STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP002081-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARQUIS LAKEITH PENDELTON,

Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MICHAEL J. HANRAHAN, PRESIDING

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# BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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John Chisholm
District Attorney
Milwaukee County

William G. Davidson
Assistant District Attorney
State Bar No. 1097538
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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## ISSUE PRESENTED

Did City of Milwaukee Police Officer Ross Mueller have the requisite reasonable suspicion to conduct an investigatory stop when he contacted Marquis Lakeith Pendelton on March 26, 2016?

The circuit court answered, “yes.”

## 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 the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. See Wis. Stat (Rule) 809.23(1)(b)4.

## STATEMENT OF THE CASE

City of Milwaukee Police Officer Ross Mueller and his partner, Josh Heritz, responded to investigate a report of suspicious activity occurring in a church parking lot at approximately 1:46 a.m. on March 26, 2016. (R29:4-5). Once on scene, officers observed only Pendelton who was walking alone through a nearby alley. (R29:6). Both the church parking lot and the alley in which officers contacted Pendelton were located in a "hotspot crime area." (R29:36-37). After observing Pendelton for some time, officers decided to stop Pendelton to conduct a field interview because they believed he may have been involved in the reported suspicious activity. (R29:8). Pendelton ignored Officer Mueller's request that he stop and continued to walk away from officers until Officer Mueller instructed him to stop. (R29:8). Prior to the stop, Officer Mueller also observed that Pendelton's movements were consistent with those of individuals attempting to conceal weapons or contraband. (R29:10).

During a frisk of his person, Pendelton admitted to Officer Mueller that he possessed a concealed firearm. (R29:12). Pendelton was subsequently arrested and charged with one count of Carrying a Concealed Weapon in violation of Section 941.23(2) of the Wisconsin Statutes. (R1).

On September 8, 2016, Officer Ross Mueller testified at an evidentiary hearing regarding Pendelton's Motion to Suppress Evidence. (R29). Following the evidentiary hearing, the circuit court, the Honorable Michael J. Hanrahan presiding, issued a decision from the bench denying Pendelton's motion to suppress evidence having found that Officer Mueller testified

credibly and "did have reasonable suspicion to stop [Pendelton] and question him . . ." (R29:37).

Pendelton then entered a plea of guilty to Carrying a Concealed Weapon on November 23, 2016 with the circuit court sentencing Pendelton to three months of incarceration imposed and stayed for nine months of probation. (R31:19). Pendelton later filed a postconviction motion alleging ineffective assistance of trial counsel which the circuit court subsequently denied. (R20). This appeal follows the circuit court's denial of Pendelton's postconviction motion. (R21).

## STANDARD OF REVIEW

When reviewing the circuit court's denial of a motion to suppress evidence, this Court will uphold the circuit court's factual findings unless clearly erroneous, but reviews its application of the facts to constitutional principles de novo. *State v. Gonzalez*, 2014 WI 124, ¶ 6, 359 Wis. 2d 1, 856 N.W.2d 580 (quoting *State v. Samuel*, 2002 WI 34, ¶ 15, 252 Wis. 2d 26, 643 N.W.2d 423).

## ARGUMENT

### I. The circuit court correctly denied Pendelton's motion to suppress evidence because specific and articulable facts warranted a reasonable belief that Pendelton may have been involved in criminal activity.

Defendant-Appellant Marquis Lakeith Pendelton was convicted of Carrying a Concealed Weapon in violation of Section 941.23(2) of the Wisconsin Statutes on November 23, 2016. (R14). He now appeals from the judgment of conviction asserting that the circuit court erred in denying his pre-trial motion to suppress evidence. (Brief of Defendant-Appellant, p. 8). Pendelton argues that he was unreasonably seized in violation of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution because officers lacked "any objectively reasonable basis to believe he was engaged in any criminal activity." (Brief of Defendant-Appellant, p. 9).

Pendelton's argument fails because it disregards pertinent facts and law. The circuit court appropriately denied Pendelton's motion to suppress evidence and this Court should affirm the judgment of conviction.

### A. An investigatory stop or seizure requires only reasonable suspicion.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729. Before a citizen is considered seized as contemplated under the Fourth Amendment, he must first yield to an officer's show of authority. *In re Kelsey C.R.*, 2001 WI 54 ¶ 33, 243 Wis. 2d 422, 444, 626 N.W.2d 777, 787.

An investigatory or *Terry* stop typically involves temporary questioning of an individual. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Young* at ¶ 20. Such a stop is constitutional if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Young* at ¶ 21 (citation omitted). Accordingly, an investigatory stop permits police to briefly detain a person in order to ascertain the presence of possible criminal behavior, even though there is no probable cause supporting an arrest. *Id.* During such stops, officers are constitutionally permitted to search individuals for the limited purpose of uncovering weapons so long as, when considered objectively, "'a reasonably prudent man in the circumstances [then present] would be warranted in the belief that his safety and that of others was in danger' because the individual may be armed with a weapon and dangerous." *State v. Kyles*, 2004 WI 15 ¶ 9-10, 269 Wis. 2d 1, 9-10, 675 N.W.2d 449, 452-53.

Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young* at ¶ 21 (citation omitted). "A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient." *Id.* (citing *Terry*, 392 U.S. at 27). However, officers need not eliminate the possibility of innocent behavior before initiating an investigatory stop. *Id.* Wisconsin courts have defined "reasonable suspicion" as follows:

> Although it is not possible to state precisely what the term reasonable suspicion means, it is a "commonsense nontechnical conception(s) that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" What is certain is that reasonable suspicion is "a less demanding standard than probable cause." The information necessary to establish reasonable suspicion can be less in both content and reliability than the information needed to establish probable cause. In other words, the required showing of reasonable suspicion is low, and depends upon the facts and circumstances of each case.

*State v. Buchanan*, 2011 WI 49 ¶ 9, 334 Wis. 2d 379, 389, 799 N.W.2d 775, 780-81 (quoting *State v. Eason*, 2001 WI 98 ¶ 19, 245 Wis. 2d 206, 226-27, 629 N.W.2d 625, 633).

### B. Officer Mueller had reasonable suspicion to believe that Pendelton may have been involved in criminal activity.

Pendelton claims that Officer Mueller lacked not only reasonable suspicion to believe that Pendelton may have been engaged in criminal activity, but that Officer Mueller "lacked even a 'hunch.'" (Brief of Defendant-Appellant, p. 12). Moreover, Pendelton argues that "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," and concludes that these facts, alone, are not enough to permit an investigatory stop here. *Id*.

Pendelton's argument, however, is fatally flawed because it fails to fully consider the facts. Indeed, a complete review of the record does reveal facts sufficient to reach the less demanding standard of reasonable suspicion necessary to justify an investigatory stop.

Of the facts found by the circuit court during the evidentiary hearing, the four that follow remain undisputed by the parties:

1) At 1:37 a.m., a call was received from a citizen witness who reported concerning activity occurring in a church parking lot;

2) Officer Mueller and his partner arrived in the area approximately nine minutes after the call was received;
3) Once on scene, Officer Mueller observed Pendelton wearing dark clothing walking away from the church parking lot in a nearby alley; and
4) Pendleton was the only person present in the alley and no other person was even visible in the area.

(R29:32-36).

Moreover, though Pendelton suggests that the circuit court improperly considered the church parking lot to be located in a "high crime area" (Brief of Defendant-Appellant, p. 18), Officer Mueller's testimony is not conclusory and instead does support the circuit court's finding in this regard. When asked during direct examination why he believed Pendelton might be armed, Officer Mueller responded, in part, that he considered the location in his analysis because "[t]he location is considered at District 4 a hotspot through the *data-driven policing* that they use." (R29:10) (emphasis added).

Importantly, the circuit court found Officer Mueller to have been "a credible witness and that his testimony was credible and detailed." (R29:37). In Wisconsin, the trial court is the "ultimate arbiter of both the credibility of the witnesses, and the weight to be given to each witness' testimony." *State v. Anson*, 2005 WI 96 ¶ 32, 282 Wis. 2d 629, 650, 698 N.W.2d 776, 787 (quoting *Pindel v. Czerniejewski*, 185 Wis. 2d 892, 898, 519 N.W.2d 702 (Ct. App. 1994) (citations omitted)).

During the evidentiary hearing, Officer Mueller testified that he was aware that perpetrators will attempt to conceal their movement by navigating through alleys because "[s]ometimes it is easier trying to conceal yourself in an alley than it is in a city street because of the streetlights." (R29:6). Only after Officer Mueller and his partner observed Pendelton for some time did they "decide[ ] to conduct a field interview believing [Pendelton] was the individual that was . . . called on. (R29:8). While observing Pendelton, neither officer "observed anybody else in that parking lot or in the area on foot at all at that time of night." *Id*.

When officers first attempted to contact Pendelton, he was "located in the middle of the street" and ignored Officer Mueller's request that he stop. (R29:8). Instead, Pendelton continued walking away from officers toward a chest-high fence surrounding a residential property. *Id*. Only after Officer Mueller exited officers' vehicle and instructed Pendelton "to stop and come here" did Pendelton finally do so. *Id*. By the time Pendelton did stop, Officer Mueller had already observed Pendelton to have "his arm . . . across his body and . . . his left hand [concealed] in his left jacket pocket." (R29:8-9). Officer Mueller explained that officers refer to this type of behavior as "'blading,' [which is] used to conceal a portion of your body from law enforcement . . . if you're trying to conceal some type of contraband or weapon." *Id*. "It was [after I observed Pendelton "blading"] that I decided to conduct a frisk of his person believing that he would be concealing some type of weapon." *Id*. Officer Mueller later testified that he found Pendelton's conduct to be consistent with that of an individual "attempting to press against [his body] a concealed firearm or weapon . . . ." (R29:10).

Neither was Pendelton seized nor officers' conduct subject to Fourth Amendment scrutiny until the moment Pendelton actually yielded to Officer Mueller's instruction that he stop.

In determining whether an investigatory stop is constitutionally reasonable, Wisconsin courts employ a common sense test based on the totality of the facts and circumstances. *State v. Post*, 2007 WI 60, ¶ 13-14, 301 Wis. 2d 1, 733 N.W.2d 634, 638. (citation omitted).

When he decided to stop Pendelton for the purpose of conducting a field interview, Officer Mueller did "possess specific and articulable facts that warrant[ed] [his] reasonable belief" that Pendelton may have been involved in criminal activity. Courts have recognized that reasonable suspicion is not a particularly high threshold. *See Young* at ¶ 59; *State v. Larson*, 215 Wis. 2d 155, 162, 572 N.W.2d 127, (Ct. App. 1997) (observing that the reasonable suspicion standard set forth in *Terry* "is not high").

In *State v. Luiz-Lorenzo*, an officer was dispatched at approximately 3:00 a.m. to investigate a report of several

individuals causing a disturbance in a part of town otherwise quiet at such an early hour. *State v. Luiz-Lorenzo*, No. 2015AP1540-CR, unpublished (WI App. May 18, 2016) at ¶ 2 (App. 102). Though he did not see any subjects in the immediate area of the reported disturbance, the officer did observe Luiz-Lorenzo in a poorly lit alley standing alone against the wall of a closed business. *Id*. The officer approached Luiz-Lorenzo and as he began to exit his police vehicle, Luiz-Lorenzo "immediately started to walk into some nearby bushes." *Id* at ¶ 3. (App. 102). On those facts alone, the court there concluded that the officer's suspicion that Luiz-Lorenzo may have been involved in illegal activity was objectively reasonable and affirmed the circuit court's denial of Luiz-Lorenzo's motion to suppress evidence. *Id*. at ¶ 11-12. (App. 106-107).

Like the officer in *Luiz-Lorenzo*, Officer Mueller and his partner responded to investigate a caller's complaint alleging suspicious activity. (R29:5). Similarly again, officers here did not observe any individuals in the immediate area of the reported suspicious activity, but did observe Pendelton in a nearby [dimly lit] alley "walking from the exact area of the dispatched location." (R29:6-7). Just like Luiz-Lorenzo, Pendelton was the only individual officers observed to be in the area after arriving on scene to investigate the caller's complaint. (R29:8). Though the nature of officers' initial contacts with Luiz-Lorenzo and Pendelton differ slightly (Luiz-Lorenzo "immediately started to walk into some nearby bushes" upon mere sight of the officer there, while Pendelton here ignored Officer Mueller's request that he stop and instead continued walking), neither Luiz-Lorenzo nor Pendelton yielded to officers' instructions until after they had first widened the gap separating themselves from the officers. (R29:8).

While the officer in *Luiz-Lorenzo* testified that he had contacted other individuals involved in criminal activity in the same alley in which he found Luiz-Lorenzo, the court there did not appear to consider the area to be one fraught with crime. *Luiz-Lorenzo* at ¶ 10. (App. 106). Here, however, the circuit court did find that the location to which officers responded was a "hotspot crime area." (R29:37). Though the officer in *Luiz-Lorenzo* made no such observation, Officer Mueller did

observe Pendelton to have been "blading" his body in a manner consistent with that of individuals attempting to conceal weapons. (R29:10).

That any of the individual circumstances giving rise to Pendelton's seizure might have been the product of wholly innocent behavior does not preclude Officer Mueller from "briefly detain[ing] [Pendelton] in order to ascertain the presence of possible criminal behavior, even though there [was] no probable cause supporting an arrest." *Young* at ¶ 21. As the *Luiz-Lorenzo* court correctly noted, the question this Court must answer "is whether a reasonable officer would reasonably suspect illegal behavior" given the totality of the circumstances then facing Officer Mueller. *Luiz-Lorenzo* at ¶ 11. (App. 106). Because the record here is replete with facts sufficient to permit a reasonable officer to reasonably suspect of Pendelton some criminal behavior, the circuit court correctly denied Pendelton's motion to suppress evidence.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm the judgment of conviction.

Dated this _____ day of March, 2018.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

_____
William G. Davidson
Assistant District Attorney
State Bar No. 1097538

## 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 2,531.

_____ _____

Date William G. Davidson
Assistant District Attorney
State Bar No. 1097538

## 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.

_____ _____

Date William G. Davidson
Assistant District Attorney
State Bar No. 1097538

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.