STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP002081-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARQUIS LAKEITH PENDELTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Michael J. Hanrahan, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

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ISSUE PRESENTED

1. Did law enforcement violate Mr. Pendelton's right, under the state and federal constitutions, to be free from unreasonable seizures by conducting an investigative detention without sufficient reasonable suspicion?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is statutorily ineligible for publication. *See* Wis. Stat. § 809.23(1)(b)4.

While Mr. Pendelton does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

The criminal complaint charged Mr. Pendelton with a single count of carrying a concealed weapon. (1:2). Mr. Pendelton filed a dispositive suppression motion alleging an investigative detention that was not supported by reasonable suspicion. (5). The circuit court conducted an evidentiary hearing and then denied the motion. (29). Thereafter, Mr. Pendelton pleaded guilty to the charged offense and received a probation disposition. (14); (App. 101).

Mr. Pendelton filed a timely notice of intent to pursue postconviction relief. (13). He then filed a timely Rule 809.30 postconviction motion. (18). That motion was denied in a written order. (20); (App. 114). This appeal followed. (21).[1]

[1] *See* Wis. Stat. § 971.31(10).

STATEMENT OF FACTS

Underlying Offense

On March 26, 2016 at 1:37 A.M., an anonymous tipster called 911 to report suspicious behavior in a nearby parking lot. (18).[2] She identified the parking lot in question and told the dispatcher that there were "two guys" in the parking lot "stealing a car." (18). Her only description was that one of the men was wearing a black hoodie. (18). The men "ran off" while the caller was still on the line. (18). She could not tell which direction the suspects went. (18).

Milwaukee police responded roughly ten minutes later. (29:24); (App. 109). According to Officer Ross Mueller—the only officer to testify at the hearing on the motion to suppress—they had been dispatched for a report of a "suspicious person who appeared to be looking in vehicles or loitering in the area." (29:6); (App. 105). The notes of the dispatch indicated that officers were told, several minutes before they arrived, that:

> CLR STS THERE ARE VEHS IN THE CHURCH PRKG AND 2 MALES ARE BY ONE OF THEM, LOOKS LIKE THEY ARE TRYING TO BREAK IN, SUBJS JUST RAN OFF.

(18:16); (App. 119).

Upon arrival, Officer Mueller observed a T-shaped alley near the church parking lot. (29:7); (App. 105). He

[2] Undersigned counsel attached a recording of the 911 recording to the Rule 809.30 postconviction motion. There is no pagination for that CD in the record index. While the circuit court appears to have declined the opportunity to reconsider its ruling in light of the 911 call, it has also asserted that the dispatch records—which were admitted in the motion hearing—contain identical information. (20:3).

witnessed an individual exit the parking lot and enter the alley. (29:8-9); (App. 105).[3] While it was too dark to tell much about the man, Officer Mueller could tell he was African-American and that he was wearing "dark" clothing. (29:8-9); (App. 105). The man was walking, not running. (29:8). Officer Mueller described the man as "meander[ing]." (29:12); (App. 106).

That individual was Mr. Pendelton, a young African-American male with no prior criminal record. (31:12). He had a high school education, a job, and a steady relationship. (31:12-13). He was on foot at this late hour after having a "petty" argument with his girlfriend and apparently deciding to walk off his frustration. (18:14-15).

Officer Mueller concluded, as a result of Mr. Pendelton's presence in the alley, that Mr. Pendelton was "suspicious." (29:7); (App. 105). Police therefore began to follow Mr. Pendelton. (29:9); (App. 105). They observed no suspicious behavior. (29:9); (App. 105). They nevertheless decided to stop and question Mr. Pendelton. (29:9); (App. 105). Police "asked" Mr. Pendelton to "stop." (29:9-10); (App. 105).

Mr. Pendelton did not stop walking. (29:9); (App. 105). Officer Mueller then exited his police car and "instructed" Mr. Pendelton to stop and "come here." (29:9); (App. 105). Mr. Pendelton acquiesced to this show of authority. (29:9); (App. 105). As Officer Mueller approached Mr. Pendelton, he observed him hug his body and turn away from law enforcement. (29:9-10); (App. 105-106). According

[3] Undersigned counsel would draw this Court's attention to the Google Maps printout included in his appendix. (App. 142). As that exhibit shows, the parking lot in question is located on a corner lot immediately adjacent to the alley.

to Officer Mueller, that body language generated additional suspicion. (29:10); (App. 106).

Mr. Pendelton then placed his hand in his pocket. (29:11); (App. 106).[4] Officer Mueller decided to frisk Mr. Pendelton. (29:12); (App. 106). As the pat-down started, Mr. Pendelton informed the officer that he was armed. (29:13); (App. 106). The pat-down confirmed that Mr. Pendelton was carrying a handgun which had been lawfully purchased only a short time prior to this incident. (29:13; 31:14); (App. 106). Mr. Pendelton did not, however, have a concealed carry permit. (31:11).[5]

Circuit court proceedings

Mr. Pendelton challenged the actions of police by filing a motion to suppress evidence based on an illegal seizure of his person. (5). The circuit court held an evidentiary hearing (from which the above statement of facts is largely derived). (29); (App. 104-113). That hearing disclosed:

- Officer Mueller testified that he was dispatched for a report of a suspicious black person—despite the fact that the dispatch records contain no mention of race. (29:17); (App. 107).

[4] As Mr. Pendelton pointed out in his postconviction motion, it was below freezing that night. (18:3). That assertion was supported with citation to a publicly accessible database of historic weather. If this record is insufficient, Mr. Pendelton would ask this Court to take judicial notice. *See* ***Perkins v. State***, 61 Wis.2d 341, 346, 212 N.W.2d 141 (1973) (Appellate court can take judicial notice of records which are "immediately accessible to it.").

[5] The record suggests that Mr. Pendelton did obtain a permit while this case was pending. (31:14).

- Law enforcement had no evidence, at the time they stopped Mr. Pendelton, verifying that there was actual criminal activity afoot. (29:18); (App. 108).

- Mr. Pendelton's clothing did not match the caller's report—a green jacket versus a black hoodie. (29:19-21); (App. 108).

- Officer Mueller had no description of a body type or a hair style for either suspect at the time he stopped Mr. Pendelton. (29:25); (App. 109).

After taking testimony and hearing arguments, the circuit court made findings of facts and conclusions of law. First, the court appeared to disclaim any reliance on dispatch records used by the defense, asserting that it was taking "judicial notice of the fact that it is not a detailed police report." (29:32); (App. 111). It questioned the reliability of that evidence. (29:32); (App. 111).

Next, the court made a finding of fact that the initial 911 call was at 1:37 A.M. (29:33); (App. 111). Police responded at "approximately 1:46 A.M." (29:33); (App. 111). It found that law enforcement first called over to Mr. Pendelton from the squad car. (29:34); (App. 112). The officer then got out of the squad car, at which time the second request was made. (29:34); (App. 112). While the sequence of events is not always clearly described in the court's oral ruling, the decision and order denying postconviction relief makes clear that the court believed that law enforcement's second "instruction" preceded Mr. Pendelton's allegedly suggestive movements. (20:3-4; (App. 116-117). It found Officer Mueller's testimony "credible and detailed." (29:38); (App. 113).

Considering the totality of the circumstances, the court identified a number of factors relevant to the reasonable suspicion calculus:

- Mr. Pendelton was walking in an alley, which the court believed was intrinsically suspicious. (29:34); (App. 112).
- Mr. Pendelton did not respond to the initial request to stop walking. (29:34); (App. 112).
- Mr. Pendelton made suggestive movements. (29:34); (App. 112).
- Mr. Pendelton was a black male and, while his clothing did not match the description, officers were entitled to "consider in the totality of the circumstances that the description might not be exactly what the person actually is wearing because the citizen witness may be observing something from some distance." (29:36); (App. 112).
- There were no other people present in the area. (29:36); (App. 112).
- Mr. Pendelton was in the vicinity of an area where "someone loitering or prowling" had been observed. (29:37); (App. 112).
- Mr. Pendelton placed his hand in his pocket. (29:37); (App. 112).
- This was a high crime area. (29:38); (App. 113).

Accordingly, the investigatory stop was justified. (29:37); (App. 113).

The court further ruled, despite the fact that it was not being contested, that there was a basis to frisk Mr. Pendelton. (29:37); (App. 113). The defense motion to suppress was denied. (29:38); (App. 113).

Plea and Sentence

On November 23, 2016, Mr. Pendelton pleaded guilty to carrying a concealed weapon. (31:9). The State asked that Mr. Pendelton be incarcerated for four months. (31:11). Defense counsel asked for a fine. (31:13).

The circuit court discussed the "gun violence problem in the Milwaukee area." (31:16). According to the court, "We have too many people walking around with guns who haven't been trained, don't have good temperament to be carrying a gun, are too young, too inexperienced, too foolish; and as a result of that, we have a lot of people getting shot and killed really for no reason." (31:16-17).

In the court's view, firearm training and licensing needed to be taken seriously. (31:17). The court imposed and stayed a jail sentence and placed Mr. Pendelton on probation. (31:20).

Postconviction Proceedings

Mr. Pendelton ultimately filed a postconviction motion arguing that trial counsel was ineffective for not adequately litigating the motion to suppress. (18:5-6). First, Mr. Pendelton argued that trial counsel should have used the 911 call to bolster the argument regarding a lack of reasonable suspicion. (18:6). Second, Mr. Pendelton argued that trial counsel should have argued that the seizure occurred earlier—when he assented to a law enforcement command. (18:8). Third, Mr. Pendelton argued that the court erred when it took "judicial notice" of the reliability of dispatch records. (18:9).

The circuit court denied the motion in a written order. (20); (App. 114-118). With respect to the 911 tape, "there was no evidence that Officer Mueller heard the 911 call, so the 911 call is not material to the outcome of the suppression hearing." (20:2); (App. 115). The circuit court specifically rejected an argument that the "collective knowledge doctrine" should be used to impute knowledge of the contents of the 911 call to responding officers. (20:3); (App. 116). With respect to *when* the seizure occurred, the court found that Mr. Pendelton was not seized when law enforcement exited their vehicle and "instructed" Mr. Pendelton to stop and Mr. Pendelton assented to that instruction. (20:3); (App. 116). Even if trial counsel had made an argument that the seizure occurred at that earlier point in time, there was still reasonable suspicion to detain Mr. Pendelton. (20:4); (App. 117). The court likewise rejected the judicial notice argument. (20:4); (App. 117).

Mr. Pendelton timely appealed. (21). On appeal, he is not re-litigating the issues raised in the postconviction motion. The stop issue is fully preserved and can be resolved without reference to the claims in the postconviction motion. First, while the 911 call was not introduced at the motion hearing, the trial court has made a finding of fact that its contents are identical to dispatch records it did consider. (20:3); (App. 116). Second, when a constitutionally cognizable seizure occurs is a question of law reviewed *de novo*. ***State v. Powers***, 2004 WI App 143, ¶8, 275 Wis.2d 456, 685 N.W.2d 869. Third, to the extent that the circuit court unreasonably interpreted the dispatch records, its findings of fact are reviewable without having to conduct an ineffectiveness inquiry. *See* ***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.)

ARGUMENT

I. Officers Violated Mr. Pendelton's Right to Be Free From an Unreasonable Seizure When They Stopped Him Without Any Objectively Reasonable Basis to Believe He Was Engaged in Any Criminal Activity.

A. Legal principles and standard of review.

This case involves a preserved challenge to law enforcement's temporary detention of Mr. Pendelton. That temporary detention is governed by the "reasonableness" requirement of both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.[6]

A police officer may "in appropriate circumstances and in an appropriate manner" stop and briefly detain an individual "if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'." ***United States v. Sokolow***, 490 U.S. 1, 7 (1989); ***Terry v. Ohio***, 392 U.S. 1, 30 (1968). To effectuate a temporary seizure, an officer must have "a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 301, 625 N.W.2d 623, 626; *see also* ***Florida v. Royer***, 460 U.S. 491, 498 (1983).

In other words, suspicion of criminal wrongdoing only becomes "reasonable suspicion" when it is based on "specific and articulable facts" and not just a mere "hunch." ***State v. Young***, 2006 WI 98, ¶21, 294 Wis.2d 1, 717 N.W.2d 729; ***Terry***, 392 U.S. at 27. Whether constitutionally sufficient

[6] It is also governed by Wis. Stat. § 968.24 which codifies these constitutional requirements.

reasonable suspicion exists in a given case is determined by examining the "totality of the circumstances." ***United States v. Arvizu***, 534 U.S. 266, 273 (2002).

Where an unlawful seizure occurs, the remedy is to suppress the evidence produced. ***State v. Carroll***, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963).

This Court applies a two-part test when reviewing the denial of a motion to suppress. ***Popp***, 2014 WI App 100, ¶13. 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***.

B. Mr. Pendelton was seized when police commanded him to "stop and come here" and he complied.

It is well-settled that a constitutionally cognizable seizure occurs "when an officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen." ***State v. Williams***, 2002 WI 94, ¶20, 255 Wis.2d 1, 646 N.W.2d 834 (quoting ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980). The test focuses on whether, under the totality of the circumstances, the actions of law enforcement "would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" ***Kaupp v. Texas***, 538 U.S. 626, 629 (2003) (quoting ***Florida v. Bostick***, 501 U.S. 429, 437 (1991)). "Included in this test for a seizure is the requirement that when a police officer makes a show of authority to a citizen, the citizen yields to that show of authority." ***In re Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777.

In this case, law enforcement initially made contact with Mr. Pendelton from inside their squad car, when

"they called out to him from the squad car and asked him to come over, stop and come over." (29:34); (App. 112). Mr. Pendelton kept walking. (29:34); (App. 112). Mr. Pendelton appears to have been free to do so.

The police responded, however, by escalating the encounter: They exited their vehicle and "instructed" Mr. Pendelton "to stop and come here." (29:9); (App. 105).[7] Mr. Pendelton assented to that instruction. (29:9); (App. 105). It was only after he began walking toward the officers that they observed allegedly suggestive body language. (29:9); (App. 105). This was a constitutionally cognizable seizure as a reasonable person would not have felt free to leave the scene under these circumstances.

Instead, a reasonable person would believe, after they had already tried to keep walking without success, that they were not at liberty to disregard the follow-up "instruction." There are several indicia that counsel in favor of that conclusion. First, law enforcement changed their verbal tone ("asking" versus "instructing"). *See* ***Mendenhall***, 446 U.S. at 554 ("language or tone of voice indicating that compliance with the officer's request might be compelled" can be suggestive of a constitutionally cognizable seizure). Second, law enforcement escalated the encounter by exiting the squad car—shifting the dynamics of the encounter. (29:34); (App. 112). This is an unmistakable signal that the encounter has ceased to be consensual. Third, there were at least two officers present. *See* ***Id***. (presence of multiple officers is suggestive of a seizure).

[7] Another confusion generated by the circuit court's lack of clarity in its findings of fact: Did both officers get out of the squad car or only one? Undersigned counsel believes that the circuit court was finding that both Officer Mueller and his partner exited the car due to its use of the plural pronoun throughout its findings of fact. (29:34).

Accordingly, Mr. Pendelton was seized when he stopped walking away from the officers and assented to their verbal commands.

C. Officers lacked reasonable suspicion to seize Mr. Pendelton.

Law enforcement had no reasonable suspicion to seize Mr. Pendelton. Law enforcement lacked even a "hunch." In this case, the only thing "suspicious" about Mr. Pendelton was his race and his physical presence in the vicinity of vaguely reported criminal activity long after the reported perpetrators had fled the scene. That is not sufficient to satisfy the requirements of the state and federal constitutions.

First, the circuit court concluded that Mr. Pendelton's presence in an alley was somehow suggestive. (29:34); (App. 112). Officer Mueller testified:

> They attempt to use the alley because there is a lot of foot traffic. Sometimes it is easier trying to conceal yourself in an alley than it is in a city street because of the streetlights.

(29:7); (App. 105). The circuit court accepted that reasoning and asserted:

> The officer testified in his experience as an officer that when someone is attempting to leave a scene they will walk down alleys as opposed to the city streets because there are less or no streetlights in the alleys and it's easier to conceal your movements in an alley. That is a factor considered in the totality of the circumstances.

(29:33-34); (App. 112).

However, undersigned counsel has been unable to find any legal authority that it is somehow illegal or unduly

suspicious to walk in an alley.[8] Alleys, so far as undersigned counsel is aware, are valid pedestrian thoroughfares and it makes little to no sense to somehow infer criminality from this bare fact.

Second, the circuit court found suspicious Mr. Pendelton's initial failure to respond to the law enforcement request. (29:34). While actually "evasive" acts may be taken into account in the reasonable suspicion calculus, *see* ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386 (1989); ***State v. Anderson***, 155 Wis.2d 77, 82, 454 N.W.2d 763 (1990); ***State v. Amos***, 220 Wis.2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998), Mr. Pendelton's behavior was not actually "evasive" under these facts and circumstances. Mr. Pendelton did not run away from law enforcement or try to hide. There is no indication that he changed his behavior in any way. Rather, he exercised his right to not engage in a consensual law enforcement encounter. This behavior contributes nothing to the reasonable suspicion calculus. *See* ***State v. Pugh,*** 2013 WI App 12, ¶12, 345 Wis.2d 832, 826 N.W.2d 418 ("Of course, as we have seen, Pugh had the right to walk away."); ***Royer***, 460 U.S. at 497-498.

Third, the circuit court relied on the fact that Mr. Pendelton was a black male and was consistent with the 911 caller's description. (29:35); (App. 112). At the motion hearing, Officer Mueller testified that he was on the lookout for a suspicious black male and that he stopped Mr. Pendelton partially on that basis. (29:17); (App. 108). That assertion is contrary to both the 911 call (the actual citizen report) and the dispatch records used in cross-examination, which do not

[8] *See also* ***Brown v. Texas***, 443 U.S. 47, 52 (1979) (reliance on defendant's presence in the alley, in reasonable suspicion calculus, was not supported by facts in record which would indicate "it was unusual for people to be in the alley.").

contain a racial description. (18; 29:17); (App. 119). The circuit court nonetheless accepted that Officer Mueller's account—that he was dispatched to look for a suspicious black male—was accurate, and relied on that statement in its oral ruling. (29:35); (App. 112). In postconviction proceedings, however, the circuit court appears to have reversed its position: "Officer Mueller agreed that he did not have a racial description." (20:3); (App. 116).

However, the circuit court also claimed that "the defendant matched the description of the subject *as he knew it to be at the time* (black male/dark clothing)." (20:4); (App. 117). And, the circuit court continued to disclaim any reliance on dispatch records to the contrary and flatly refused to consider the actual 911 tape containing the tip. (20); (App. 114-118).

Mr. Pendelton believes that—with respect to the racial descriptor—this Court should abandon the circuit court's clearly erroneous factual finding. The circuit court findings with respect to what Officer Mueller knew about the suspect's race are inconsistent and in any case, a finding that there was a report referencing a black male is "clearly erroneous and against the great weight and clear preponderance of the evidence." *See* ***Bank of Sun Prairie v. Opstein****,* 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

The dispatch records which fail to disclose a racial description and therefore contradict the officer's testimony (CAD, or computer aided dispatch reports) are reliable, trustworthy—and most importantly, admissible—evidence which the circuit court was wrong to summarily reject. ***City of West Bend v. Smith***, No. 2016AP2170, ¶7-11, unpublished

slip op. (Wis. Ct. App. October 18, 2017).[9] (App. 134-141). The circuit court's decision to privilege the testimony of the officer is not reasonable under these circumstances—especially when the circuit court was willing to rely on other information in the dispatch records in its findings (such as when the stop occurred). (29:33; 18:16); (App. 111; App. 119).

The lack of a racial description is problematic. More problematic still, however is the existence of a possible racial assumption on the part of Officer Mueller. The 911 caller did not report a race and the dispatch records do not contain a racial description. (18); (App. 119). More importantly, Officer Mueller has apparently acknowledged that "he did not have a racial description" despite also testifying that his decision to stop Mr. Pendelton was at least partially based on the fact that he matched a (nonexistent) racial description. (29:17; 20:3); (App. 108; App. 119). If neither the caller nor the dispatcher told the officer to be on the lookout for a suspicious black person, it would appear that the only source of this information is an assumption on the part of Officer Mueller. Subjecting Mr. Pendelton to a law enforcement intrusion on the basis of his race—in conjunction with an assumption about the race of a suspected criminal—is not defensible under any legal authority.

However, even if this Court decides to adopt the circuit court's conclusion—that Mr. Pendelton's race is somehow relevant to the reasonable suspicion calculus—that

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[9] *See also* ***State v. Michael***, No. 2012AP2738-CR, unpublished slip op. (Wis. Ct. App. June 10, 2014) (Finding that trial counsel was ineffective for not introducing a CAD report which would have corroborated the defendant's testimony and impeached a key witness). (App. 120-133). Both decisions are included in the appendix pursuant to Wis. Stat. § 809.23(3).

fact contributes only negligible weight to the reasonable suspicion calculus. The bare fact that Mr. Pendelton matched a racial type is not compelling, especially when he also failed to match the only other part of the (very limited) description at issue. Here, Officer Mueller clearly testified that he was looking for someone with a black "hoodie." (29:16); (App. 107). Mr. Pendelton was wearing a *green* "military style" jacket. (29:20-21); (App. 108).[10]

Fourth, the circuit court drew support from the fact that Mr. Pendelton was the only individual in the area. (29:36); (App. 112). However, the "suspiciousness" of this fact is greatly diluted by the gap in time between the initial call and the law enforcement response, Mr. Pendleton's lack of suspicious behavior, and most significantly, the fact that he was observed alone—with no accomplice in sight.

Fifth, the court believed that Mr. Pendelton was observed in a vicinity of potential criminal activity, "someone loitering or prowling in the church parking lot." (29:36-37); (App. 112). Again, that is not accurate—the dispatch records do not mention "prowling" and the word does not ever appear in Officer Mueller's testimony. And, while Officer Mueller did report that he was looking for someone "loitering," that is also contrary to the actual dispatch records. Again, this Court should not be bound by the circuit court's findings in this respect as they are not consistent with the evidence.

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[10] The trial court's attempt to justify the stop should be concerning, as it made a ruling that reasonable officers are apparently allowed to "consider" that a description in a citizen report may be incorrect. (29:36); (App. 112). However, this ignores that "circumstances 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." ***State v. Gordon***, 2014 WI App 44, ¶12, 353 Wis.2d 468, 846 N.W.2d 483.

In any case, law enforcement also knew that the alleged criminal behavior had occurred roughly 10 minutes before they arrived. (29:33); (App. 111). They did not know in what direction the alleged suspects had run from the scene. (29:25); (App. 109). Moreover, Mr. Pendelton's behavior was not consistent with someone who had recently been involved in felonious criminal activity. According to law enforcement, he was "walking" or "meander[ing]" and they observed no suspicious behaviors—besides his apparent presence. (29:8; 29:12; 29:9); (App. 105-106). Mr. Pendelton's mere presence in the vicinity of a possible crime scene is not a sufficient basis to detain him. ***Gordon***, 2014 WI App 44, ¶14; ***Pugh***, 2013 WI App 12, ¶12.

Sixth, the court asserted that this was a high crime area. (29:38); (App. 113). However, mere presence in a high crime area does not transform the innocuous pedestrian into a possible criminal. ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000) ("An 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."); ***State v. Morgan***, 197 Wis.2d 200, 211, 539 N.W.2d 887 (1995) (Quoting treatise for proposition that "simply being about in a high-crime area should not of itself ever be viewed as a sufficient basis to make an investigative stop."); ***United States v. Mallides***, 473 F.2d 859, 861 n.3 (9th Cir. 1973) ("That innocent activity occurs in a high crime area provides no basis for converting innocuous conduct into suspicious conduct.").

State v. Washington, 2005 WI App 123, ¶¶3, 17, 284 Wis.2d 456, 700 N.W.2d 305, is instructive on this final point. In that case, this Court recognized that there was no reasonable suspicion to detain the defendant *even though* officers also knew that the defendant did not live in the area,

he had a track record for dealing drugs, and police had an actual complaint that someone was loitering in the area.

At the same time, there were not any specific justifications for why this was a "high crime area" beyond the officer's conclusory testimony. While circuit courts may rely on the characteristics of a neighborhood in determining reasonable suspicion, there should be some basis in the record for making that subjective—and potentially problematic[11]—conclusion. Here, there was none.

Outside of the court's weak justification for the stop, there are other problems plainly apparent. Law enforcement had only a vague "tip" involving criminality and, as they admitted, there was no verification that any cars had in fact been broken into on that evening. (29:18); (App. 108). They had only the most vague description—someone wearing a dark hooded sweatshirt, with no other details. (29:6); (App. 105). Most problematic of all, however, is the extent to which Mr. Pendelton's race—and very presence in a neighborhood where some vaguely described "criminality" occurred—has been allowed to act as a proxy for reasonable suspicion. This Court should not allow police conduct of this nature—when unsupported by any other indicia of wrongdoing—to stand.[12]

Accordingly, this Court should reverse the ruling of the circuit court, suppressing all derivative evidence obtained as a result of the seizure, and remand for further proceedings.

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[11] *See* Reshaad Shirazi, *It's High Time to Dump the High Crime Area Factor*, 21 BERKELEY J. CRIM. L.76 (2016).

[12] *See* ***Washington v. Lambert***, 98 F.3d 1181, 1187-88 (9th Cir. 1996) (Discussing police seizures: "These encounters are humiliating, damaging to the detainees' self-esteem, and reinforce the reality that racism and intolerance are for many African-Americans a regular part of their daily lives.")

D. Even if Mr. Pendelton was not seized until after exhibiting "suspicious" body language, there was still insufficient reasonable suspicion to detain him.

The circuit court found that Mr. Pendelton was not "seized" when he assented to a law enforcement "instruction" and began walking toward the officers. (20:3); (App. 116). The court therefore found that it could utilize Mr. Pendelton's body language after police told him to stop as indicia supporting reasonable suspicion. (20:4); (App. 117).

According to police, Mr. Pendelton made two allegedly suggestive gestures. First, he is alleged to have "bladed" his body by turning away and hugging his arms to his body. (29:9-10); (App. 105-106). Second, he placed his hand in his pocket. (29:11); (App. 106). However, these ambiguous gestures (which can also be explained in context of the cold and wintry conditions that evening) do not meaningfully contribute to the reasonable suspicion calculus.

In the vehicular search context, the Wisconsin Supreme Court has been critical of over strong reliance on otherwise innocuous behaviors with potentially innocent explanations. *See* ***State v. Johnson***, 2007 WI 32, ¶43, 299 Wis. 2d 675, 729 N.W.2d 182:

> Were we to conclude that the behavior observed by the officers here [leaning forward and reaching under the seat] was sufficient to justify a protective search of Johnson's person and his car, law enforcement would be authorized to frisk any driver and search his or her car upon a valid traffic stop whenever the driver reaches to get his or her registration out of the glove compartment; leans over to get his wallet out of his back pocket to retrieve his driver's license; reaches for her purse to find her driver's license; picks up a fast food wrapper from the floor; puts down a soda; turns off the radio; or makes

> any of a number of other innocuous movements persons make in their vehicles every day. In each of these examples, the officer positioned behind the vehicle might see the driver's head and shoulders move, or even momentarily disappear from view. Without more to demonstrate that, under the totality of circumstances, an officer possesses specific, articulable facts supporting a reasonable suspicion that a person is dangerous and may have immediate access to a weapon, such an observation does not justify a significant intrusion upon a person's liberty.

Id., ¶ 43.

In the investigative detention context, this Court has also been critical of law enforcement reliance on otherwise ambiguous body language—including both "blading" and "security checks." ***Gordon***, 2014 WI App 44, ¶17 (As to the significance of the "security adjustment," this Court also recognized that "many folks, most innocent of any nefarious purpose, may occasionally pat the outside of their clothing to ensure that they have not lost their possessions."); ***Pugh***, 2013 WI App 12, ¶12 (Expressing skepticism of the very term "blading" by asserting that "Calling a movement that would accompany *any* walking away "blading" adds nothing to the calculus except a false patina of objectivity.") (emphasis in original).

With respect to putting a hand in the pocket, the Wisconsin Supreme Court has cautioned against over strong reliance on this behavior in determining whether there is a basis to frisk a suspect. *See* ***State v. Kyles***, 2004 WI 15, ¶50, 269 Wis.2d 1, 675 N.W.2d 449. ("We refuse, however, to adopt a per se rule that in all cases, regardless of other circumstances, a person's placing his or her hands in his or her pockets after an officer directed that the hands be removed is sufficient to provide reasonable suspicion to

effectuate a protective weapons frisk."); *see also* ***State v. Mohr***, 2000 WI App 111, ¶15, 235 Wis.2d 220, 613 N.W.2d 186 (putting hands in pockets was not sufficiently suspicious under specific facts and circumstances of case).

Kyles also draws a useful distinction between mere placement of the hand in a pocket and placement of the hand in a pocket in response to a direct request to remove the hand. ***Kyles***, 2004 WI ¶49-50. That distinction matters: An individual who places the hand in the pocket after being told not to—or who refuses to withdraw their hand in response to law enforcement commands—is clearly much more suspicious than the individual who merely exhibits a commonplace gesture.

Mr. Pendelton's ambiguous behavior does not provide substantial weight to the reasonable suspicion calculus under these facts and circumstances. Hugging the body and placing a hand in the pocket—while walking outdoors late at night—does not meaningfully communicate that he either has committed, or is about to commit a crime. Accordingly, even when this evidence is placed on the reasonable suspicion scale, there is still an insufficient basis to conclude that the actions of law enforcement were justified.

Accordingly, there was no basis to seize Mr. Pendelton. This Court should reverse the ruling of the circuit court, suppressing all derivative evidence obtained as a result of the seizure, and remand for further proceedings.

CONCLUSION

Mr. Pendelton therefore respectfully requests that this Court grant the relief requested.

Dated this 3rd day of January, 2018.

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 5,617 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 3rd day of January, 2018.

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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; and (3) 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.

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