STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP000640-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ASHLEY L. MONN,

Defendant-Appellant.

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Appeal of an Order and Judgment
Entered in Barron County Circuit Court,
the Honorable Michael J. Bitney, Presiding

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CARY BLOODWORTH
Assistant State Public Defender
State Bar No. 1089062

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
bloodworthc@opd.wi.gov

Attorney for Defendant-Appellant

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## ISSUES PRESENTED

1. Should evidence found in Ms. Monn's purse be suppressed because Ms. Monn's consent to the search was unlawfully obtained, in violation of her Fourth Amendment rights?

   Circuit Court Answer: No.

2. Should evidence found in Ms. Monn's purse be suppressed as fruit of the poisonous tree because the initial entry into the trailer in which she was staying was unlawful, in violation of her Fourth Amendment rights?

   Circuit Court Answer: No.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat § 752.31(2)(f) and (3), making publication inappropriate. Wis. Stat. § 809.23(1)(b)4; *see also Waukesha County v. Genevieve M.*, 2009 WI App 173, ¶5, 322 Wis. 2d 131, 776 N.W.2d 640. Ms. Monn welcomes oral argument if the court would find it helpful.

## STATEMENT OF THE CASE

Ms. Monn was charged with possession of methamphetamine and possession of drug paraphernalia after police found a glass pipe and a container with methamphetamine residue in her

purse. The key question in this case is whether Ms. Monn's consent to the search of her purse was voluntary. The circuit court found that it was and denied two separate motions to suppress based on this finding.

The night of May 6, 2017, Ms. Monn was staying overnight at her friend Joseph Perzichilli's trailer. Around 3:00 a.m. on May 7, Ms. Monn awoke to Barron County Sherriff Department officers banging on and then forcibly entering the trailer with police dogs, screaming, "Sherriff's Department! Come out or you're gonna get bit!" (9A at 0:08).[1] Ms. Monn complied and exited the trailer, at which point she was handcuffed outside. (38:6, 13, 37; App. 108, 115, 139).

The officers had been dispatched to the area earlier that night because of an anonymous report that an individual for whom there was an active arrest warrant may be located in a nearby trailer. (4:2). Officers could not locate that individual, but a man approached the officers and told them that someone named Joseph Perzichilli "might be" staying at the trailer located at 360 16½ Avenue. (4:2). This

[1] Document 9 of the appellate record is a CD-ROM that contains several videos. The third, sixth, and seventh videos on the disc were introduced as evidence at the December 18, 2017, suppression hearing and are part of the record. The third video on the disc, identified by system ID 47013, is 6 minutes and 19 seconds long and will be cited as 9A in this brief. The sixth video on the disc, referred to by system ID 47022, is 2 minutes and 14 seconds long and will be cited as 9B. The seventh video on the disc is not cited in this brief.

informant was not identified. The officers ran Mr. Perzichilli's name and discovered there was a warrant for his arrest for failing to appear at a hearing for operating after revocation, and they decided to attempt to execute that warrant. (38:17; App. 119). They checked the registration of the two cars parked in front of the trailer; neither was registered to Mr. Perzichilli. (38:34; App. 136). The officers observed smoke coming from the stove pipe and knocked loudly for five minutes. (4:2). There were several dogs inside the trailer that barked during this time, but no one answered the door, and the officers did not observe any movement inside the trailer. (4:2).

The officers contacted the owner of the trailer, Dean Sellent. (38:5). Mr. Sellent told them that Mr. Perzichilli did work for him and in exchange he allowed Mr. Perzichilli to stay in the trailer. (38:33; App. 135). Mr. Sellent gave the officers permission to enter the trailer and to use force if necessary. (4:2). He could not, however, confirm whether Mr. Perzichilli was in the trailer that night. (38:34; App. 136). The officers then forcibly entered the trailer, and Ms. Monn and Mr. Perzichilli were the only people found inside. The officers then did a protective sweep of the trailer. (38:17; App. 119). After searching the trailer, Mr. Perzichilli was transferred to a squad car. (38:25; App. 127).

The officers questioned Ms. Monn for approximately ten minutes. (38:37; App. 139). After confirming that there were no warrants for her

arrest, the officers determined that they had no reason to continue to detain her. (38:14; App. 116).

At around 3:20 a.m., an officer told Ms. Monn, "let me shut the [trailer] door and we'll get you out of here." (9B at 2:00; 38:28; App. 130). At this point, Ms. Monn was still handcuffed and did not have her shoes or her purse, which were still in the trailer. (38:13, 17; App. 115, 119). It is unclear from the record whether Ms. Monn asked the officers to retrieve her purse and shoes from the trailer.[2] An officer retrieved the purse and asked Ms. Monn if there were any weapons inside. (38:39; App. 141). Ms. Monn replied that there were not. (38:40; App. 142). An officer asked if he could search it, and Ms. Monn agreed. (30:40; App. 142). As the officer was going through the purse, Ms. Monn indicated that there was a pipe in the purse used for smoking methamphetamines. (38:40; App. 142). Officers also found a container with methamphetamine residue. (4:2-3). At this point, Ms. Monn had been detained for approximately twenty minutes.[3]

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[2] Officer Hodek could not recall whether she asked to go back in the trailer herself or whether she asked the officers to retrieve the items. (38:16; App. 118). Officer Wiese testified that she asked the officers to retrieve them for her. (38:38; App. 140). In the body camera video, Ms. Monn cannot be heard asking the officers to retrieve them. (9B at 2:03).

[3] There was a subsequent search of Ms. Monn's car. However, nothing found in Ms. Monn's car was the basis for the charges in this case. (38:29-31; App. 131-33). Thus, the facts and circumstances surrounding that search will not be discussed in this brief.

Ms. Monn was arrested and charged with one count of possession of methamphetamine, in violation of Wis. Stat. § 961.41(3g)(g), and one count of possession of drug paraphernalia, in violation of Wis. Stat. § 961.573(1). Ms. Monn filed a motion to suppress the evidence found in the purse, arguing that she was illegally detained at the time she consented to the search, rendering her consent invalid. (8). The circuit court denied the motion, concluding that the detention was valid under *Michigan v. Summers*, 452 U.S. 692 (1981), which authorizes categorical detention during the execution of a search warrant. (14:3; App. 164). The court also concluded that Ms. Monn's consent was voluntary because she was free to go at the time she consented to the search of her purse. (14:4; App. 165). Ms. Monn filed a motion to reconsider, which the circuit court also denied.

Ms. Monn then filed a second motion to suppress, arguing that the initial entry into the trailer was illegal and in violation of the Fourth Amendment and that the evidence should be suppressed as fruit of the poisonous tree. (17). The circuit court agreed that the entry into the trailer was illegal, but it nevertheless denied the motion because it concluded that the attenuation doctrine applied. (41:9-10; App. 175-76). Specifically, the court concluded that Ms. Monn's voluntary consent to the search of her purse severed any connection between the illegal entry and the evidence found in her purse. (41:10; App. 176).

Subsequently, Ms. Monn pled guilty to an amended count one, possession of amphetamine, in violation of Wis. Stat. § 961.41(3g)(d), and count 2, possession of drug paraphernalia, was dismissed and read in. The parties agreed to a joint recommendation of a withheld sentence with one year of probation, with expungement upon the completion of probation. The circuit court followed the joint recommendation. This appeal follows.

## ARGUMENT

The circumstances surrounding this case are rife with violations of Ms. Monn's Fourth Amendment rights. After obtaining permission to enter the trailer from Mr. Perzichilli's landlord, officers forcibly entered the trailer in which Ms. Monn was staying in the middle of the night with police dogs based on information that Mr. Perzichilli "might" be there in order to arrest him for failing to appear at a hearing for operating after revocation. This aggressive and intrusive entry was unlawful because Mr. Perzichilli's landlord could not consent to entry of the trailer. *See State v. Kieffer*, 217 Wis. 2d 531, 588 N.W.2d 352 (1998). Then, officers ordered Ms. Monn out of the trailer, handcuffed her, questioned her, and detained her for twenty minutes. This detention amounted to a seizure under the Fourth Amendment and was unlawful because officers had no reason to detain her or to continue her detention for as long as they did. *See Florida v. Royer*, 460 U.S. 491 (1983). Finally, while still handcuffed and barefoot outside the trailer, officers brought

Ms. Monn her personal items and conducted a warrantless search of her purse. This search was unlawful because although Ms. Monn consented to it, her consent was invalid because she was unlawfully detained at the time, *see State v. Kolk*, 2006 WI App 261, 298 Wis. 2d 99, 726 N.W.2d 337, and involuntary because it was the product of coercion, *U.S. v. Mendenhall*, 446 U.S. 544 (1980). Given the numerous Fourth Amendment violations, the evidence obtained during the search of her purse should be suppressed.

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV. The Wisconsin Constitution includes a similar provision, Article I, § 11, which is interpreted consistent with the Fourth Amendment. *State v. Arias*, 2008 WI 84, ¶20, 311 Wis. 2d 358, 752 N.W.2d 748.

Ms. Monn's Fourth Amendment rights were violated multiple times during the execution of the arrest warrant for Mr. Perzichilli. The standard of review for Fourth Amendment claims is mixed; this court upholds the circuit court's findings of historical fact unless clearly erroneous but decides constitutional questions de novo. *Kieffer*, 217 Wis. 2d 531, ¶16.

## I. The search of Ms. Monn's purse violated her Fourth Amendment right to be free from unreasonable searches.

Police in this case did not have a warrant to search Ms. Monn's purse. Unless certain exceptions apply, police may not search an individual's personal belongings without a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). One exception to the warrant requirement is a search with consent. *Id*. However, the consent to search must be validly obtained and voluntarily given. *Kolk*, 298 Wis. 2d 99, ¶20. In this case, it was not.

### A. Ms. Monn's consent was not valid because she was unlawfully detained at the time she consented.

Although a warrant is generally required for police to "seize" a person, certain exceptions apply. *Mendenhall*, 446 U.S. at 551. If an exception to the warrant requirement does not apply, then a seizure, no matter how temporary, violates the Fourth Amendment and is unlawful. Consent given during an unlawful detention is per se invalid because it is not "the result of an independent act of free will." *Royer*, 460 U.S. at 501.

At the time Ms. Monn consented to the search of her purse, she was being unlawfully detained. As such, her consent to search the purse was invalid, and the evidence found during the search should be suppressed. *See Kolk*, 298 Wis. 2d 99, ¶20. ("[C]onsent must be voluntarily given and consent

will not sustain a search if it is given during an illegal seizure.").

1. Ms. Monn was seized at the time she consented to the search of her purse.

Whether an individual is "seized" for purposes of the Fourth Amendment is a fact-specific question. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). In other words, a person is "seized" if, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554. Detentions, even brief ones, are seizures under the Fourth Amendment. *Id.* at 551.

The circumstances surrounding Ms. Monn's detention clearly indicate that she was not free to leave. It was three o'clock in the morning; Ms. Monn was barefoot; she was in the middle of a gravel pit; and she did not have access to her purse, her shoes, or her phone. Without those items, she could not walk away, drive away, or call someone to come get her.

Further, Ms. Monn was handcuffed from the moment she exited the trailer until after her purse was searched, approximately 20 minutes, restraining her liberty and ability to leave. Ms. Monn remained handcuffed while officers went into the trailer to

retrieve her purse and during the search of the purse. And despite having determined that they had no basis to hold Ms. Monn any further, the officers never told her that she was free to go. The closest they came was telling her, "let me shut the [trailer] door and we'll get you out of here." That was not a clear indication that she was free to leave, especially given that she remained handcuffed during and after this statement. *See State v. Jones*, 2005 WI App 26, ¶17, 278 Wis. 2d 774, 693 N.W.2d 104 (requiring "some verbal or physical demonstration by the officer, or some other equivalent facts, which clearly convey to the person that the [detention] is concluded and that the person should be on his or her way.").

Under these circumstances, no reasonable person would have believed that they were free to leave. The affirmative restraint on Ms. Monn's liberty amounted to a seizure under the Fourth Amendment.

2. It was unreasonable for the officers to seize Ms. Monn while executing the arrest warrant for Mr. Perzichilli.

a. There is no categorical authority to detain individuals during the execution of an arrest warrant.

The circuit court concluded that the officers had the authority to temporarily detain Ms. Monn while they executed the arrest warrant for

Mr. Perzichilli, relying on *Summers*, which holds that police have authority to detain a person present at a residence when they execute a search warrant. 452 U.S. at 705. The *Summers* rule is categorical, meaning that it does not depend on the circumstances of a particular case; when executing a search warrant, it is always reasonable for officers to detain occupants of that residence. *Muehler v. Mena*, 544 U.S. 93, 98 (2005). However, this case does not deal with detention incident to a search warrant; Ms. Monn was detained while the officers executed an *arrest* warrant. *Summers* is clear that its holding is limited to search warrants. *Summers*, 452 U.S. at 705 n.20. Neither the United States Supreme Court nor the Wisconsin Supreme Court has applied the *Summers* rule to detentions incident to arrest warrants, and at least one federal circuit has concluded that the *Summers* rule does not apply to arrest warrants. *See Sharp v. Cnty. of Orange*, 871 F.3d 901, 914-15 (9th Cir. 2017).

This court should not extend the *Summers* rule to apply to detentions incident to arrest warrants. "Search warrants and arrest warrants are meaningfully different because they protect different Fourth Amendment interests." *Id.* at 913 (citing *Steagald v. U.S.*, 451 U.S. 204, 212-13 (1981)). As such, the reasoning underlying the *Summers*' holding does not apply to arrest warrants. First, *Summers* emphasized that in approving a search warrant, "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime." *Summers*, 452 U.S. at 703. This

has two consequences: first, it indicates that a neutral magistrate, not a police officer, has authorized an invasion of the privacy of the home. *Id.* Second, because the search warrant indicates there is probable cause of criminal activity at a particular residence, there is at least reasonable suspicion that the occupant of that residence is involved in or has knowledge of criminal activity. *Id.* at 703-04.

Neither of these rationales applies in the case of an arrest warrant. First, a neutral magistrate has made no probable cause finding regarding any individual but the subject of the arrest warrant. Thus, while a judicial officer has authorized an invasion of the subject of the arrest warrant's privacy based on probable cause that he has committed a criminal offense, a judicial officer has not authorized an invasion of another individual's privacy. Without this interposition of a neutral magistrate finding some reason to believe the other individual was involved in criminal activity, a categorical rule is not appropriate. *See Steagald*, 451 U.S. at 213 (expressing concern that when the subject of an arrest warrant is believed to be in a third party's residence, the belief and subsequent entry of the third party's home "was never subjected to the detached scrutiny of a judicial officer.").

Similarly, there is nothing about an arrest warrant for one individual which raises an inference that another individual is involved in criminal activity. In the search warrant context, the court emphasized the connection between the residence, for

which there is probable cause to believe there is evidence of criminal activity, and an occupant of that residence, who would presumably know about or be involved in criminal activity going on in his own residence. However, there is no such connection between the subject to an arrest warrant and another individual who happens to be present at the time the warrant is executed. Nothing about another individual's mere presence during the execution of an arrest warrant gives rise to any inference that that individual knows about or is involved in criminal activity. *See Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990) ("[A] *search warrant* implie[s] a judicial determination that police had probable cause to believe that someone in the home was committing a crime[, whereas] the existence of [an] *arrest warrant* implies nothing about whether dangerous third parties will be found in the arrestee's house."). This weighs against a categorical rule for detentions incident to arrest warrants.

*Summers* also identified several justifications for detaining occupants of a residence during the execution of a search warrant. First, the Court noted "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." *Summers*, 452 U.S. at 702. This justification does not exist in the context of arrest warrants; an individual who is not the subject of the arrest warrant does not have reason to fear being arrested. This significantly reduces, if not eliminates, reasons a person might flee. *See Sharp*, 871 F.2d at

914 ("So there is no real flight risk in the arrest-warrant context.").

Next, *Summers* noted that officers are justified in detaining occupants during a search warrant to facilitate "the orderly completion of the search," stating that detained occupants may be more motivated to assist law enforcement in opening locked doors and containers in their home. *Summers*, 452 U.S. at 703. Again, this justification does not apply in the context of arrest warrants. Executing an arrest warrant is very different than executing a search warrant and permits much more limited searches. Further, there is no reason to believe that an individual not subject to an arrest warrant would have the means to assist in a search. Unlike the occupant of a residence, individuals who are present at the time an arrest warrant is executed are no more likely to have keys to locked doors or containers than any other person on the street.

Finally, *Summers* discusses that officer safety justifies the categorical detention of occupants in the search warrant context. *Id.* at 702. Admittedly, officer safety can also be a concern during the execution of an arrest warrant. However, officer safety alone cannot justify such a categorical exception to the Fourth Amendment. *Sharp*, 871 F.3d at 914 ("The *Summers* Court relied on much more than [officer safety] to give officers the 'far-reaching authority' they now have to execute search warrants."). Further, officer safety concerns can still be addressed without a categorical authorization to

detain individuals present during the execution of an arrest warrant. Officers would still have the ability to detain individuals during the execution of an arrest warrant if doing so was reasonable under the circumstances. *Id.* at 915.

Given the differing nature of arrest warrants and the fact that the rationale behind *Summers* does not apply in the context of arrest warrants, the *Summers* rule should not be extended and applied here to authorize Ms. Monn's detention simply because she was present during the execution of Mr. Perzichilli's arrest warrant.

b. Under the circumstances of this case, it was unreasonable to detain Ms. Monn.

Without a categorical exception, this court must look to the totality of the circumstances in determining whether Ms. Monn's detention was reasonable. *See Summers*, 452 U.S. at 697-98; *Sharp*, 871 F.3d at 915. The state bears the burden of showing that a warrantless seizure was reasonable under the circumstances. *State v. Quartana*, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997).

Here, the circumstances surrounding the execution of the arrest warrant did not warrant detaining Ms. Monn. The officers did not testify that they believed Ms. Monn to be dangerous, were concerned about her fleeing, or that they had any

other specific reason for detaining Ms. Monn during execution of the arrest warrant.

Even if they had, such a belief would have been unreasonable. Officers had no reason to believe that there was a warrant for her arrest or that she was otherwise involved in criminal activity; they had run a warrant check and admitted that they had no reason to arrest her. Further, the officers had no reason to believe that Ms. Monn was a threat to them or that she would somehow interfere with the execution of the arrest warrant. She cooperated with the officers and exited the trailer voluntarily, and she did not engage in any disruptive behavior. *See Sharp*, 871 F.3d at 915 (concluding it was unreasonable to detain a third party during execution of an arrest warrant because he was "compliant" and "was not engaged in any . . . disruptive behavior"). They similarly had no reason to believe she would flee because, aside from having been cooperative and having no reason to believe she would be arrested, she was barefoot in a gravel pit in the middle of the night, which would have made flight difficult. The officers did not need Ms. Monn's assistance in locating Mr. Perzichilli because he also exited the trailer voluntarily at the same time as Ms. Monn. Based on these facts, the state has not met its burden in showing that it was reasonable for the officers to detain Ms. Monn while they executed the arrest warrant.

### 3. Even if Ms. Monn's initial detention was reasonable, it was unlawful by the time officers asked to search her purse.

Even if a detention is reasonable at its onset, it can become unreasonable. If this court determines that Ms. Monn's initial detention was reasonable, then it should still conclude that it became unreasonable, and therefore unlawful, before Ms. Monn consented to the search of her purse.

A lawful detention can become unlawful if it extends past the point when the original justification for the detention has dissipated. *See, e.g.*, *Jones*, 278 Wis. 2d 774, ¶23. The circuit court concluded that this principle did not apply outside the context of traffic stops, but this was erroneous. This principle applies to all seizures, not just traffic stops. *See, e.g.*, *Mena*, 544 U.S at 101 (applying the principle in the context of a person being detained during the execution of a search warrant); *Royer*, 460 U.S. at 500 (applying the principle in the context of a search and seizure of a traveler in an airport). Any detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Royer*, 460 U.S. at 501 The state bears the burden of proving that a seizure "was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id.* at 500.

At the point at which Ms. Monn consented to the search of her purse, Ms. Monn was still detained; she was still handcuffed and had not been told clearly

that she was free to go. But by the time the officer asked for Ms. Monn's consent to search her purse, there was no ongoing reason to detain her. The purpose of their mission was complete; they had arrested Mr. Perzichilli and completed other actions incident to the arrest, like performing a protective sweep of the trailer. They had searched her and knew she had no weapons on her. They had confirmed that Ms. Monn had no arrest warrants, had questioned her for ten minutes, and had already decided that they had no reason to hold her. At that point, Ms. Monn had been handcuffed and detained for approximately 20 minutes. Clearly, at the point at which officers told her, "let me shut the [trailer] door and we'll get you out of here," the initial reason for detaining her, whatever that was, had dissipated, and her detention past this point was prolonged past the point of reasonable. The officers had completed their mission and determined they had no reason to continue to hold Ms. Monn, and yet they continued to do so while an officer returned to the trailer to retrieve her purse and shoes and then came back and discussed the purse's content and ask for consent to search it. At this point, Ms. Monn's detention was unlawful.

Because Ms. Monn was unlawfully detained at the time she consented to the search, her consent was invalid. *Id.* at 501. Without consent, the warrantless search of her purse violated the Fourth Amendment, and evidence from that search should be suppressed.

### B. Even if Ms. Monn was legally detained at the time she consented, her consent was still not voluntary.

Even if this court concludes that Ms. Monn was legally detained at the time of consent, the search was still unlawful because her consent was not voluntary. Consent can be involuntary even when a detention is lawful if it is the product of duress or coercion, either express or implied. *Mendenhall*, 446 U.S. at 557. In determining whether consent is voluntary, this court looks to the totality of the circumstances surrounding the consent. *Id.* at 557. The totality of the circumstances includes both "the characteristics of the accused and the details of the interrogation." *Bustamonte*, 412 U.S. at 226. The state bears the burden of proving by clear and convincing evidence that consent was voluntary. *Mendenhall*, 446 U.S. at 557; *see also State v. Phillips*, 218 Wis. 2d 180, ¶25, 577 N.W.2d 794 (1998).

Here, the circumstances do not support the circuit court's conclusion that Ms. Monn's consent was voluntary. The incident took place between 3:00 and 3:20 a.m. outside a trailer in a gravel pit. Officers forcibly entered the trailer and threatened Ms. Monn with police dogs. She was handcuffed outside, in the middle of the night with no shoes for approximately twenty minutes. *See Phillips*, 218 Wis. 2d 180, ¶29 (considering threatening and non-cooperative conditions as a factor in whether consent was voluntary). She was questioned by an

officer for ten minutes while handcuffed. She was still handcuffed at the time she consented to the search of her purse. *See id.*, ¶29 (considering being handcuffed as a factor in whether consent was voluntary). No one advised her of her *Miranda*[4] rights, and no one informed her she had the right to refuse to consent to the search of her purse. *See Mendenhall*, 446 U.S. at 558 (considering the fact that defendant "was twice expressly told that she was free to decline to consent to the search" in concluding that consent was voluntary).

Further, the "choice" Ms. Monn had was not really a choice at all. She needed her phone, her keys, and shoes in order to leave. She also needed the handcuffs removed. Despite the officers' testimony that she was "free to leave," walking away from a trailer in a gravel pit in the middle of the night in handcuffs, with no shoes or money and with no way to contact anyone was not realistically an option. Officer Weise even acknowledged this, testifying that Ms. Monn's "choice" at the time was to walk away with no shoes, purse, or phone; consent to the search; or, as he put it, "she could have hung out." (38:43; App. 145).

Ms. Monn's personal characteristics further indicate that her consent was not voluntary. Ms. Monn was only 19 years old when this incident occurred and had no education past high school. She had no prior convictions and was inexperienced with

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

law enforcement and the criminal justice system. The officers did not inform her of her rights or tell her that she could refuse to consent to the search of her purse.

Looking at all of these facts together, it is clear that Ms. Monn's consent was not voluntary. She was a young, inexperienced person in a new and bewildering situation. She was handcuffed in the middle of the night with no way to leave except to retrieve her purse. She was not told her options or her rights. This was not an act of independent free will. Rather, given the inherently coercive circumstances created by the officers, Ms. Monn had no real choice but to consent to the search of her purse. As such, her consent was not voluntary.

### C. The proper remedy is for this court to reverse the circuit court's denial of the first suppression motion and order that Ms. Monn's plea be withdrawn.

Under the exclusionary rule, the remedy for an unconstitutional seizure is to suppress the evidence it produced. *State v. Washington*, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305 (citing *Wong Sun v. U.S.*, 371 U.S. 471 (1963)). Here, the evidence obtained was the result of either invalid consent given while Ms. Monn was being unlawfully detained or the result of involuntary consent given under inherently coercive circumstances. Either way, the warrantless search of the purse violated the Fourth Amendment, and the evidence found should be suppressed.

When a defendant enters a plea following the trial court's denial of a suppression motion, and a reviewing court determines that the trial court erred, the defendant should be allowed to withdraw his or her plea unless the state can prove that there was no reasonable probability that the trial court's error contributed to the plea. *State v. Senrau*, 2000 WI App 54, ¶36, 233 Wis. 2d 508, 608 N.W.2d 376. Here, the state cannot meet this burden because granting suppression would have eliminated the state's evidence against Ms. Monn.

## II. The entry into the trailer violated Ms. Monn's Fourth Amendment right to be free from unreasonable search and seizure, and the evidence found in the purse is fruit of the poisonous tree.

Aside from the search of Ms. Monn's purse, a separate Fourth Amendment violation occurred when officers initially entered the trailer. When a Fourth Amendment violation occurs, both "primary evidence obtained as a direct result of the" violation and "evidence later discovered and found to be derivative of" the violation are excluded. *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016). Such derivative evidence is referred to as "fruit of the poisonous tree." *Id.* Here, the evidence found during the search of the purse derived not only from the unlawful search of the purse, but also from the unlawful entry into the trailer and should be excluded on this independent basis.

A. Ms. Monn's Fourth Amendment rights were violated.

A threshold issue is whether Ms. Monn may assert a Fourth Amendment claim based on entry into the trailer since she did not reside in it. The circuit court properly concluded that Ms. Monn had standing to bring a Fourth Amendment claim.[5] (41:6-7; App. 172-73). A person may assert "the protection of the Fourth Amendment" if she "has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Ms. Monn was an overnight guest of Mr. Perzichilli, a legitimate resident of the trailer. As an overnight guest, Ms. Monn "had an expectation of privacy in the [trailer] that [is] reasonable." *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990) (concluding that overnight guests have a "legitimate expectation of privacy" deserving of Fourth Amendment protection). Thus, she may assert a Fourth Amendment claim based on the entry into the trailer.

B. The officer's entry into the trailer was unlawful.

The circuit court also correctly concluded that the officer's entry into the trailer was unlawful. (41:7, 9; App. 173, 175). The state argued that because

[5] Although the parties and the circuit court framed this as a standing issue, the U.S. Supreme Court considers this a substantive Fourth Amendment issue. *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978). The substantive question is, were a particular defendant's "personal" rights violated. *Id.*

Mr. Sellent owned the trailer and consented to the search, the officer's entry was legal. However, the court correctly concluded that Mr. Perzichilli and Mr. Sellent had a landlord-tenant relationship and that Mr. Sellent therefore could not consent to entry of the trailer. Despite the fact that there was no written lease, Mr. Sellent told the officers that he allowed Mr. Perzichilli to stay in the trailer in exchange for doing work. *See Kieffer*, 217 Wis. 2d 531, ¶26 (considering an informal, unwritten rent arrangement). The officers also believed that Mr. Sellent was Mr. Perzichilli's landlord when they entered the trailer, referring to Mr. Sellent as "your landlord" shortly after entry. (9A at 3:00).

Further, there is no evidence in the record to suggest that Mr. Sellent exercised joint access or control over the trailer. *See Rakas*, 439 U.S. at 149; *Kieffer*, 217 Wis. 2d 531, ¶27. The state submitted no evidence to show that Mr. Sellent resided in the trailer, used the trailer, or even had keys to the trailer. *See Kieffer*, 217 Wis. 2d 531, ¶¶21-27. Rather, the evidence shows that Mr. Perzichilli had access to and resided in the trailer and that he exercised the ability to invite or exclude others. Based on these facts, the circuit court correctly concluded that Mr. Sellent, as Mr. Perzichilli's landlord, could not consent to entry into the trailer, and that the officers reasonably believed this at the time of entry, rendering the entry unlawful.

C. The attenuation doctrine does not apply.

Despite finding that the entry was unlawful, the circuit court denied the suppression motion because it concluded that the attenuation doctrine applied. Specifically, the court found that Ms. Monn's voluntary consent to search the purse removed any taint from the unlawful entry.

Typically when there is a Fourth Amendment violation, evidence later discovered is considered to have derived from the illegality and is excluded as "fruit of the poisonous tree." *Strieff*, 136 S. Ct. at 2061 (internal citation and quotations omitted). However, where "the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance," the attenuation doctrine applies and the evidence is not excluded. *Id.* at 2061. "The primary concern in attenuation cases is whether the evidence objected to was obtained by exploitation of a prior police illegality or instead by means sufficiently attenuated so as the be purged of that taint." *State v. Anderson*, 165 Wis. 2d 441, 447-48, 477 N.W.2d 277 (1991). In determining whether the attenuation doctrine applies, this court should consider three factors: (1) the temporal proximity between the unconstitutional conduct and the discovery of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *Strieff*, 136 S. Ct. at 2062.

The evidence found in Ms. Monn's purse was derivative of the illegal entry; but for the unlawful entry, the circumstances under which the officers had the opportunity to search the purse would not exist. Officers would not have had the ability to enter the trailer to obtain the purse in the first place. Officers also would not have detained Ms. Monn, putting her in the situation where she had to consent to the search of her purse in order to obtain her belongings. This is a clear example of officers exploiting the original Fourth Amendment violation, the unlawful entry, to obtain evidence they would not otherwise have had access to.

Further, all three factors weigh against applying the attenuation doctrine. First, the temporal proximity factor favors attenuation when there is "substantial time" between the unlawful conduct and the discovery of the evidence. *Kaupp v. Texas*, 538 U.S. 626 (2003) (*per curiam*). In this case, only twenty minutes elapsed. *See, e.g.*, *Brown v. Illinois*, 422 U.S. 590, 604 (1975) (concluding that "less than two hours" weighed against attenuation).

Second, flagrancy of the police misconduct in this case is significant. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. District Court*, 407 U.S. 297, 313 (1972). The officers here relied on the consent of someone they themselves identified as Mr. Perzichilli's landlord to enter the trailer, a clear violation of the Fourth Amendment. Not only did they violate the

chief interest the Fourth Amendment is designed to protect, they did so in an unnecessarily aggressive manner. *See Phillips*, 218 Wis. 2d 180, ¶48 (considering whether officers "use[d] violence, threats, or physical abuse . . . [or] gain[ed] entry . . . by breaking through, unlocking, or even opening a window or door" as a factor in determining the flagrancy of the conduct). Despite having other options, like waiting for Mr. Perzichilli to leave in the morning, or coming back at another time to when Mr. Perzichilli may be home, they chose to break down the door in the middle of the night and threaten the occupants with police dogs. All that to arrest Mr. Perzichilli because he failed to appear at a hearing for operating after revocation. The flagrancy of this violation also weighs against applying the attenuation doctrine.

Finally, no intervening circumstance occurred to break the causal chain between the unlawful entry and the discovery of the evidence. Ms. Monn was handcuffed and detained the entire time, and no one explained her rights. *See, e.g.*, *Phillips*, 218 Wis. 2d 180, ¶43 (1998) (concluding that an conversation in which the officer explained to the defendant "sufficient information with which he could decide whether to freely consent to the search" constituted an intervening circumstance which removed the taint of previous illegal conduct).

Ms. Monn's consent to the search did not remove the taint of the unlawful entry because, as discussed, it was not voluntary. "[A]n intervening

independent act of free will" by the defendant can be an intervening circumstance that removes the taint of an unlawful invasion. *Brown*, 422 U.S. at 598. But Ms. Monn's consent was not an independent act of free will. For the reasons discussed above, Ms. Monn's consent was invalid because it was the result of another Fourth Amendment violation, namely an unlawful detention, rendering the warrantless search unlawful. Officers cannot cure one Fourth Amendment violation with another Fourth Amendment violation. And if this court does not accept that Ms. Monn's detention was unlawful at the time of the search, Ms. Monn's consent was still not voluntary because, as discussed above, the circumstances surrounding her consent were so coercive as to render her consent involuntary. *See id.* at 604 ("The voluntariness of the statement is a threshold requirement.").

Because her consent was not an independent act of free will, it cannot have acted to purge the taint of the illegal entry. As such, the attenuation doctrine does not apply, and the evidence found in the purse should be suppressed as fruit of the illegal entry.

### D. The proper remedy is for this court to reverse the circuit court's denial of the second suppression motion and order that Ms. Monn's plea be withdrawn.

As discussed above, the remedy for an unconstitutional seizure is to suppress the evidence it produced. *Washington*, 284 Wis. 2d 456, ¶10 (citing *Wong Sun v. U.S.*, 371 U.S. 471 (1963)). Here, the

evidence obtained was derived from the unlawful entry as officers would not have had access to the purse or its contents had they not unlawfully entered the trailer. Further, Ms. Monn's consent to the search was not an independent act of free will and thus did not purge the taint of the unlawful entry. Because the evidence was fruit of the poisonous tree, it should be suppressed.

And, as discussed above, the state cannot meet its burden in showing that there was no reasonable probability that the trial court's error in denying the suppression motion contributed to the plea because granting the suppression motion would have eliminated the state's evidence against Ms. Monn. *Senrau*, 233 Wis. 2d 508, ¶3. Thus, Ms. Monn should be permitted to withdraw her plea.

## CONCLUSION

For the reasons stated above, Ms. Monn respectfully requests that this court reverse the orders denying her motions to suppress evidence, reverse the judgment of conviction, and order her plea withdrawn.

Dated this 17th day of June, 2019.

Respectfully submitted,

CARY BLOODWORTH
Assistant State Public Defender
State Bar No. 1089062

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
bloodworthc@opd.wi.gov

Attorney for Defendant-Appellant

## CERTIFICATIONS

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 6,747 words.

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.

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.

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 17th day of June, 2019.

Signed:

CARY BLOODWORTH
Assistant State Public Defender

# APPENDIX

## INDEX TO APPENDIX