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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2018AP1209-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MOSE B. COFFEE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Winnebago County Circuit Court,
the Honorable John A. Jorgensen, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Whether evidence obtained during a warrantless search of Mose B. Coffee's vehicle incident to his OWI arrest must be suppressed because there was no reason to believe that evidence of the OWI arrest would be found in the area of the vehicle searched by officers.

The circuit court answered: No, the search incident to arrest exception justified the warrantless search of Mr. Coffee's vehicle.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issue will be sufficiently addressed in the briefs. Publication is not warranted because the issue raised involves the application of established legal principles to the facts of this case.

STATEMENT OF THE CASE AND FACTS

Mose B. Coffee pled no contest to operating while intoxicated (OWI) as a second offense in violation of Wis. Stat. § 346.63(1)(a) and to possession of THC with intent to deliver contrary to Wis. Stat. § 961.41(1m)(h)2. (43:95; 21). As part of the agreement, a count of possession of drug paraphernalia was dismissed and read in at sentencing and a count of operating with a prohibited alcohol concentration, second offense, was dismissed. (43:95, 102).

Prior to entering his plea, Mr. Coffee sought to suppress the fruits of what he contended was an unlawful search of his vehicle incident to his OWI arrest.[1] (8; 14). At the January 3, 2018, suppression hearing, Oshkosh Police Officers Timothy Skelton, Brenden Bonnett, and Benjamin Fenhouse testified. (*See* 43:5, 60, 77; App. 101, 118). Defense counsel also introduced portions of Officer Bonnett's body camera footage, which captured the search of Mr. Coffee's vehicle incident to his OWI arrest. (43:3, 68-70; Ex. 1; App. 109-111).

While on patrol, Officer Timothy Skelton observed a vehicle without its required front license plate. (43:6-7, 28). Officer Skelton conducted a traffic stop and identified the driver as Mr. Coffee. (43:7, 8-9, 28-29). At the suppression hearing, Officer Skelton testified that Mr. Coffee had a slur to his speech and that he could smell the odor of intoxicants coming from either Mr. Coffee or the vehicle. (43:9). Officer Skelton testified that Mr. Coffee's eyes were "very glazed over and bloodshot." (43:10). Based on these observations, Officer Skelton then conducted field sobriety testing. (43:10-11, 12, 15, 19). As a result of Officer Skelton's overall observations of Mr. Coffee and based on the result of the preliminary breath test, Officer Skelton placed Mr. Coffee under arrest for operating while intoxicated (OWI). (43:21-22).

[1] In the circuit court, Mr. Coffee also challenged the administration of the field sobriety tests, the preliminary breath test, and his OWI-arrest and sought to suppress all evidence derived from these tests and the subsequent arrest. (10). Mr. Coffee does not renew these challenges on appeal and includes only portions of the suppression hearing transcript that are relevant to the unlawful search claim.

Officer Skelton then searched Mr. Coffee's person, placed handcuffs on him, and secured him in the back of his squad car. (43:22).

Officer Skelton also testified that three additional officers arrived on scene while he was performing the field sobriety testing. (43:24-25). He also testified that he instructed the other officers to conduct a search of Mr. Coffee's vehicle incident to the OWI arrest. (43:49-50). Officer Skelton testified that he informed the other officers as to the reason for the arrest—the OWI. (43:50).

Officer Brendon Bonnett also testified at the suppression hearing and stated that he arrived on scene after Mr. Coffee had been arrested and that Officer Skelton asked him to search Mr. Coffee's vehicle. (43:61-62; App. 102-103). Officer Bonnett testified that he was aware that Mr. Coffee had been arrested for an OWI offense. (43:62; App. 103). In regard to the scope of the vehicle search, Officer Bonnett specifically testified: "I'd be looking for any substance in the vehicle that could impair a driver's ability to operate the motor vehicle safely." (43:63; App. 104). He further explained: "I would be looking for any substance, whether that could be prescription medication, nonprescription medication, alcohol, illegal drugs, or even up to possibly as inhalant such as Dust-Off . . .". (43:63; App. 104). On cross-examination, Officer Bonnett indicated that he could not recall if he was informed of whether Mr. Coffee's OWI-arrest was alcohol related or not. (43:66; App. 107). But in Wisconsin, "under the influence of an intoxicant" specifically means "that the defendant's ability to operate a vehicle was impaired

because of consumption of an alcoholic beverage." WI-JI CRIM 2663.

Officer Bonnett further testified as to the details of his search and defense counsel introduced pertinent portions of the footage from Officer Bonnett's body camera. (43:68-71, 75, Ex. 1; App. 109-112, 116).[2] Officer Bonnett approached Mr. Coffee's two-door vehicle on the driver's side and opened the driver-side door. (43:Ex. 1 at 0:19-0:23).[3] He shined his flashlight on the interior of the driver-side door and into the backseat, which illuminated a black bag placed on the floor behind the driver's seat. (43: Ex. 0:50-1:01). He then started a search of the compartment in the driver-side door. (43:Ex. 1 at 1:15-:1:30). Next Officer Bonnett searched beneath the driver's seat. (43:Ex. 1 at 1:48-1:54). He then used the lever on the driver's seat to flip forward the driver's seat to allow access to the backseat of the vehicle. (43:Ex. 1 at 1:55-1:56). Officer Bonnett then removed the black bag from the floor behind the driver's seat. (43:Ex. 1 at 1:57-1:59).

Officer Bonnett first removed a green cloth bag on the top of the black bag. (43:Ex. 1 at 2:02-2:05). This revealed a nearly full bag of various items including a number of cords and cables. (43:Ex. 1 at

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[2] Defense counsel also identified the specific portions of the body camera footage relevant to its motion to suppress in its supporting memorandum. (14:3). The circuit court also indicated that it had viewed the DVD exhibit prior to the suppression hearing. (43:3).

[3] References to particular portions of the body camera footage will be indicated by "Ex. 1" followed by the time at which the particular event referenced appears in the recording.

2:06-2:10). Officer Bonnett then removed items from the bag including a cell phone, cardboard packaging, a smaller black pouch, and a box of light bulbs. (43:Ex. 1 at 2:08-2:40). Officer Bonnett continued to rifle through the bag and numerous cords and cables contained within before removing some cell phones. (43:Ex. 1 at 2:41-2:59). He continued to dig into the bag and then removed a small mason jar from underneath the remaining items in the bag. (43:Ex. 1 at 2:59-3:22). Officer Bonnett then located a second small mason jar from a similar position within the bag. (43:Ex. 1 at 3:29-3:42). Officer Bonnett testified that he observed what he believed to be flakes of marijuana contained in the jars. (43:65; App. 106). He also testified that he located sandwich baggies within the black bag. (43:74; App. 115). However, it was unclear whether the video showed the sandwich baggies or whether the baggies found in the black bag were in a box or not. (43:75-76; App. 116-17).

Finally, Officer Benjamin Fenhouse testified to his search of Mr. Coffee's vehicle, which included the passenger side and the trunk. (43:78; App. 119). He testified that he found nothing of evidentiary value in the passenger side of the vehicle, but that he initiated a search of the trunk after Officer Bonnett located the mason jars containing suspected marijuana residue. (43:78-79; App. 119-120). Officers then found various items of paraphernalia as well as an additional amount of marijuana in the vehicle's trunk. (1:4-5).

At the suppression hearing, defense counsel asserted that the search of Mr. Coffee's vehicle incident to his alcohol-related OWI arrest did not

permit the search of the black bag behind the driver's seat. (43:85; App. 126). Specifically, counsel asserted that it was not reasonable for officers to believe that evidence of the alcohol-related OWI arrest would be found at the bottom of a bag behind the driver's seat under the circumstances presented. (43:85-88; App. 126-129). Counsel asserted that the unreasonable search of the black bag led to the search of the vehicle's trunk and asserted that the fruits of the unlawful search must be suppressed. (43:89; App. 130).

The court denied Mr. Coffee's suppression motion. (43:93-94; App. 134-135). In doing so, the court found that Mr. Coffee's OWI arrest was alcohol related, which allowed officers to search the vehicle for alcohol. (43:90; App. 131). The court then indicated that the black bag at issue was within reach of the driver; therefore, it would be reasonable for officers to believe that alcohol could have been concealed within the bag. (43:92; App. 133). The court stated:

> I'm really not putting much weight on the fact of where exactly that bottle[4] was found because it doesn't matter if the defendant just threw it on top of the bag or to conceal it pushed it down to the bottom or in the middle. That's easily done. That's not a difficult task to accomplish. And then you put a few things on it, close it up, that's still all reasonable actions that someone could do and would do it they are trying to hide something from an officer's search when they come up to make contact with a driver. . . .

[4] The court later clarified that it meant to say "jar" rather than "bottle." (43:94; App. 135).

(43:92, 93; App. 133-134). The court concluded that once the jars containing marijuana were found, then officers could search for other evidence of that crime. (43:94; App. 135).

After the court denied the defendant's motions, including the suppression motion, Mr. Coffee immediately pled no-contest to the OWI, second offense, and to possession with intent to deliver. (43:95). This appeal follows.

ARGUMENT

Evidence Obtained During a Warrantless Search of Mose B. Coffee's Vehicle Incident to His OWI Arrest Must Be Suppressed Because There Was No Reason to Believe That Evidence of the OWI Arrest Would Be Found in the Area of the Vehicle Searched by Officers.

A. Applicable constitutional provisions and standard of review.

The Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution guarantee the right to be free from unreasonable searches.[5] The Fourth Amendment in pertinent part, provides: "The right of the people to be secure in their persons, houses,

[5] Wisconsin courts "have historically interpreted the Wisconsin Constitution's protections in this area identically to the protections under the Fourth Amendment as defined by the United States Supreme Court." *State v. Dearborn*, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97.

papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .". U.S. Const. amend. IV.

A basic and long held principle under the Fourth Amendment is that warrantless searches are *per se* unreasonable absent the application of a well-recognized exception to the warrant requirement. *State v. Sanders*, 2008 WI 85, ¶27, 311 Wis. 2d 257, 752 N.W.2d 713. The state bears the burden to prove that an exception to the warrant requirement applies. *State v. Denk*, 2008 WI 130, ¶36, 315 Wis. 2d 5, 758 N.W.2d 775.

At issue here is the long-recognized search incident to arrest exception. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969). Under *Chimel*, an officer is permitted to search the area within the immediate control of a lawfully arrested individual. *Id.* at 763. In the context of vehicles, the search incident to arrest exception has evolved to allow for a search under two circumstances: (1) when the arrestee is unsecured and within reaching distance of the vehicle and (2) "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Arizona v. Gant*, 556 U.S. 332, 343 (2009).[6] As Mr. Coffee was secured in a squad car at the time

[6] Similarly, Wis. Stat. § 968.11 defines the scope of a search incident to a lawful arrest to include searches for evidence related to the fruits of the crime of the arrest as well as the evidence of the crime of arrest. Wis. Stat. § 968.11(3)-(4).

of the vehicle search in question, only the second circumstance arguably applies here.

Generally speaking, appellate review of a circuit court's order on a motion to suppress evidence presents a question of constitutional fact necessitating a two-step review process. *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. First, this court upholds the circuit court's factual findings unless clearly erroneous. *Id.* Second, this court independently applies constitutional principles to the facts. *Id.*

In this case, however, in regard to the search of the black bag found in Mr. Coffee's vehicle, this court and the circuit court are on equal footing in regard to the factual findings due to the body camera footage of the search. When the reviewing court and the circuit court are equally able to make factual determinations, review of factual conclusions in *de novo*. *See State v. Jimmie R.R.*, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196 (applying *de novo* review to a minor's videotaped statement). When a video is ambiguous or conflicts with testimony deferential review applies. *State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898.

Here, the circuit court found that Mr. Coffee's OWI arrest was alcohol related based on the testimony of the officers. (*See* 43:90; App. 130). Mr. Coffee does not challenge this finding and this finding is reviewed under the clearly erroneous standard.

In regard to video of the search itself, the circuit court made few factual findings. The court found that the black bag at issue was accessible from the driver's seat. (43:92; App. 133). This court is on equal footing with the circuit court to make factual determinations based on the officer's body camera footage of the search; therefore, factual findings derived from the video, such as the positioning of the bag and the glass mason jars within the bag, are reviewed *de novo*.

B. Officers lacked a reasonable belief that evidence of Mr. Coffee's alcohol related OWI arrest would be found in the bottom of a bag behind the driver's seat.

In *Gant*, the United States Supreme Court clarified the scope of the search incident to arrest exception as it relates to vehicles. *Gant,* 556 U.S. at 335. There, police searched the defendant's vehicle following his arrest for driving with a suspended license after the defendant was secured in a police vehicle. *Id.* The Court held that this search was unconstitutional under the Fourth Amendment because the defendant had no ability to reach into his vehicle to either access a weapon or to conceal or destroy evidence and because police had no reasonable belief that evidence of the crime of arrest would be found within the vehicle. *Id.* at 346.

Specifically, the Court held:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 351.

Prior to *Gant*, the Court's earlier decision in *New York v. Belton*, 453 U.S. 454 (1981), had been widely interpreted by courts to allow police broad authority to conduct warrantless searches of vehicles under the search incident to arrest exception even when the arrestee had no access to the vehicle following his or her arrest. *Gant*, 556 U.S. at 341; *State v. Fry*, 131 Wis. 2d 153, 178, 388 N.W.2d 565 (1986).

The state in *Gant* had advocated for a continued broad interpretation of *Belton* to allow for an expansive search of vehicles incident to a lawful arrest. *Gant*, 453 U.S. at 344-345. However, the Court rejected the state's position and reiterated that although a driver has a lesser privacy interest in his or her vehicle than his or her home, constitutional protections still apply to an individual's vehicle. *Id.* at 345. The Court explained:

> It is particularly significant that *Belton* searches authorize police officers to search not just the

> passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Id. at 345 (footnote omitted). Our state supreme court has accepted the *Gant* holding as the proper interpretation of Article 1, Section 11 of the Wisconsin Constitution. *State v. Dearborn*, 2010 WI 84, ¶3, 327 Wis. 2d 252, 786 N.W.2d 97.

Here, there can be no dispute that Mr. Coffee was under arrest for an alcohol-related OWI and that he had no access to his vehicle at the time of his search because he was handcuffed and placed in a squad car during the search. (43:22, 62, 90; App. 131). Thus, the circuit court correctly found that the search incident to Mr. Coffee's arrest was limited to evidence of alcohol intoxication. (43:90; App. 131).

In reevaluating lower courts' interpretation of *Belton*, *Gant*, rejected the notion that law enforcement has unbridled authority to perform a limitless search of the vehicle. *See Gant*, 556 U.S. at 345. Rather, under *Gant*, the search incident to arrest is now limited in a case like Mr. Coffee's to whether "it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 556

U.S. at 349. The question then becomes what is "reasonable to believe" in terms of the scope of the vehicle search and the containers within the vehicle.

Gant indicated that some offenses, specifically drug offenses, will present officers with a reason to believe that evidence of the arrest will be found in the vehicle and the containers within. *Id.* at 343 (citing *Thornton v. United States*, 541 U.S. 615 (2004) and *Belton*, 453 U.S. 454 (1981)). In *Thornton*, the defendant consented to a pat-down search following a lawful traffic stop and the officer located narcotics in the defendant's pocket. *Thornton,* 541 U.S. at 618. In *Belton*, an officer smelled burnt marijuana and observed an envelope he believed to contain marijuana in plain view. 453 U.S. at 455-56.

This court, relying on similarities to *Thornton* and *Belton*, has upheld a search of a vehicle incident to an arrest for possession of marijuana. *State v. Smiter*, 2011 WI App 15, ¶13, 331 Wis. 2d 431, 793 N.W.2d 920. In *Smiter*, 331 Wis. 2d 431, ¶3, officers observed the passenger of a vehicle throw a cigar from the vehicle and appear to reach under the front seat during a lawful traffic stop. Officer's recovered the cigar, determined it contained marijuana, and arrested the passenger. *Id.* Officer's then searched the vehicle incident to this arrest and located cocaine under the passenger's seat. *Id.*, ¶4.

This court upheld the search of the vehicle incident to arrest under *Gant* determining that it was reasonable for officers to believe that additional evidence of drug possession—the offense of arrest—would be found in the vehicle. *Id.*, ¶15. However, this

court also explained that officers had additional reason to believe that drugs would be found in the vehicle based the officer's observation that the passenger appeared to conceal something under his seat as the officer approached. *Id.*, ¶17. This court then indicated that the marijuana cigar recovered by officers appeared moist indicating it was recently wrapped, which further suggested to officers that additional marijuana may be in the vehicle. *Id.* This court concluded:

> Because [the defendant] was arrested for a drug offense, and because the police officers had *additional reasons to believe relevant evidence of the drug offense may be located in the Buick*—including [the defendant's] furtive movements and the damp marijuana blunt—we conclude that the search of the Buick was authorized by *Gant*.

Smiter, 331 Wis. 2d 431, ¶18 (emphasis added).

Unlike *Smiter*, Mr. Coffee's case does not fall within the rubric applied to searches incident to arrest for drug-related offences, which suggest that drug-related offenses often present officers reason to believe that evidence of drugs will be found in the vehicle or containers within the vehicle. *See Gant*, 556 U.S. at 334. First, although Officer Bonnett testified that he was searching for any substance that may cause a driver to be impaired, including medication or illegal drugs, under *Gant,* the scope of his search must be limited to evidence of the offense of arrest, which, the circuit court found was an OWI due to alcohol intoxication. Alcohol, a legal substance, is generally consumed at home or at a bar or

restaurant. Without an admission or open containers in plain view or some other articulable fact akin to the discovery of the marijuana cigar found in *Smiter*, there is no reason to believe that Mr. Coffee was consuming alcohol in his car. Notwithstanding that it was not reasonable to believe that Mr. Coffee had open alcohol containers in his car in the first place, it is even more unreasonable to believe that rummaging through Mr. Coffee's personal belongings in a bag lodged behind the driver's seat would yield fruits of the crime of OWI due to alcohol.

Also unlike the officer's observations in *Smiter*, there was no indication that Mr. Coffee had attempted to conceal anything from police while he was being pulled over. In fact, Officer Skelton testified that Mr. Coffee immediately turned into a parking lot to pull over after the officer initiated his emergency lights. (43:28). Importantly, Officer Skelton also testified that Mr. Coffee immediately exited his vehicle after pulling over so that Mr. Coffee was actually outside of the vehicle as Officer Skelton approached. (43:8). Not only did the state fail to present any testimony to indicate that Mr. Coffee made any furtive movements or that he attempted to conceal anything in his vehicle, the record demonstrates that Mr. Coffee was not even in the vehicle as Officer Skelton approached immediately following the stop. Without some indication that Mr. Coffee was consuming alcohol in the vehicle or that he was attempting to conceal something within the vehicle, an officer could not have a reasonable belief that alcohol—evidence of the crime of arrest—would be found in near the bottom of the black bag stored behind the driver's seat.

In regard to the glass jars at issue, the circuit court found that the location of the jars was immaterial to the constitutionality of the search: "I'm really not putting much weight on the fact of where exactly that [jar] was found because it doesn't matter if the defendant just threw it on top of the bag or to conceal it pushed it down to the bottom of middle. That's easily done." (43:92; App. 133). However, the location of the jars is critical to a determination of whether it was reasonable for officers to believe that evidence of the crime of arrest would be found beneath numerous other items stored in a bag behind the driver's seat.

The circuit court made no explicit finding as to the location of the jars within the black bag behind the driver's seat. This court is in the same position as the circuit court to view the body camera footage to determine the location of the black bag in the vehicle as well as the location of the jars within the bag. The body camera footage reveals that Officer Bonnett looked through the entirety of the black bag, that the bag was nearly full of miscellaneous personal items including various cords and cables, and that Officer Bonnett located the glass jars after removing several items from the bag before pulling the glass jars out from the bottom area of the bag. (43:Ex. 1 at 2:02-3:42). The body camera footage of the search demonstrates that it was not reasonable for officers to believe that evidence of an alcohol related OWI would be found in an inaccessible position at the bottom of a bag buried beneath numerous personal possessions.

Under similar circumstances to Mr. Coffee's case, this court has evaluated the reasonableness of a search of a container in a vehicle incident to an alcohol-related OWI arrest. *State v. Hinderman*, 2014AP1787-CR unpublished slip op. (Ct. App. Feb. 12, 2015). There, the defendant was arrested for an OWI after an officer observed poor driving, a strong odor of intoxicant's, the defendant's glassy bloodshot eyes, as well as the defendant's performance on field sobriety tests. *Id.*, ¶¶2-3. After the defendant was arrested and secured in a squad car, an officer searched the defendant's vehicle. *Id.*, ¶4. Officers observed no alcohol in plain view, but located marijuana and drug paraphernalia in a small three inch by three inch pouch found inside the defendant's purse. *Id.* The circuit court suppressed the evidence obtained from the pouch and this court affirmed by adopting the reasoning of the circuit court. *Id.*, ¶11. Specifically, in granting the defendant's suppression motion, the circuit court had reasoned:

- As expressed in *Gant*, the Fourth Amendment's protections applicable to vehicles are meant to stymie the concern of "unbridled discretion to rummage at will among a person's priv[ate] effects."

- The pouch searched was "tangentially likely, if at all, to contain evidence of an OWI arrest."

- The possibility of alcohol being concealed in the pouch was "simply too remote to be specific and articulate in the scheme."

- "[S]pecific and articulable facts did not exist to base a reasonable belief that evidence relating

> to the crime of OWI would be found in the three-by-three inch pouch inside [the defendant's] purse."

Hinderman, slip. op., ¶¶10-11. The court of appeals adopted the circuit court's reasoning. This persuasive reasoning is highly applicable to Mr. Coffee's case considering the similarities between the cases. Like the defendant in *Hinderman*, Mr. Coffee was arrested for an alcohol-related OWI offense, placed under arrest, and secured in a police vehicle. Officers in both cases then did more than check the center console or floorboards for evidence of alcohol related to the arrests. Rather, in both cases officers conducted detailed searches of the defendants' personal belongings. In both cases there was no indication that the defendants had tried to conceal evidence of their arrests. Finally, comparable to the unreasonable belief that alcohol would be found inside a small pouch in the defendant's purse in *Hinderman* is the unreasonable belief that alcohol would be found at a bottom of a bag that was brimming with Mr. Coffee's personal belongings.

In sum, under *Gant*, Mr. Coffee's alcohol related OWI arrest did not give officers unbridled authority to search the bag behind the driver's seat. Similar to *Hinderman*, officers did not have a reasonable belief that evidence related to the OWI arrest would be found at the bottom of the bag in question. This is especially true here where, unlike the defendant in *Smiter*, there is no indication that Mr. Coffee was in possession of the intoxicating substance or attempted to conceal anything during his traffic stop. Therefore, based on the specific

circumstances of Mr. Coffee's stop and his alcohol related OWI arrest, it was unreasonable for officers to believe that evidence of his arrest would be found at the bottom of the bag containing numerous personal belongings. This search violated Mr. Coffee's Fourth Amendment rights and the marijuana evidence obtained as a result must be suppressed.

C. The fruits of the unlawful search must be suppressed.

The unconstitutional search of the black bag in Mr. Coffee's vehicle following his OWI arrest led to the search of the vehicle's trunk. Whether the evidence seized from the trunk must also be suppressed as a result of the unconstitutional search depends on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

To determine whether the fruits of illegal government action must be suppressed, courts may consider: "(1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *State v. Phillips*, 218 Wis. 2d 180, 205, 577 N.W.2d 794 (1998) (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).

Here, the evidence seized from Mr. Coffee's trunk must be suppressed as the search of the trunk followed only because officer's located marijuana and then plastic baggies in the black bag. (43:71, 74,

78-79; App. 112, 115, 119-120). Officer Fenhouse specifically testified: "It was only until after Officer Bonnet found what he did [referring to the glass jars] that I moved onto the trunk portion." (43:79; App. 120). There was no indication that significant delay occurred between Officer Bonnett finding the glass jars and the continued search of the vehicle's trunk or that any intervening circumstances exist.

Moreover, aside from the discovery of the glass jars as a result of the illegal search, officers had no independent grounds to conduct a warrantless search of Mr. Coffee's trunk incident to his arrest. First, officers would not have reason to believe that evidence of an OWI would be located in the trunk of a vehicle. Second, there was no indication that aside from the fruit of the illegal search, officers had probable cause to believe that the trunk contained evidence of a crime. The probable cause necessary to search the trunk developed only after officers located the glass jars. Finally, in the circuit court, the state offered no alternative argument to meet its burden to prove that an exception to the warrant requirement existed for officers to search Mr. Coffee's trunk. As such, the evidence obtained from Mr. Coffee's trunk must be also be suppressed.

D. Mr. Coffee's conviction for possession with intent to distribute must be reversed, and he must be permitted to withdraw his pleas.

"In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility

that the erroneous admission of the disputed evidence contributed to the conviction." *State v. Semrau*, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376. The erroneous admission of disputed evidence contributed to the conviction if there is a reasonable probability that but for the error, "the defendant would have refused to plead and would have insisted on going to trial." *State v. Sturgeon*, 231 Wis. 2d 487, 504, 605 N.W.2d 589 (Ct. App. 1999). "Only if the error contributed to the conviction must a reversal…result." *Semrau*, 233 Wis. 2d 508, ¶21.

Had the evidence obtained from the black bag and from the vehicle's trunk been suppressed, the state would have had no evidence to support the possession with intent to deliver or the possession of paraphernalia charges. Without evidence to support these two charges, Mr. Coffee would not have entered into the plea agreement that he did, which involved his no-contest plea to the possession with intent to deliver charge. Consequently, the error in denying the suppression motion is not harmless.

CONCLUSION

For the reasons stated, Mose B. Coffee respectfully requests that the court reverse his convictions and remand to the circuit court with instructions to permit him to withdraw his no-contest pleas.

Dated this 10th day of September, 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 4,994 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 10th day of September, 2018.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender

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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 s. 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 10th day of September, 2018.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender