As in ***Diggins*** and ***Gordon,*** the State argues "[t]his all occurred, in an area which the officers knew to have a high prevalence of criminal activity, including robberies." (State's Brief at 12). As this Court reiterated in ***Gordon***, 353 Wis. 2d 468, ¶ 15, that factor "has the tendency to condemn a whole population to police intrusion that, with the same additional facts, would not happen in other parts of our community." That is precisely what we see here, as the State asks this Court to characterize wholly legal and innocuous behavior as though it indicates potential criminal activity on the part of Mr. Cummings, just by virtue of the neighborhood he was walking in.

As the trial court found, Mr. Cummings did not flee (23:42), and there is no other physical response or "security adjustment" that the State points to. The State attempts to characterize Mr. Cummings' turn at an intersection as nefarious, stating that "unprovoked flight from officers can,

alone, constitute the requisite suspicion to conduct a [] stop" and further describes the turn as "unusual." (State's Brief at 11). Mr. Cummings did not reverse direction and he did not quicken his pace. *He turned left at a street corner.* To try and characterize this everyday action taken by many as indicative of a crime is unreasonable. Even if Mr. Cummings noticed a police presence, this Court in ***Gordon*** found that recognition of police presence without flight is of no consequence. 353 Wis. 2d 468, ¶ 16.

As for his clothing, Mr. Cummings was walking wearing more clothing than officers felt were necessary given the weather.[3] Mr. Cummings was wearing a hooded sweatshirt and bandana around his neck that may have partially obstructed his face – but as ***Diggins*** reflects, clothing alone is not enough to create an individualized reasonable suspicion. This court went so far as to say that it was an "extraordinary conclusion" that Diggins' clothing in the context of that time of night in that particular neighborhood was necessarily indicative of a crime. ***Id.,*** ¶ 23. Just as in ***Diggins,*** without more, Mr. Cummings' clothing is indicative of nothing. *See also* ***State v. Matthews,*** 2011 WI App 92, ¶¶ 11-14, 334 Wis. 2d 455, 799 N.W.2d 911 (this Court found reasonable suspicion where defendant was walking late at night in a high-crime area and wearing a ski mask and hooded sweatshirt, but there was the additional factor that officers observed the defendant have an "unusual interaction" with a female who walked by him, looked twice over her shoulder

[3] As the officer testified, Mr. Cummings ultimately explained that he was homeless, which certainly would explain why he was not at home at that time of night, and why he was carrying a backpack and wearing extra clothing. (23:13).

with a "worried" look on her face, who the defendant then began walking after).

Here, as the trial court found, there were insufficient facts to conclude that Mr. Cummings was about to commit, had committed, or was committing a criminal offense. This Court should uphold the trial court's ruling. [4]

[4] Moreover, the State has waived any argument that discovery of warrant functioned as an attenuating circumstance under ***Utah v. Strieff***, 136 S. Ct. 2056, 2061 (2016). For one, it was not raised in either the trial court or in the State's opening brief. *See* ***Flowers v. State,*** 43 Wis. 2d 352, 366, 168 N.W.2d 843 (arguments not raised in the trial court are considered waived). Regardless, as explained above, only Officer Lanza testified that officers were informed of a warrant. Officer Cartagena never testified regarding the warrant at all. The Supreme Court in ***Strieff,*** 136 S.Ct at 2061-62 specifically addressed the discovery of a "valid, pre-existing, and untainted arrest warrant" as being an attenuating circumstance under an analysis of the three factors articulated in ***Brown v. Illinois,*** 422 U.S. 590, 95 S.Ct. 2254, L.Ed.2d 416 (1975). As there was no testimony regarding whether the warrant in Mr. Cummings' case was "valid, pre-existing, and untainted," ***Strieff*** is distinguishable in any event.

CONCLUSION

The facts in this case fall far short of establishing an individualized suspicion based on specific, articulable facts that Mr. Cummings has committed, was committed, or was about to commit a crime. This Court should uphold the decision of the circuit court suppressing all evidence obtained as a result of the violation of Mr. Cummings' Fourth Amendment Rights.

Dated this 10th day of January, 2018.

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 4,291 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 10th day of January, 2018.

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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 10th day of January, 2018.

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A P P E N D I X

I N D E X
T O
A P P E N D I X

Page