STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP000320-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. SMITH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered
in Milwaukee County Circuit Court,
the Honorable David C. Swanson, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Mr. Smith "seized" for the purposes of the state and federal constitutions when he was confronted by an armed police officer and repeatedly asked to accompany that officer to an enclosed area for further questioning?

   The trial court answered no.

2. Did law enforcement have reasonable suspicion to seize Mr. Smith at that time?

   Because the circuit court found that Mr. Smith had not been seized, it did not reach the reasonable suspicion issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is requested as it will help to guide litigants in future cases with similar facts.

While Mr. Smith 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

An information charged Mr. Smith with possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(1m)(a), and possession of THC as a second and subsequent offense, contrary to Wis. Stat. §§ 961.41(3g(e). (3:1).

The circuit court, the Honorable David Swanson presiding, held an evidentiary hearing as to whether or not

Mr. Smith was subject to a constitutionally impermissible seizure. (25); (App. 103).[1] Specifically, the parties disputed whether Mr. Smith had been seized *before* he was asked to accompany an officer to an enclosed vestibule for further questioning. (25:4); (App. 106). The motion was dispositive because it was only after Mr. Smith was relocated to the vestibule that law enforcement smelled the odor of marijuana giving them a basis to further detain Mr. Smith. (26:16); (App. 118).

At the conclusion of the hearing, the circuit court denied the defense motion to suppress. (25:88); (App. 190).

Following the motion hearing, Mr. Smith pleaded to both charges. (26:2). Mr. Smith received a global sentence consisting of three years of initial confinement followed by two years of extended supervision. (26:27).

He ultimately filed a timely notice of appeal.[2] (18).

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[1] Counsel's motion to suppress is not preserved in the circuit court record. However the State's responsive pleading accurately captures the defense position: "As grounds for the motion, the defendant argues that any and all evidence should be suppressed because Detective Martinez illegally detained the defendant prior to the defendant's moving into the vestibule of the Burleigh Glass store." (4:1).

[2] *See* Wis. Stat. § 971.31(10).

STATEMENT OF RELEVANT FACTS[3]

Suppression Hearing

In order to meet their burden—of proving that Mr. Smith was not seized until after he had been taken to the vestibule—the State called two witnesses.

The State's first witness was Detective Steven Wall of the Milwaukee County Sheriff's Office. (25:5); (App. 107). On the date in question—April 5, 2017—Detective Wall was working in the "fugitive apprehension unit" alongside Detective Alex Martinez. (25:26; 25:6); (App. 128; App. 108). Both detectives were equipped with police "gear." (25:32); (App. 134). That gear included a law enforcement badge worn around the neck, a "tac vest," a firearm, and a taser. (25:9; 25:46); (App. 111; App. 148).

The detectives were trying to locate an individual named "Connor" who was a "felon out of Florida." (25:8); (App. 110). They were following up on a tip about a red car that may have been linked to "Connor." (25:8); (App. 110). Using DOT records, the detectives went to the address on file for that car. (25:8); (App. 110). They spotted the car in question and followed it to a gas station. (25:11); (App. 113). They witnessed another individual get in and out of the car. (25:11-12); (App. 113-114). The person who got out of the car then walked away from the gas station in the company of another pedestrian. (25:12); (App. 114). At this point, the detectives switched their focus from the car—which was the suspect of the tip—to the as-yet unknown individuals observed in connection with their surveillance of the car.

[3] As the only issue on appeal is the outcome of the suppression hearing, Mr. Smith will focus on those facts in the statement of facts.

(25:12); (App. 114). According to Detective Wall, he wanted to "figure out the connection between that red car and our target, Connor." (25:12); (App. 114).

Ultimately, Detective Wall observed the two men inside a business—Burleigh Glass. (25:13); (App. 115). Detective Wall parked his unmarked police car and waited for the two men to exit the business. (25:14); (App. 116). At this point, he still "didn't know who these gentlemen were." (25:14); (App. 116).[4] After one of the men waved to him—signaling, according to Detective Wall, that he had been identified as law enforcement—Detective Wall decided to go into the store and "FI" the two men. (25:15); (App. 117).[5]

Detective Wall testified that, in order to enter the store itself, a visitor first had to pass through an enclosed vestibule. (25:15); (App. 117). Detective Wall and his partner passed through that vestibule and into the store in order to talk to the two men. (25:15-16); (App. 117-118).

Detective Wall initiated contact with Derek Johnson, the pedestrian seen walking with the person who had been observed getting in and out of the red car. (25:16); (App. 118). While he spoke to Mr. Johnson, Detective Martinez spoke with Mr. Smith in the vestibule. (25:17); (App. 117). Detective Martinez testified that Mr. Smith was walking around the store when police entered. (25:41); (App. 143). After Detective Martinez identified himself as a detective, Mr. Smith begin to walk away. (25:41); (App. 143). Detective Martinez asked if he could speak with Mr. Smith while

[4] Neither individual turned out to be the "Connor" in question, as "Connor" was actually separately arrested that morning by other officers in an unrelated law enforcement contact. (25:29-30); (App. 131-132).

[5] FI is short for "field interview." (25:35); (App. 137).

simultaneously walking toward him. (25:41); (App. 143). Detective Martinez testified that Mr. Smith stated "what do you want to talk to me for." (25:42); (App. 144). Detective Martinez responded by stating that he had "a couple of questions" for Mr. Smith. (25:42); (App. 144). Detective Martinez asked if Mr. Smith would accompany him into the vestibule. (25:43); (App. 145). Mr. Smith complied. (25:44); (App. 146). Prior to his entry into the store itself, Detective Martinez testified that he did not witness anything suspicious about Mr. Smith. (25:47); (App. 149).

After ascertaining that there was nothing suspicious about Mr. Johnson, Detective Wall joined Detective Martinez in the vestibule. (25:17); (App. 119). Upon entering, he smelled marijuana. (25:18); (App. 120). A frisk conducted in the vestibule revealed that Mr. Smith was in possession of a firearm. (25:21); (App. 123). A later search incident to arrest revealed that Mr. Smith was also in possession of marijuana. (1:2).

Detective Wall testified that, prior to Mr. Smith being taken into the vestibule, he had not witnessed any criminal activity. (25:35); (App. 137). He was in no way a suspect in any wrongdoing until such time that police smelled the odor of marijuana while inside the vestibule. (25:36); (App. 138).

However, Detective Martinez testified that his suspicion had been "raised" before Mr. Smith was taken to the vestibule as a result of Mr. Smith's reaction to Detective Martinez's entry into the store. (25:50); (App. 152). According to Detective Martinez, Mr. Smith's "eyes got big" and he "attempted to walk away." (25:50); (App. 152). While Detective Martinez thought that Mr. Smith might run away, that did not occur. (25:50); (App. 152). Detective Martinez

had the following exchange with defense counsel as to his suspicions at that time:

> Q: Now I'm going to ask the question again. At the point that you thought that he was going to run, did you observe him engage in any illegal or suspicious activity?
>
> A: No, he didn't. He stopped and then this is when I first noticed him blading his body away from me, when I noticed him to be very nervous. And this is when I first raised my suspicions he may have something on his person.
>
> Q: When you say may have had something on his person, what did you think he may have had on his person?
>
> A: He may have had something illegal on his person or he may have had a warrant. He tried -- that's what my -- that's what my initial thought was.
>
> Q: And that is based upon what?
>
> A: My -- my training and experience.
>
> Q: In fact, you didn't believe that he had something on him in the sense that he may have had something, you actually knew he had something on him, isn't that correct?
>
> A: No.
>
> Q: Are you sure?
>
> A: Yes.

(25:50-51); (App. 152-153).

Further cross-examination disclosed that Mr. Smith was visibly nervous during the initial law enforcement contact (before entering the vestibule) and that Detective Martinez believed there "might have been a strong possibility that he may have had something on his person or a warrant." (25:54); (App. 156). That cross-examination also disclosed that, during the initial contact, Detective Martinez asked Mr. Smith to remove his hands from his pockets and Mr. Smith complied with that request. (25:52); (App. 154). He also testified that Mr. Smith had initially declined to talk to Detective Martinez during the initial contact, although Detective Martinez could not recall how many times he had done so. (25:55); (App. 157).

Following the testimony of the two detectives, Mr. Smith testified. (25:60); (App. 162). At the point when officers entered, Mr. Smith stated he was "walking towards the back of the store." (25:76); (App. 178). As Mr. Smith testified, the Burleigh Glass store was small—about half the size of the courtroom where the suppression hearing was held (25:76); (App. 178). The two detectives walked into the business and identified themselves as law enforcement. (25:76); (App. 178). According to Mr. Smith, they "asked me to stop." (25:76); (App. 178). At this time, the two officers were positioned in front of the door that Mr. Smith would have had to walk through in order to exit the business. (25:74); (App. 176).

Detective Martinez initiated a back-and-forth exchange with Mr. Smith. (25:62); (App. 164). That exchange lasted roughly two minutes. (25:62); (App. 164). First, Detective Martinez asked Mr. Smith what he was doing. (25:63); (App. 165). Detective Martinez then asked to talk with Mr. Smith. (25:62); (App. 164). Mr. Smith asked what Detective Martinez wanted to talk to him about. (25:62); (App. 164).

Detective Martinez told Mr. Smith he just wanted to ask him some questions. (25:62); (App. 164). At that point, Mr. Smith stated he did not want to answer Detective Martinez's questions. (25:62); (App. 164). Detective Martinez responded by asking Mr. Smith to step into the vestibule. (25:62); (App. 164). Mr. Smith asked why. (25:62); (App. 164). Detective Martinez told him that he wanted Mr. Smith to step into the vestibule so they could talk. (25:62); (App. 164). Mr. Smith told Detective Martinez, for the second time, that he did not want to talk to him. (25:62); (App. 164).

During that conversation, Mr. Smith testified that Detective Martinez was moving closer to him, and ultimately stopped five feet away from where Mr. Smith was standing. (25:76); (App. 178). While the detective was "walking and talking" Mr. Smith testified that he did not feel free to move. (25:78); (App. 180). According to Mr. Smith, he believed that "if I was doing anything he more than likely would try to tackle me." (25:78); (App. 180). He believed that Detective Martinez's body language was "threatening" because he was walking toward Mr. Smith in an aggressive manner while Mr. Smith continued to stand still. (25:78); (App. 180).

Mr. Smith testified that, initially, Detective Martinez's tone was "clear." (25:63); (App. 165). After he initially refused to "talk," however, Detective Martinez's tone and body language became more assertive: He placed his hands on his hips, near his gun and taser. (25:64); (App. 166). He looked "straight at" Mr. Smith, with a "kind of aggressive look." (25:64); (App. 166). Mr. Smith described Detective Martinez as having a "facial expression of emphasis." (25:64); (App. 166). His eyes were narrowed and his mouth was "frowned up." (25:64); (App. 166). He looked like "[s]omewhat of a demand." (25:64); (App. 166). Detective

Martinez was also a much larger man than Mr. Smith. (25:66); (App. 168).

When asked if he felt free to leave, Mr. Smith stated that he did not. (25:66); (App. 168). He explained why:

> Because when I told him that I didn't want to talk to him, I tried to stay in the store and continue what I was doing, he told me again that he wanted to talk to me in the vestibule, like it was more of a demand.

(25:66); (App. 168). After being asked "[t]wo or three times" to accompany the detective to the vestibule, Mr. Smith ultimately complied. (25:66; 25:70); (App. 168; App. 172). It was while in that vestibule that law enforcement ultimately smelled marijuana, providing a basis to lawfully detain and eventually arrest Mr. Smith. (25:88); (App. 190).

Following the close of evidence, the State argued that "any reasonable person under these circumstances would have felt free to leave." (25:81); (App. 183). In contrast, defense counsel emphasized the insistent nature of the police encounter, where Mr. Smith was repeatedly asked to step into an enclosed space despite clearly declining to do so. (25:83); (App. 185).

The circuit court acknowledged that it was "not an easy call." (25:86); (App. 188). The facts were "somewhat difficult." (25:86); (App. 188). The circuit court then sided with the State in finding that a reasonable person would have felt free to terminate this encounter. (25:86); (App. 188). It made several factual findings in support of that conclusion. First, that while there were two officers in the store, only one officer was initially talking to Mr. Smith. (25:87); (App. 189). Second, that Detective Martinez did not display his weapon, although it was visible. (25:87); (App. 189). The detective did

not produce any other weapon during the encounter. (25:87); (App. 189). Third, "He never physically touched Mr. Smith." (25:87); (App. 189). Fourth, the testimony was "pretty consistent" that Detective Martinez "asked Mr. Smith to go with him into the vestibule. (25:87); (App. 189).

The ultimate question, then, was the "tone" of the detective when he made this request. (25:87); (App. 189). The circuit court stated:

> And here we get into questions of tone. You know, well, did Mr. Smith feel compelled. At some point the test becomes too subjective.
>
> And the test under the case is what -- objectively what would -- what would a reasonable person believe in these circumstances. In response to a request from an officer, I think under those circumstances a reasonable person could believe he could say no, no, I'm not going to speak to you, and not go into the vestibule.

(25:87); (App. 189).

Accordingly, the court found that Mr. Smith was not seized until after the odor of marijuana was smelled in the vestibule, and it denied the defense motion to suppress. (25:88); (App. 190).

SUMMARY OF ARGUMENT

In independently applying the relevant legal framework, the evidence clearly shows that a reasonable person in Mr. Smith's position would not have felt free to terminate the police encounter which occurred in the store. Because police lacked reasonable suspicion to seize Mr. Smith while he was in Burleigh Glass, his detention was unlawful and any resulting evidence must therefore be suppressed.

ARGUMENT

I. Mr. Smith was subject to a constitutionally cognizable seizure of his person when he was confronted by law enforcement in Burleigh Glass and repeatedly asked to accompany the detective to an enclosed space for further questioning.

A. An objectively reasonable person would not have felt free to terminate this police encounter.

1. Legal standard for determining when a seizure occurs.

The right to be free from unreasonable searches and seizures is guaranteed by the Fourth Amendment to the United States Constitution, and Article I, § 11 of the Wisconsin Constitution. This court consistently follows the United States Supreme Court's interpretation of the Fourth Amendment in construing Article I, § 11. ***State v. Betterley***, 191 Wis. 2d 407, 416, 529 N.W.2d 216 (1995). The Fourth Amendment governs all police intrusions, including investigative stops. ***Terry v. Ohio***, 392 U.S. 1 (1968). Where an unlawful stop occurs, the remedy is to suppress the evidence it produced. ***State v. Washington***, 2005 WI App 123, ¶ 10, 284 Wis. 2d 456, 700 N.W.2d 305 (2005); ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963).

With respect to the standard of review in this case, this Court applies a two-pronged analysis. "The circuit court's findings of evidentiary or historical fact are upheld unless clearly erroneous." ***State v. Williams***, 2002 WI 94, ¶ 17, 255 Wis.2d 1, 646 N.W.2d 834. However, the determination of whether defendant has been "seized" under the state and federal constitutions is a legal question reviewed de novo. ***Id***.

In determining whether a defendant has been seized, this Court applies the following "general rule": "[A] seizure has occurred when an officer, 'by means of physical force of show of authority, has in some way restrained the liberty of a citizen.'" ***Id***., ¶ 20 (quoting ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980)).

As framed by the United States Supreme Court in ***Mendenhall***:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be 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.... In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Mendenhall, 446 U.S. at 554-55. In applying this objective test, this Court must look at the police interaction in context, with full consideration of all the facts and circumstances. ***Williams***, 2002 WI 94, ¶ 23.

2. No reasonable person would have felt free to exit Burleigh Glass while this police encounter was ongoing.

In this case, Mr. Smith was going about his lawful business when law enforcement arrived on the scene. As Mr. Smith testified, the Burleigh Glass store was small—about

half the size of the courtroom where the suppression hearing was held (25:76); (App. 178). He was in that store with at least one other individual, Mr. Johnson. (25:16); (App. 118). Suddenly, two armed officers made a dramatic entrance, announcing their presence as police officers to those in earshot—including Mr. Smith. (25:41; 25:16); (App. 143; App. 118). The detectives were positioned so as to block the only available exit. (25:74); (App. 178). They were "geared up" with "tac vest[s]" over their plain clothes outfits. (25:9); (App. 111). They also had visible weapons. (25:87); (App. 189).

Mr. Smith, who had been walking around the store when police entered, tried to continue on his way. (25:76); (App. 178). Instead of being allowed to do so, he was immediately told to "stop." (25:76); (App. 178). One of the detectives began approaching him in what Mr. Smith believed to be a threatening fashion. (25:78); (App. 180). He ultimately came within five feet of Mr. Smith. (25:76); (App. 178). That detective repeatedly requested to talk with Mr. Smith in an enclosed area. (25:66); (App. 168). Although Mr. Smith refused those requests, the detective refused to take "no" for an answer. (25:66); (App. 168). Mr. Smith testified that there was a discernible difference in the detective's tone and affect when he declined to be questioned. According to Mr. Smith, the detective frowned, narrowed his eyes, and placed his hands on his hips near his firearm and taser. (25:64); (App. 166).

No reasonable person in this circumstance would have felt free to disregard Detective Martinez and go about his business; numerous facts and circumstances support this objective conclusion. First, there is the presence of two detectives in an otherwise relatively small space. *See* ***Mendenhall***, 446 U.S. at 554; *c.f.* ***Cty. of Grant v. Vogt***, 2014

WI 76, ¶ 53, 356 Wis. 2d 343, 850 N.W.2d 253 ("Vogt was not subject to the threatening presence of multiple officers.). Importantly, those detectives were positioned in front of the exit door—meaning that Mr. Smith would have had to either walk around them or ask them to step aside in order to exit. Moreover, the detectives were plainly armed and appeared to be on a "mission"—this was not a situation where their presence was merely incidental. Instead, they identified themselves as police and immediately proceeded to "FI" Mr. Smith and his companion.

Second, Mr. Smith *did* attempt to go about his business by walking away, but the detective immediately told him to "stop." (25:76); (App. 178). A reasonable person would infer from this response to an attempt to leave the scene that they were not, in fact, free to do so.

Third, this Court must consider Detective Martinez's two-minute-long interaction with Mr. Smith. (25:62); (App. 164). While Detective Martinez never displayed his firearm or placed his hands on Mr. Smith during that encounter, this was not required in order to effectuate a seizure. After all, "words alone may be enough to make a reasonable person feel that he would not be free to leave." ***United States v. Richardson***, 385 F.3d 625, 629 (6th Cir. 2004). In addition to Detective Martinez's words, this Court must also consider Detective Martinez's tone, demeanor and body language. *See* ***Mendenhall***, 446 U.S. at 554.

Here, Mr. Smith was the immediate focus of Detective Martinez's attention. Detective Martinez—who had already told Mr. Smith to "stop"—walked directly at Mr. Smith while repeatedly asking him to answer questions. Mr. Smith described the demeanor of the detective as being both "threatening" and "aggressive." (25:78); (App. 180).

Importantly, Mr. Smith did attempt to disengage from the encounter by twice declining Detective Martinez's request to talk with him. (25:62); (App. 164). Detective Martinez, however, did not acknowledge or respect those assertions, and in fact continued to ask Mr. Smith if he would accompany him to the vestibule for further questioning. (25:70); (App. 172). Detective Martinez also signaled his disapproval of Mr. Smith's refusal to talk by shifting his tone and giving facial cues which communicated an "emphasis" or a "demand." (25:64); (App. 166). Finally, Detective Martinez also asked Mr. Smith to remove his hands from his pockets—signaling a degree of control over Mr. Smith's bodily autonomy that is not consistent with a purely voluntary encounter. (25:52); (App. 154).

Under these facts and circumstances, a reasonable person would not have felt free to simply walk around Detective Martinez and exit the store. Instead, a reasonable person would have believed—especially in light of having their prior refusals ignored—that they were not free to leave. Accordingly, Mr. Smith was seized while he was still in Burleigh Glass and required by Detective Martinez's show of authority to move to the vestibule for further questioning.

B. Law enforcement lacked reasonable suspicion to seize Mr. Smith.

1. Legal standard.

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***, 392 U.S. at 30. 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, 625 N.W.2d 623; *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 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).

This Court independently assesses whether there was reasonable suspicion to seize Mr. Smith. *See* ***Williams***, 2002 WI 94, ¶ 17.

2. There was insufficient reasonable suspicion for the police seizure of Mr. Smith.

As a starting point, the State has not previously argued that there was constitutionally sufficient reasonable suspicion to seize Mr. Smith. In reviewing the trial record, it appears the only disputed issue was whether or not Mr. Smith was "seized" at all. However, in the interests of completeness, Mr. Smith will briefly address the non-existence of reasonable suspicion in this case.

Here, Detective Wall was clear that he had no specific information about Mr. Smith and his companion that would suggest it was reasonably likely they were involved in criminal activity. (25:35); (App. 137). He did not even know the identity of either man until they were questioned. (25:14); (App. 116). While he knew they had a connection—albeit a

tenuous one—to a red car which, in turn, may have been linked to a known fugitive, there is no evidence in the record to conclude that Mr. Smith's actions with respect to the car were inherently suspicious. Thus, at the time the two men entered Burleigh Glass, the detectives had no reasonable suspicion to stop and question either individual.

And, once inside the store, Detective Wall testified that he did not witness anything else suspicious about Mr. Smith. (25:35); (App. 137). The only testimony suggesting "suspiciousness" comes from Detective Martinez, whose observations alone fail to establish reasonable suspicion. Here, Detective Martinez testified that his suspicion was aroused because of Mr. Smith's visible nervousness, his attempt to walk away when police entered the store, and his body language. (25:50-51); (App. 152-153). Such "nervousness," however, is afforded only minimal weight in the reasonable suspicion calculus. As the Seventh Circuit Court has noted:

> In any event, our court-along with the First, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits-has held that nervousness is "of limited value in assessing reasonable suspicion" and/or is so common that it alone cannot justify a Terry stop. ***United States v. Simpson***, 609 F.3d 1140, 1147 (10th Cir.2010); *accord* ***United States v. McKoy***, 428 F.3d 38, 40 (1st Cir.2005) ("Nervousness is a common and entirely natural reaction to police presence…."); ***United States v. Richardson***, 385 F.3d 625, 630–31 (6th Cir.2004) ("[A]lthough nervousness has been considered in finding reasonable suspicion in conjunction with other factors, it is an unreliable indicator, especially in the context of a traffic stop. Many citizens become nervous during a traffic stop, even when they have nothing to hide or fear.") (citations omitted); ***United States v. Portillo–Aguirre***, 311 F.3d 647, 656 n. 49 (5th Cir.2002) ("We have never held that

> nervousness alone is sufficient to create reasonable suspicion of criminal activity."); ***United States v. Jones***, 269 F.3d 919, 929 (8th Cir.2001) (suspect's nervous demeanor alone was not enough to establish reasonable suspicion); ***United States v. Chavez–Valenzuela***, 268 F.3d 719, 726 (9th Cir.2001) (holding that "extreme nervousness" during a traffic stop does not alone "support a reasonable suspicion of criminal activity, and does not justify an officer's continued detention of a suspect after he has satisfied the purpose of the stop."); ***United States v. Brown***, 188 F.3d 860, 865 (7th Cir.1999)("Nervousness … alone will not justify a Terry stop and pat-down….").

Huff v. Reichert, 744 F.3d 999, 1007 n. 3 (7th Cir. 2014). Wisconsin courts, meanwhile, accept that while nervousness is an acceptable factor, it needs to be unusual—and not the "typical" nervousness attendant to police-citizen encounters. *See* ***State v. Sumner***, 2008 WI 94, ¶ 38, 312 Wis.2d 292, 752 N.W.2d 783. Mr. Smith's nervousness was not unusual; in fact, it was probably a reasonable response to the sudden presence of multiple armed detectives suddenly intervening in his otherwise routine and law-abiding business.

Second, 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. Smith's behavior was not actually "evasive" under these facts and circumstances. As the testimony shows, Mr. Smith was already walking around the store when police entered. (25:41). Thus, this is not a case where Mr. Smith tried to actually run away or sought a hiding place. 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, Mr. Smith's body language was ambiguous and not sufficiently suggestive under these facts and circumstances. Rote references to "blading" his body, without more, are not a sufficient basis for reasonable suspicion. *See* ***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). And, while Mr. Smith did have his hand in his pocket, Detective Martinez was clear that Mr. Smith's removal of his hand in response to a law enforcement request mitigated his suspicion of Mr. Smith on at least that ground. (25:57); (App. 159).

Finally, and most importantly, this Court must keep in mind that the reasonable suspicion calculus is exclusively concerned with the reasonable suspicion of criminality—not the policing of suspiciousness in and of itself. In order to prevail, the State needs to link suspicious behaviors to an actual risk of criminal wrongdoing. Mere suspiciousness, untethered from a reasonably inferential tie to some perceived criminality, is not a reasonable basis for law enforcement intrusion.

Accordingly, law enforcement lacked reasonable suspicion to seize Mr. Smith at the time he was seized at the Burleigh Glass store.

CONCLUSION

Mr. Smith was seized without constitutionally cognizable reasonable suspicion while inside the Burleigh Glass store. Accordingly, this Court should reverse, hold that all evidence obtained subsequent to Mr. Smith's illegal seizure be suppressed, and remand for further proceedings.

Dated this 16th day of April, 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 4,972 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 16th day of April, 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 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 16th day of April, 2018.

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