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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

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ARGUMENT

I. The Forfeiture Doctrine Should Not Apply

In his brief-in-chief, Cummings first contends that the court should disregard the argument that Cummings was not seized, positing that the State waived its right to raise the issue on appeal, by failing to raise it in the trial court. His argument fails for two reasons.

First, the State did, explicitly, raise the issue. In its response to Cummings's motion to suppress (R10), the State wrote,

> **Statement of Law and Argument**
>
> **I. Cummings was not Seized Under 4th Amendment Analysis.**
>
> Generally, police-citizen contact becomes a seizure when an officer, by means of force or show of authority, has in some way restrained the liberty of a citizen. *State v. Young,* 2006 WI 98, ¶ 18, 294 Wis. 2d 1 (citing *State v. Williams,* 2002 WI 94, ¶ 20, 255 Wis. 2d 1). Because not all police contacts constitute a seizure, many such contacts do not fall under the safeguards of 4th Amendment protection. *Young* at ¶ 18. The test then, is so long as a reasonable person would believe he was free to disregard the police and go about his business, then no seizure has occurred and the 4th Amendment does not apply. *Id.* (citing *Florida v. Bostick,* 501 U.S. 429, 434 (1991)). Some examples of when a seizure might have occurred include situations with the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *U.S. v. Mendenhall,* 446 U.S. 544, 554 (1980). However, mere questioning by officers does not, by itself, effectuate a seizure. *Florida v. Royer,* 460 U.S. 491, 497 (1983).
>
> Cummings was not seized because officers merely questioned him under circumstance where a reasonable person would believe he was free to go about his business. Cummings was approached by only two officers, neither of whom drew their weapon. Those officers did not touch Cummings and did not use any dramatic language or harsh tones that would cause a reasonable person to believe that he was not free to disregard the officers. Officers simply approached Cummings and asked him questions, including his name. It was only when Cummings provided his name that officers learned he had an arrest warrant and arrested Cummings. Subsequent to his arrest, police performed a search of Cummings and discovered marijuana.
>
> The officers' initial interaction with Cummings was not a seizure as defined under the 4th Amendment. Therefore, Cummings (sic) motion should be dismissed.

Further, Cummings's contention that the State conceded that a seizure had occurred is not supported by the record. The State prioritized its arguments at the hearing, but never acknowledged that the contact between the police and Cummings was a seizure. To the contrary, the assistant district attorney referenced the non-seizure argument made in the State's brief and argued that ***if*** the court were to find a seizure occurred, that seizure was reasonable:

> Mr. Sitzberger: 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, what is commonly referred to nowadays as a *Terry* stop, based on the *Terry v. Ohio* case.

(R23:29-30. Emphasis added).

That the State prioritized its arguments and concentrated on the reasonableness of the officers' actions does not constitute a concession of the other claim.

Second, while arguments not raised in the circuit court are usually deemed forfeited on appeal, see *State v. Ndina*, 2009 WI 21, ¶¶ 29–30, 315 Wis. 2d 653, 761 N.W.2d 612, the rule is one of administration, not competence or jurisdiction. This court has the discretion to decide whether to apply forfeiture. *State v. Kaczmarski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702. Given the history of this case, it should not be applied here.

Here, in its brief in the trial court, the State specifically asserted that no seizure had occurred, cited case law in support of that position, and set forth the facts underlying its position. (R10) In doing so, the State complied with the very heart of the forfeiture rule:

> The reason for the [forfeiture] rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court.

Cappon v. O'Day, 165 Wis. 486, 490-91, 162 N.W. 655 (1917)

The State specifically raised the question in the trial court; Cummings failed to respond to it or address it in the trial court. Under those circumstances, enforcing the forfeiture rule against the State would not be appropriate. As in *Ndina*, "the values protected by the forfeiture and waiver rules would not be protected in the instant case by applying a forfeiture or waiver rule" to the State. *Ndina*, 315 Wis. 2d 653, ¶ 38.

II. Cummings Was Not Seized for 4th Amendment Purposes Until After The Warrant was Discovered

Cummings's argument that his initial encounter with the police constituted a seizure is premised, in large degree, on assertions which are not supported by the record. He asserts that the,

> 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.

(Brief of Defendant-Respondent, p. 11)

The record, however, fails to support those assertions.

In contrast, to the assertion that officers "stopped Mr. Cummings on the street," the testimony established that the officers approached him and spoke with him. (R22:8, 10, 11) They asked him his name, where he was going, and whether he

was from the area. (R22:12) They did not touch him; they did not draw their weapons; and they did not order him to raise his hands. (R22:11) In short, they issued no commands to him and made no demands of him. There was no testimony that the officers even asked him to stop; and in Officer Lanza's view, Cummings was free to leave. (R22:15-16, 18)

Cummings asserts that he was physically separated from his identification. (Brief of Defendant-Respondent, p. 10) That conclusion is simply not clear from the record: Officer Lanza indicated that he thought Cummings had some sort of identification (R23:26), and the identification was run through the system, leading to the discovery of the warrant. But Lanza was not asked, and he did not indicate, whether the officers retained possession of it.

Cummings asserts that the officers made him set his backpack on the ground. (Brief of Defendant-Respondent, p. 11) To the contrary, the evidence established that the officers ***asked*** him to do so and that he complied (R22:18) Compliance with an officer's requests does not transform a consensual encounter into a seizure. *State v. Young*, 2006 WI 98, ¶34, 294 Wis. 2d 1, 717 N.W. 2d 729.

Cummings asserts that the officers made him empty his pockets in the presence of four police officers. (Brief of Defendant-Respondent, p. 11) Again, the testimony does not support that conclusion. The officers testified that *at some point*, Cummings was *asked* to put the contents of his pockets on the hood of the squad car (R22:25-26); but the testimony did not establish when that occurred, how many officers were present, or even whether that happened before the warrant was discovered. (R22:16-17, 26) 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.

Ultimately, the testimony established that the two officers drove up to Cummings and spoke with him. There was no evidence of any physical force or any show of authority, or any restraint on Cummings's liberty during that initial encounter. That encounter, therefore, did not implicate the 4th Amendment.

III. Reasonable Suspicion Existed Which Would Have Justified A Seizure Of Cummings

Suspicious activity is, by its nature, ambiguous. *State v. Anderson,* 155 Wis. 2d 77, 84, 454 N.W.2d 763, 766 (1990). If any reasonable inference of wrongful conduct can be objectively discerned, officers have the right to temporarily detain the individual for the purpose of inquiry. *Id.* The officers' suspicion cannot be an inchoate hunch: it must be grounded in specific, articulable facts, and reasonable inferences which may be drawn from those facts, that a person has committed, is committing, or is about to commit a crime. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996)

Here, the officers had such facts: Cummings was walking alone at about 2:30 in the morning (R22:6-7); the night was warm to hot, but he wearing a hooded sweatshirt with the hood raised up over his head, which was inconsistent with the weather. (R22:7, 15, 19, 22) His face was partially obscured by a bandana he wore (R22:14, 23, 27); and when he looked at the police, he immediately changed direction and walked away from them. (R22:7-8)

These were articulable and particularized observations, which would be consistent with an armed robbery having occurred or about to occur; and they were made in an area which the officers knew to have a high prevalence of criminal activity, including robberies. (R22:24)

Cummings's reliance on *State v. Diggins*, No. 2012AP526-CR, unpublished, (WI App. July 30, 2013) (App. 101-120) is misplaced. In *Diggins*, the officers' decision to conduct a stop was premised on an objectively unreasonable belief that Diggins was loitering (App. 107) and a subjective belief that a dark hat and dark jacket were "suspicious" attire. In *Diggins*, there was no evidence that Diggins had tried to avoid the police (App. 108). In contrast, Cummings was wearing clothing that was objectively out of sync with the weather, was wearing a bandana in the manner of a mask, which partially obscured his appearance; and took steps to avoid the police as soon as he saw them. Under these facts, it was the essence of good police work to investigate the situation further.

CONCLUSION

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 January, 2018.

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 1,852.

_____ _____

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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