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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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REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

ARGUMENT

I. Mr. Pendelton's constitutionally cognizable seizure occurred before he displayed allegedly "suspicious" body language.

In his opening brief, Mr. Pendelton argued that the circuit court erred in its determination of when the constitutionally cognizable seizure occurred. (*See* Opening Brief at 10-12). As the issue was framed in both the circuit court and the opening brief, Mr. Pendelton asserts that he was "seized" when he assented to a law enforcement command and stopped walking away from officers.

Both parties agree that Mr. Pendelton was initially walking away from the direction of law enforcement. (State's Br. at 7). Law enforcement instructed him to "stop and come here." (29:8). At the moment he ceased exercising his free will by choosing not to continue on his preordained path, he was therefore subject to a constitutionally cognizable seizure. Although he made "suspicious" movements while walking back toward law enforcement, it is Mr. Pendelton's position that he was already seized at the point he stopped walking away and, thus, those movements are not relevant to the reasonable suspicion inquiry. (29:9-10).

The State's position on appeal is hard to parse. They assert:

> 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.

(State's Br. at 7). In Mr. Pendelton's view, he yielded to that instruction by ceasing to continue on his preordained path. The State argues later in the brief, however, that Mr. Pendelton's body language—occurring as he walked back toward the officers—is properly considered in the reasonable suspicion calculus. (State's Br. at 8-9). The State does not further support its argument as to *when* the constitutionally cognizable seizure occurred. Because the State has failed to adequately litigate that relevant legal issue, Mr. Pendelton believes it should be conceded in his favor. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Accordingly, this Court should hold that Mr. Pendelton was seized when he stopped walking away—prior to exhibiting the allegedly suspicious body language.

II. There was insufficient evidence to support a finding of reasonable suspicion under these facts and circumstances.

The State makes several arguments to support a finding of reasonable suspicion. None are especially persuasive.

First, the State argues that this case can be decided in their favor via citation to an unpublished Court of Appeals decision. (State's Br. at 7). However, that case is easily distinguishable.

In that case, law enforcement received a report of a disturbance involving several individuals. ***State of Wisconsin v. Luiz-Lorenzo***, No. 2015AP1540-CR, unpublished slip op., ¶2 (Wis. Ct. App. May 18, 2016). While the officer was unable to observe any such individuals upon arrival to the scene, he made sure to check out a nearby alley. ***Id***. The officer in that case did so because had particularized experience with that specific alley. ***Id***. He had previously contacted "people involved in criminal activity in that alley." ***Id***. He therefore knew it to be a hideout for illicit individuals seeking to place themselves "out of sight" from anyone who might be traveling on the nearby street. ***Id***.

The officer observed a single individual in the alley. ***Id***. In response to being spotted by law enforcement, that individual immediately began to walk into nearby foliage. ***Id***., ¶3. The officer ordered the suspect out of the bushes. ***Id***. When he emerged, however, the suspect had his hand in his pocket. ***Id***., ¶4. Although he complied with a law enforcement request to remove his hand, he later placed it back in the pocket and refused to remove it. ***Id***. He was physically noncompliant and was ultimately arrested. ***Id***.

Thus, while the defendant's presence in the alley was a factor in this Court's decision, that fact was accompanied by other salient facts which render the case factually distinguishable from the facts of this case. Unlike Mr. Pendelton, the defendant in that case *had* acted evasively—his immediate response to a law enforcement presence was to hide in the adjacent bushes. ***Id***., ¶11. Mr. Pendelton did no such thing; rather, he was already walking when asked to stop. There has been no evidence that he altered his path or tried to run and hide. He certainly did nothing as suspicious as ducking into nearby bushes. The State's attempt to

compare the cases on this point is therefore something of a stretch. (State's Br. at 8).

Another notable distinction is the officer's specialized knowledge with that particular alley—a fact which is lacking in this case. Instead of a particularized suspicion based on specific knowledge about a discrete area where prior criminal activity had *actually* occurred, all law enforcement had in this case was a generalized statement—that walking in an alley (any alley, it would appear) is intrinsically suspicious. There is obviously a vast difference between those two statements.[1] In order to support its argument, the State therefore falls back on generalized statements about the entire area being a "hotspot crime area." (State's Br. at 8). Again, there is vast difference between, on the one hand, particularized information regarding a discrete location and, on the other, a generalized (and conclusory) allegation as to an entire geographic area.[2]

Accordingly, the persuasive authority cited by the State is not applicable to these facts and circumstances.

Second, the State relies on statements about Mr. Pendelton "blading" his body. (State's Br. at 9). As Mr. Pendelton has argued, however, that observation was made *after* the seizure had already occurred. Even if this Court disagrees as to the timing, Mr. Pendelton has already made

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[1] The State also ignores the United States Supreme Court case cited by Mr. Pendelton in which presence in an alley *was not* in and of itself a basis for reasonable suspicion. ***Brown v. Texas***, 443 U.S. 47, 52 (1979)

[2] The State believes that the reference to the high crime area was not conclusory. (State's Br. at 6). Mr. Pendelton persists in his claim; the testimony is still insufficient. In effect, the State alleged that this was a high crime area not because they say-so but because vaguely stated "data" says-so. This is still a conclusory and insufficient assertion.

arguments in the opening brief (which are not addressed in the State's brief) as to why those observations are insufficient indicia of reasonable suspicion under these facts and circumstances. (Opening Brief at 19-21).

III. Remaining arguments.

Mr. Pendelton's brief contains thirteen pages of argument. In response, the State has submitted roughly three pages of relevant argument, most of which is concerned with the discussion of an irrelevant and distinguishable unpublished Court of Appeals decision. Many of the arguments made in the opening brief are not adequately addressed or responded to in the State's brief. Mr. Pendelton therefore reiterates all those original arguments made in the opening brief and, in lieu of reciting his original arguments verbatim, directs this Court to those arguments and authorities.

Above all else, this Court should not lose sight of several important facts: First, although no one named the alleged suspects as black, Mr. Pendelton's race was *still* allowed to function as indicia of reasonable suspicion. (29:35). Second, although the only clothing description at hand was very different—a black hoodie—Mr. Pendelton's green army jacket was *still* allowed to function as indicia of reasonable suspicion. (29:16; 29:20-21; 29:36). Third, Mr. Pendelton was not breaking the law by walking through an alley and, even though law enforcement surveilled his behavior prior to contacting him, they observed nothing intrinsically suspicious about his actions. (29:9). As Mr. Pendelton argued at length in the opening brief, the case law demands something more because, at the end of the day, Mr. Pendelton's greatest "offense" was being in the wrong place at the wrong time. This is not a sufficient basis for

constitutionally cognizable reasonable suspicion. Mr. Pendelton therefore persists in his argument that his seizure was unlawful and unconstitutional. In this case, law enforcement observed nothing that would warrant a state-sanctioned interference with his liberty.

Accordingly, this Court should reverse and remand for further proceedings.

CONCLUSION

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

Dated this 20th day of March, 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 1,358 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 20th day of March, 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; 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.

Dated this 20th day of March, 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