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OF WISCONSIN**

STATE OF WISCONSIN
C O U R T O F A P P E A L S

DISTRICT III

Case No. 2018AP1863-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACI LYNN BUSHA,

Defendant-Appellant.

On Notice of Appeal from a Judgment
Entered in the Douglas County Circuit Court,
the Honorable Kelly J. Thimm, Presiding

REPLY BRIEF

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ARGUMENT

- I. Ms. Busha Was in Custody When the Officer Told Her He Didn't Believe Her and Asked Her to Tell the Truth; Thus Her Confession to Driving Was Inadmissible Per *Miranda v. Arizona*.

The state is correct that there's no dispute about the historical facts here. It's wrong, though, when it asserts that the trial court's "finding that the encounter was consensual" governs because it is a factual finding unchallenged by Ms. Busha. Respondent's Brief at 6, 7-8. She very clearly does dispute that the encounter was consensual: she argues that she was in the officer's custody. Appellant's Brief at 6-9. Moreover, the state gets the standard of review wrong: whether a person has given voluntary consent—which again is a Fourth Amendment question, while this is a Fifth Amendment case—is a question of constitutional fact. *State v. Phillips*, 218 Wis. 2d 180, 189, 577 N.W.2d 794 (1998). The same is true of *Miranda* custody. *State v. Goetz*, 2001 WI App 294, ¶8, 249 Wis. 2d 380, 638 N.W.2d 386. So, whether the facts testified to (which are, again, undisputed) meet the legal standard is a question of law that this court reviews *de novo*.

The state's only other argument is to try to distinguish the facts here from those in *United States v. Richardson*, 700 F. Supp. 2d 1040, 1052 (N.D. Ind.

2010), which Ms. Busha cited for the notion that an officer's accusations of guilt can be a factor indicating *Miranda* custody. The distinctions the state draws are of little significance—the point is that nobody, on being told by a police officer that he knows she is lying and is guilty of a crime, would believe she was free to terminate the encounter. The state's claim that there was no “shift in circumstances” between the beginning of Ms. Busha's encounter with law enforcement and the interrogation at issue here simply ignores the crucial fact. Respondent's Brief at 7.

CONCLUSION

Because Ms. Busha received no *Miranda* warnings before she was interrogated in police custody, she respectfully requests that this court reverse her conviction and sentence and remand to the circuit court with directions that her resulting statements be suppressed.

Dated this 8th day of February, 2019.

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 363 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 8th day of February, 2019.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender