STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP000447-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER JAN VANBEEK,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Sheboygan County Circuit Court
The Honorable Kent Hoffmann, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Ms. VanBeek was seized when Officer Oetzel returned to his squad vehicle and retained her driver's license.

The State argues that Ms. VanBeek was not seized until either (1) Officer Oetzel asked her to exit her truck, or (2) at the earliest when Officer Oetzel retained her license during his second conversation with her and after he finished questioning her about her address. (State's Br. at 10-11, 16). In coming to this conclusion, the State relies on *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560.

The State further argues that Ms. VanBeek's reliance on *Florida v. Royer*, 460 U.S. 491 (1983), *United States v. Lambert*, 46 F.3d 1064 (10th Cir. 1995), and *State v. Luebeck*, 2006 WI App. 87, 292 Wis. 2d 748, 715 N.W.2d 639 to support her argument that she was seized when Officer Oetzel returned to his squad vehicle and retained her driver's license is misplaced.

The State is wrong. Ms. VanBeek was seized when Officer Oetzel returned to his squad vehicle and retained her driver's license. This seizure was not supported by reasonable suspicion.

A. The *Floyd* Court's decision supports Ms. VanBeek's argument that Officer Oetzel's retention of her driver's license resulted in her seizure.

In *Floyd*, a police officer conducted a lawful traffic stop of the defendant's car because his vehicle's registration was suspended. *Id.*, ¶ 2. After writing citations, the officer asked the defendant to exit the car. *Id.*, ¶ 5. Upon exiting his car, the officer asked the defendant if he had any weapons, to which he answered no. *Id.* The officer asked for consent to search for his safety and the defendant assented, resulting in the discovery of drugs. *Id.*

The Wisconsin Supreme Court held that the officer's questions about weapons and consent to search did not unlawfully extend the stop because such questions are part of the mission of a routine traffic stop because they relate to officer safety. *Id.*, ¶ 28.

The Court also held that the defendant voluntarily gave his consent to the search. *Id.*, ¶ 34. The defendant argued he did not because the officer did not return his identification card prior to asking for consent. *Id.*, ¶ 31. The Court concluded this was only "useful to a part of the analysis we have already resolved against Mr. Floyd's position." *Id.* Meaning it was only useful in deciding whether the defendant was seized. *Id.* The Court had already decided he was lawfully seized. *Id.*

Furthermore, the *Floyd* Court stated:

> If an officer withholds a person's documents, there is *good reason to believe the person was not free to leave* at that time. That, in turn, helps us decide whether the person was seized.

Id., ¶ 31. (emphasis added)(internal quotes omitted). Thus, *Floyd* supports Ms. VanBeek's argument that an officer's retention of someone's driver's license is a significant factor in determining that the person was seized.

B. The holdings in *Royer*, *Luebeck*, and *Lambert* apply in this case.

The State argues that Ms. VanBeek's reliance on *Royer*, *Luebeck*, and *Lambert* is misplaced. The State is wrong. In *Royer* the police officer's retention of the defendant's driver's license and airline ticket was a significant factor in the U.S. Supreme Court's conclusion that the encounter between the police and the defendant was not consensual. *Id.* at 501. The State is correct that *Royer* was a plurality opinion. (State's Br. at 12).

> When a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Marks v. United States, 430 U.S. 188, 193 (1977).

In Royer, four Justices joined the plurality opinion: Justices White, Marshall, Powell and

Stevens.[1] *Royer*, 460 U.S. at 493. Justice Brennan concurred in the result but disagreed with the plurality's analysis of whether the officer's initial stop of the defendant was lawful. *Id.* at 512. Justice Brennan believed that the initial stop was not supported by reasonable suspicion. *Id.* Most importantly, Justice Brennan wrote that he believed that Royer was seized at the point when the officers first asked him to produce his identification and airline ticket. *Id.* at 511. Therefore, because Justice Brennan's concurrence would have gone farther than the plurality opinion, the holding in *Royer* that the officer's retention of his driver's license and airline ticket was a significant factor in determining that he was seized has precedential value.

The State also attempts to distinguish the facts of this case from *Royer*. The State points to the fact that the *Royer* Court concluded that the officer's asking for and examining Royer's driver's license and airline ticket were permissible. (*Id.*). Ms. VanBeek does not dispute this. If Officer Oetzel had simply requested and examined Ms. VanBeek's driver's license while he spoke with her at her truck's window, she would not have been seized. However, when Officer Oetzel retained Ms. VanBeek's driver's license and returned to his squad vehicle with it, he seized her.

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[1] Justice Powell also wrote a short concurring opinion in which he cited the officer's retention of Royer's driver's license and airline ticket as a factor in his conclusion that Royer was seized. *Id.* at 508-509.

The State further argues that this case is different from *Royer* because Officer Oetzel did not accuse Ms. VanBeek of transporting narcotics, ask her to accompany him to a police room, and Ms. VanBeek was not at an airport where her movement was naturally restricted. (State's Br. at 12). This argument overlooks the level of importance that the *Royer* Court attached to the officer's retention of the defendant's documents. Indeed, the Court noted that the officers could "…have obviated any claim that the encounter was anything but consensual…" by simply returning the defendant's driver's license and ticket and telling him he was free to go if he desired. *Id.* at 504. This suggests that the officer's retention of the defendant's documents was the most important factor in their determination that the defendant was seized.

In addition, the State's argument that Ms. VanBeek's movement was not naturally restricted overlooks the fact that she could not have driven away while Officer Oetzel retained her driver's license. *See* Wis. Stat. § 343.18(1). The State concedes as much but argues that this "was the natural result of [Ms. VanBeek] choosing to give her license to Officer Oetzel." (State's Br. at 14). This is simply not true. Officer Oetzel did not ask Ms. VanBeek for her license so he could take it to his squad. He simply asked for her information for his report and stated he wanted a "photo-ID" to "compare faces." (20 at 01:13). Given his request, Officer Oetzel's returning to his squad with Ms. VanBeek's license was not a natural result of her decision to show it to him.

This Court's decision in *Luebeck* is also controlling in this case. In that case, the defendant was lawfully stopped and after completing the tasks necessary to address the original mission of the stop, the officer asked the defendant for permission to search. *Id.*, ¶¶ 2-4. This Court held that the defendant's subsequent consent to search was not valid because he was illegally seized at the time. *Id.*, ¶ 17. The "key factor" in determining that the defendant had been illegally seized and was not free to leave was the officer's retention of the defendant's driver's license. *Id.*, ¶ 16.

This Court's decision in *Luebeck* is not in conflict with the holding in *Floyd*, as the State argues. (State's Br. at 13). In *Luebeck*, the officer's retention of the driver's license and asking for consent occurred after the tasks related to the mission of the traffic stop should have reasonably been completed. *See Id.*, ¶¶ 2-4, 15.

This is different from *Floyd*, where the defendant was legally seized at the time the officer asked for consent. *Id.*, ¶ 31. The *Floyd* Court concluded that the officer's questions about whether the defendant possessed weapons and for consent to check were related to officer safety and thus part of the traffic stop's mission. *Id.*, ¶ 28. Therefore, *Luebeck* and *Floyd* are not in conflict.

Finally, *Lambert* remains persuasive authority for the proposition that when officers receive a person's driver's license and do not return it to them, the contact will be transformed into a seizure. *Id.*, 46

F.3d at 1068. The State argues that *Lambert* conflicts with *Floyd*. (State's Br. at 13). However, as noted multiple times above, *Floyd* does not stand for the proposition that police retention of a person's identifying documents does not transform a consensual police encounter into a seizure. As a result, this Court should still consider *Lambert* as persuasive authority.

C. Officer Oetzel did not have reasonable suspicion when he seized Ms. VanBeek by returning to his squad vehicle while retaining her driver's license.

Most of Officer Oetzel's information about Ms. VanBeek was from an anonymous tip. (102:5-6). The tip was that two people were sitting in a truck for an hour and someone with a backpack had approached the truck and departed. (102:5-6). This does not amount to reasonable suspicion. The State attempts to align these facts with those in *State v. Allen*, 226 Wis. 2d 66, 593 N.W.2d 504 (Ct. App. 1999). Its arguments on this point are unpersuasive.

Allen involved a high-crime area that had received numerous complaints about various types of crime. *Id.* at 68. Police surveilled the neighborhood to address these complaints. *Id.* During that surveillance, an officer observed two men approach a car which one of them briefly entered and exited, after which the car drove away. *Id.* The men stayed in the area for five to ten more minutes before walking to a pay phone. *Id.* These observations took

place during the evening. *Id.* Police stopped the men and eventually discovered drugs. *Id.* at 69.

This Court held that police had reasonable suspicion, citing the combination of three factors to support it: (1) the defendant's action occurred in a high-crime area with lots of drug-dealing complaints, (2) brief contact with a vehicle, and (3) the two men hung around in the neighborhood for five to ten minutes after the contact. *Id.* at 75, 77.

In this case, Ms. VanBeek was not in a high-crime area. A brief contact with Ms. VanBeek's truck and the fact that she was parked with Sitzberger for ten minutes standing alone and without the high-crime area is not enough to create a reasonable suspicion.

More importantly, the anonymous tip in this case cannot factor into the reasonable suspicion analysis because it did not give predictive information that police corroborated. *See State v. Rutzinski*, 2001 WI 22, ¶ 22, 241 Wis. 2d 729, 623 N.W.2d 516 (In order to be reliable, an anonymous tip must provide information indicating the tipster possessed inside information and this information must be corroborated by police). The tip must contain something more than just "easily obtainable facts such as the defendant's whereabouts or the type of car she drove." *Id.*, ¶ 24.

Here, the anonymous tip only provided the easily obtainable facts about Ms. VanBeek's location and vehicle. (102:5). As a result, the tip is not

reliable, meaning it cannot be reliable upon in forming reasonable suspicion.

However, the State argues that it can and cites *State v. Miller*, 2012 WI 61, 341 Wis. 2d 307, 815 N.W.2d 349. (State's Br. at 27). In that case, police received five separate tips the defendant was selling drugs. *Id.*, ¶¶ 8-11. The first tip came from a jail inmate whose identity was known to police. Three additional uncorroborated anonymous tips were received. *Id.*, ¶ 9. The final tip provided predictive information and came from a person who partially identified himself. *Id.*, ¶¶ 11-15. Police officers verified some of the details from the final tip and stopped the defendant, discovering drugs. *Id.*, ¶¶ 16-17.

The Wisconsin Supreme Court concluded that the officers had reasonable suspicion. *Id.*, ¶ 59. The "key information" supporting reasonable suspicion in that case was the final tip because the tipster risked being identified by police and provided information and future predications that the officers corroborated. *Id.*, ¶¶ 51-52, 55. The Court also reasoned that the earlier tips, while of limited reliability, could be considered by the officer "when evaluating the reliability of the final tips." *Id.*, ¶ 57. This was only because the earlier tips "were generally consistent with the allegations in the final tips." *Id*.

In this case, no other tips were received, so the uncorroborated anonymous tip cannot be used to bolster the credibility of a more reliable tip. Therefore, *Miller* is not relevant here.

Excluding the tip, at the time that he returned to his squad vehicle and retained her license Officer Oetzel only knew that Ms. VanBeek was sitting in her truck at 12:22 a.m. and talking with a friend whom she had just picked up. This is not enough for reasonable suspicion, as Officer Oetzel subjectively concluded. (20 at 01:13, 02:36; 107:9).

II. Reasonable suspicion never existed prior to the dog sniff.

The State concedes that Ms. VanBeek was seized either when Officer Oetzel completed his questioning of her regarding her address or when he asked her to exit her truck just before the dog sniff. (State's Br. at 17). The State believes that reasonable suspicion existed at either point. The State is wrong.

The State cites nine factors to support reasonable suspicion. (State's Br. at 18-22). With regard to the first, fourth and fifth factors, the State attempts to compare this case to *Allen*, 226 Wis. 2d 66. That comparison fails because Ms. VanBeek was not parked in a high-crime area. It was the combination of (1) high-crime area, (2) brief contact with a car, and (3) hanging around a neighborhood for five to ten minutes that led to reasonable suspicion in *Allen*. *Id.* at 75. Additionally, as noted above, the allegation about the person approaching Ms. VanBeek's truck came from an unreliable anonymous tip, and thus cannot be relied upon to support reasonable suspicion.

For similar reasons, the State's third factor is not helpful. The allegation that Ms. VanBeek and Sitzberger had been in the truck for an hour cannot be reliable upon in forming reasonable suspicion because it also came from an unreliable anonymous tip.

The State also argued in its second factor that it was suspicious that Ms. VanBeek and Sitzberger did not provide an explanation as to why they were sitting in the truck for ten minutes. The State fails to recognize that this was because Officer Oetzel *did not specifically ask* them why they were sitting in the truck for ten minutes. (20 at 00:30-01:53).

The sixth factor the State points to is Officer Oetzel's discovery that Ms. VanBeek had overdosed earlier that year and Sitzberger was on supervision. While these are factors that can be considered, they do not lead to reasonable suspicion in this case.

In its seventh and eighth factors, the State argues it was suspicious that Sitzberger did not know much about a friend whom he had not known long. However, it makes complete sense that someone who had only known a friend for a short time might be unfamiliar with that person's last name and may get details about their address wrong when asked to recite them from memory.

Finally, the State argues that it was suspicious that Ms. VanBeek was in her truck for half an hour before Officer Oetzel arrived on scene. Again, nothing about this is suspicious. The State suggests this long

wait period is indicative of a drug transaction. However, drug transactions are typically very brief encounters. *See Allen*, 226 Wis. 2d at 75; *State v. Young*, 212 Wis. 2d 417, 433, 569 N.W.2d 84 (Ct. App. 1997).

In addition to *Allen*, the State attempts to compare this case to *State v. Amos*, 220 Wis. 2d 793, 584 N.W.2d 170 (Ct. App. 1998). Again the State misses the mark. *Amos* is a case in which the defendant was sitting in his car, which was parked in an open-air drug market. *Id.* at 795. The area was posted no trespassing and police were asked to strictly enforce this rule. *Id.* at 795-796. The officers observed a female approach the defendant's car and she noticed the officers watching her and abruptly turned and walked away. *Id.* at 796. The defendant then almost immediately drove out of the parking lot. *Id.*

Again, the big factor missing in this case is that Ms. VanBeek was not parked in an area known for crime or drugs. Without that factor reasonable suspicion is lacking.

After sifting out the factors that are irrelevant or that came from the unreliable anonymous tip, we are left with (1) Ms. VanBeek was sitting in her truck for ten minutes with a friend at 12:22 a.m., and (2) she had previously overdosed on drugs within the last year. This is simply not enough to amount to reasonable suspicion and is far less than in *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623 and *State v. Betow*, 226 Wis. 2d 90, 95,

593 N.W.2d 499 (Ct. App. 1999). Therefore, Officer Oetzel did not have reasonable suspicion to hold Ms. VanBeek for the dog sniff.

CONCLUSION

Officer Oetzel seized Ms. VanBeek when he returned to his squad and retained her license. This seizure was not supported by reasonable suspicion. Even if the seizure came later in time, reasonable suspicion was still lacking. This Court should reverse the circuit court's decision, vacate Ms. VanBeek's conviction, and remand with instructions to suppress any evidence obtained pursuant to the resulting unlawful search.

Dated this 8th day of August, 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 2,948 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 August, 2019.

Signed:

JAY PUCEK
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