STATE OF WISCONSIN

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

DISTRICT I

Case No. 2019AP435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES TIMOTHY GENOUS,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The initial traffic stop was unconstitutional because the police lacked reasonable suspicion that Mr. Genous had engaged in a drug transaction.

The State claims that Mr. Genous' reasonable suspicion analysis is flawed because, according to the State, Mr. Genous focuses on the facts individually, rather than addressing them under the totality of the circumstances. (Resp. Br. at 9-10). That is not a fair characterization of Mr. Genous' argument.

In his initial brief, Mr. Genous specifically argued that "[n]one of the facts, whether considered alone or taken together, provided a reasonable basis to suspect that [he] sold [Kayla Sienko] drugs." (Br. at 15). He then addressed all the facts under a totality-of-the-circumstances approach. (*Id.* at 15-23).

That approach demonstrates that reasonable suspicion for the initial traffic stop was lacking. At bottom, the stop in this case was based on propensity evidence. The police assumed it was likely the woman who entered Mr. Genous' car was buying drugs simply because she matched the general description of Ms. Sienko, who has a drug history. For obvious reasons, that assumption was not justified.

The other facts in this case do not move the needle in any meaningful way. Mr. Genous had contact with a woman in his car for a few seconds. That type of innocuous activity is does justify an investigative stop, even when it happens late at night or in a high-crime area.

The State points out that police officers are not required to rule out the possibility of innocent conduct before initiating a traffic stop. (Resp. Br. at 9). This is true, of course, but only if there is "a reasonable [competing] inference of unlawful conduct that can be objectively drawn." *See State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). No such reasonable competing inference existed in this case. An officer needs more than just the observation of short-term contact, even late at night or in a high-crime area, to reasonably suspect a drug transaction.

The State claims that Mr. Genous' actions of turning off his car's headlights are another fact supporting reasonable suspicion of drug activity. (Resp. Br. at 10). Not so. It was perfectly normal for Mr. Genous to turn off his lights after he parked his car on a residential street while he waited for someone to come out of their house and meet him. Rather than showing any reasonable sign that Mr. Genous was trying "to avoid drawing attention to this car," his actions in this respect simply reflect that he had parked his car and thus did not need to keep his lights on while he waiting.

The cases the State cites for support on this point are all highly distinguishable. (*See id.*) In three of those cases, the defendants parked their cars in the parking lots of closed or abandoned businesses and then proceeded to turn off their headlights. *State v. Resch*, Appeal No. 2010AP2321-CR, unpublished slip op., ¶¶2, 14 (Wis. Ct. App. April 27, 2011) (R-App. 103-07); *United States v. Salazar*, 609 F.3d 1059, 1061-62 (10th Cir. 2010); *United States v. Watson*, 953 F.2d 895, 896 (5th Cir. 1992). In *Salazar* and *Watson*, the suspects also engaged in other evasive or concealing behavior. *Salazar*, 609 F.3d at 1062; *Watson*, 953 F.2d at 896.

In the other case cited by the State, *United States v. Brown*, 63 F. App'x 655, 656 (4th Cir. 2003), the defendant's car made elusive movements and upon seeing the officer, he looked away as if to avoid making eye contact. The driver then pulled into a driveway and turned off his lights, after which he exited the car and proceeded to the darkened rear of the house, ignoring the officer's commands to return to the driveway. These cases are far too different from this case to support the State's position.

This case is also distinguishable from *State v. Allen*, 226 Wis. 2d 66, 593 N.W.2d 504 (Ct. App. 1999), the case primarily relied upon by the State. Although some superficial similarities exist between the cases, *Allen* presents a far more suspicious set of circumstances.

In *Allen*, the defendant had short-term contact with another person in a car, and this occurred late at night and in a high-crime area. But the court's conclusion that reasonable suspicion existed was based on much more than that. The additional context surrounding the short-term contact was critical in establishing reasonable suspicion. The police in *Allen* had placed a two-block area under surveillance after receiving numerous complaints about drug activity, gangs, and gunshots. *Id.* at 68. Allen and a companion were standing in that specific area late at night, with no apparent legitimate reason for being there. A car pulled up to the curb, and the two men approached it. One of them got in the car and then got out after about a minute. *Id.* And significantly, after the car left, the two men continued to hang around the area for some time, again with no apparent lawful reason for being there. *Id.* These facts strongly suggested that Allen and his friend were selling drugs in that area.

This case is very different. Mr. Genous was not hanging out on a street corner and did not briefly get inside a random car that pulled up to the curb. He also did not hang around the area after the car left, with no apparent lawful reason for being there.

Instead, he simply drove his car to a woman's house, parked outside, and waited for her to come out and meet him. Also, after the woman went back in her home, Mr. Genous left and went on his way. Unlike the circumstances in *Allen*, Mr. Genous' conduct did not provide a reasonable basis for

believing he was dealing drugs. It was nothing more than a hunch for Officer Stilk to assume otherwise.

II. The officers exceeded the permissible scope of the *Terry* stop by ordering Mr. Genous to take off his shoes and socks.

The State claims that the search of Mr. Genous' shoes and socks was permissible because the officers had a reasonable basis to believe he was armed and dangerous. (Resp. Br. at 11-13). The State is incorrect for a number of reasons.

As an initial matter, the police did not have reasonable suspicion that Mr. Genous was armed and dangerous, so they were not justified in conducting a protective search of his person for weapons. The officers merely saw a woman exit her house and then get inside Mr. Genous' car for a few minutes. After the woman got out of his car and went back in her home, Mr. Genous drove away. He did not commit any traffic violations, act unusually nervous, or fail to produce his license after the stop. The officers also had no prior contact or experience with Mr. Genous, so they had no reason to believe he was a dangerous person. In addition, the officers outnumbered Mr. Genous three to one. Given these circumstances, it was simply unreasonable for the officers to suspect that Mr. Genous may have been armed and dangerous.

This is true not withstanding the fact that the stop took place late at night and in a high-crime area.

These generic factors simply cannot justify a protective search given the non-threatening nature of Mr. Genous' actual conduct. *See State v. Kyles,* 2004 WI 15, ¶11-14, 17, 269 Wis. 2d 1, 675 N.W.2d 449 (concluding that officers lacked reasonable suspicion to conduct a protective search during a traffic stop that took place in the evening and in a high-crime area, despite the fact that Kyles appeared unusually nervous and refused to remove his hands from his pockets).

The items the officers saw in Mr. Genous' car—the cigar wrappers, hand sanitizer, and cell phones—were also insufficient to justify a protective search for weapons. There is no rational connection between everyday items like these and firearms or other weapons.

The fact that one of the officers saw Mr. Genous "dipping his right shoulder down" (49:53) was insufficient, as well. *See State v. Johnson*, 2007 WI 32, ¶36, 299 Wis. 2d 675, 729 N.W.2d 182 ("Johnson's 'head and shoulder' movement did not give [the police] reasonable suspicion to conduct a search of Johnson's person and car."). As the Wisconsin Supreme Court noted in *Johnson*:

> Were we to conclude that the behavior observed by the officer here was sufficient to justify a protective search of Johnson's person and his car, law enforcement would be authorized to frisk a driver and search his or her car upon a valid traffic stop whenever the driver reaches to get his or her registration out of the glove

> compartment; leans over to get his wallet out of his pack pocket to retrieve his driver's license; reaches for her purse to find her driver's license; picks up a fast food wrapper from the floor; puts down a soda; turns off the radio; or makes any of a number of other innocuous movements persons make in their vehicles every day.

Id., ¶43.

Furthermore, even if a limited pat-down search for weapons was permissible, the officers exceeded the permissible scope of such a search by ordering Mr. Genous to remove his shoes and socks. Ordering Mr. Genous to take off his shoes and socks was not a limited search done "to allow the officer to pursue his investigation without of violence." *See Adams v. Williams*, 407 U.S. 143, 146 (1972). It was an investigate search for drugs, plain and simple.

It is completely unreasonable for an officer conducting a traffic stop to assume that a person has a weapon hidden in their shoes or socks and thus order the person to sit on the curb and take them off. No doubt that is why police officers do not typically order people to take off their shoes and socks when conducting a pat-down frisk for weapons.

In arguing to the contrary, the State points to cases where courts have permitted law enforcement officers to look inside a purse or an eyeglass case as part of weapons search. (Resp. Br. at 13 (citing *State v. Denk*, 2008 WI 130, 315 Wis. 2d 5, 758 N.W.2d 775; *State v. Limon*, 2008 WI App 77, 312 Wis. 2d 174, 751

N.W.2d 877)). Those cases are inapposite, however. While it may be reasonable under certain circumstances to believe that a weapon may be hidden in a purse or an eyeglass case, the same cannot be said for a person's shoes and socks.

Moreover, the only way to detect a weapon that is hidden in a purse or container is to open it and look inside. However, even assuming a weapon could realistically be hidden in a person's shoes and socks, it certainly could not be concealed in a sock in a way that pat-down of the exterior of the sock would not detect it. The State offers no reason why Officer Stikl needed to have Mr. Genous take off his socks after removing his shoes.

The State's argument also has no reasonable stopping point. According to the State, it was reasonable for the officers to order Mr. Genous to take off his shoes and socks because they might have contained a small weapon like a knife or a razor blade. (Resp. Br. at 13). If the State is correct, then there is no reason why a weapons frisk could not include a full roadside strip search of a person. After all, a small knife or razor blade can be hidden in a sock, it could be hidden in a person's underwear, as well. The State's argument, taken to its logical conclusion, would completely obliterate any limit on the scope of protective searches for weapons.

In the alternative, the State claims that even if the police exceeded the limited scope of a protective search by ordering Mr. Genous to take off his shoes

and socks, the gun they discovered should still not be suppressed. (*Id.* at 14-15). As the State sees it, the officers' illegal actions of searching Mr. Genous' shoes and socks was not the "but-for" cause of the discovery of the gun, which was discovered later during the search of his car.

The State misses the point of Mr. Genous' argument entirely. Mr. Genous' claim is twofold. First, he asserts that the illegal search of his shoes and socks rendered the *Terry* stop itself unconstitutional. Second, he asserts that any evidence the police discovered from then on was fruit of a poisonous tree—the poisonous tree here being the unconstitutional stop that remained ongoing.

The State does not even directly challenge either of these points. It does not dispute that an unlawful search conducted during a *Terry* stop renders the stop itself unconstitutional. Of course, how could it really? Nor does the State claim that evidence discovered during an unconstitutional *Terry* stop should not be suppressed. Again, how could it?

The State's reliance on *State v. Hogan*, 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124, is unavailing. In *Hogan*, the police unlawfully extended a traffic stop for a seat belt violation in order to investigative whether the defendant was driving under the influence of drugs. After the defendant passed all the field sobriety tests, however, the officer told him he was free to go. A short time later, the officer re-approached the defendant's car and asked him for

consent to search his car, which the defendant gave. During the search, the officer found methamphetamines and two firearms. *Id.*, ¶¶2-5.

Because the defendant in *Hogan* was no longer seized at the time he gave consent, the Wisconsin Supreme Court held that the consent was valid. The court did so without employing the attenuation analysis that is usually applied when consent to search is given during an illegal seizure, because the illegal police activity—the extension of the stop—could not have been the but-for cause of the defendant's consent because the stop was over at that point. *Id.*, ¶¶69-72.

In this case, by contrast, the traffic stop was ongoing at the time the officers searched Mr. Genous' shoes and socks and, later, his car. It was the *stop* here that was thus the but-for cause of the discovery of the gun in Mr. Genous' car. And because the officers had previously rendered the stop unconstitutional by illegally searching Mr. Genous' socks and shoes, the evidence they later discovered during that ongoing illegal stop should be suppressed as fruit of a poisonous tree.

III. The officers lacked probable cause (or reasonable suspicion) to search Mr. Genous' vehicle by opening the car door.

The State offers three arguments for why it believes the police lawfully found the gun in Mr. Genous' car—first, the circuit court's factual

finding that Officer Molthen opened the car door right before finding the gun was clearly erroneous; second, the police had probable cause to search Mr. Genous' car for drugs; and third, the police had reasonable suspicion to search his car for weapons. (State's Resp. Br. at 15-20). All three of these arguments fail.

First, the State waived its right to argue that the circuit court's factual finding that the officer opened the car door was clearly erroneous by specifically agreeing at the suppression hearing that this finding was correct. (49:65; App. 103).

Waiver aside, the circuit court's finding was not clearly erroneous.[1] The State's assertion that the "[d]ash-cam video clearly shows that an officer" saw the gun in Mr. Genous' car by "look[ing] through the driver-side window," without opening the door, is false. (Resp. Br. at 16). The video is not clear at all. It is blurry and thus very difficult to see exactly what the officer standing by Mr. Genous' driver's side door is doing. At one point, it appears as if the officer may have touched the door. (Squad cam video at 00:10:05 to 00:10:20). Maybe he opens the door slightly, maybe not. The video is ambiguous in this respect. Later,

[1] The State does not dispute Mr. Genous' assertion that the circuit court's factual findings should be reviewed under the clearly erroneous standard. (Resp. Br. at 16 & n. 6). That assertion is also correct, given that the circuit court's factual findings were based on testimony, as well the video. *See State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898.

the officer's arm appears to go inside the interior of the car, either through an open door or open window. (*Id.* at 00:10:15 to 00:10:25). In addition, right before the officer approaches the car, he says "we're gonna do it." (*Id.* at 00:10:00 to 00:10:05). Given all this, the circuit court's finding that the officer opened the driver's side door right before discovering the gun was not clearly erroneous.

Second, the police did not have probable cause to search Mr. Genous' car. Mr. Genous' initial brief fully explains why facts in this case do not justify a lawful arrest or search of his car for drugs. (Br. at 16-17). Those arguments need not be repeated here. Furthermore, unlike in *State v. Pozo*, 198 Wis. 2d 705, 544 N.W.2d 228 (Ct. App. 1995), the officers here did not see a sandwich bag in Mr. Genous' car that was rolled up in way that is common for carrying marijuana. Nor did they see a blue bindle of the type frequently used to package cocaine.

Third, as explained in Section II, the facts of this case did not provide a reasonable basis for a protective a protective search of Mr. Genous' person for weapons. The same reasoning applies to a protective search of his car. *See supra* at 5-6.

CONCLUSION

For these reasons, Mr. Genous respectfully requests that this court reverse the judgment of the circuit court, order the evidence obtained as a result of the unlawful *Terry* stop and unlawful search of Mr. Genous' vehicle to be suppressed, and remand the case to the circuit court for further proceedings consistent with this court's opinion.

Dated this 14th day of October, 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 2,992 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 14th day of October, 2019.

Signed:

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