STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP000640-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ASHLEY L. MONN,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The search of Ms. Monn's purse was unconstitutional because Ms. Monn was illegally detained at the time it was given and did not consent voluntarily.

The state concedes that Ms. Monn was detained at the time she consented to the search of her purse, Respondent's Br. at 3, 4, 11, but argues that her detention was reasonable under the Fourth Amendment. Rather than arguing, as the circuit court found, that *Michigan v. Summers*, 452 U.S. 692 (1981), authorized Ms. Monn's categorical detention,[1] the state argues that Ms. Monn's detention was reasonable under *Terry v. Ohio*, 392 U.S. 1 (1968). Respondent's Br. at 11-12.

A. *Terry* does not authorize Ms. Monn's detention.

The state asserts that *Terry* allows officers to detain an individual for investigative purposes without probable cause to arrest. Respondent's Br. at 11-12. However, the state misses a key requirement of a permissible *Terry* stop: the officers must have reasonable suspicion of a crime. *Terry*, 392 U.S. at 21; *State v. Houghton*, 2015 WI 79, ¶21, 364 Wis. 2d 234,

[1] By failing to argue that *Michigan v. Summers* authorized the detention, the state has conceded this issue. *State v. Bauer*, 2010 WI App 93, ¶11, 327 Wis. 2d 767, 787 N.W.2d 412.

868 N.W.2d 143 ("In order to justify a seizure, police must have reasonable suspicion that a crime or violation has been or will be committed."). The statute codifying *Terry* also contains this requirement, only authorizing a stop "when the officer reasonably suspects that such person is committing, is about to commit, or has committed a crime." Wis. Stat. § 968.24.

The state asserts that during a *Terry* stop, "officers may try to obtain information confirming or dispelling their suspicions," but it offers no explanation as to what the officers' suspicions were in this case. It does not point to any "specific and articulable facts which" support reasonable suspicion that Ms. Monn was committing, had committed, or was about to commit a crime.

Perhaps this is because they had no reasonable basis to believe Ms. Monn was involved in criminal activity. The officers were there not because of any suspicion of criminal activity, but rather to execute an arrest warrant for Mr. Perzichilli. Nothing about Mr. Perzichilli failing to appear at a court hearing gives rise to suspicion that Ms. Monn is involved in criminal activity. At the time of the detention, Ms. Monn had been sleeping, hardly suspicious behavior at 3:00 a.m. Ms. Monn cooperated with the officers and followed their instructions, and there is no evidence that she in any other way acted suspiciously. Without reasonable suspicion that Ms. Monn committed or was going to commit a crime,

her detention, however brief, is not permissible under *Terry*.

Nothing else surrounding the circumstances of Ms. Monn's detention rendered it reasonable under the Fourth Amendment. There is no evidence that the officers believed her to be dangerous, were concerned about her fleeing, or thought she would interfere with the execution of the warrant. Rather, all the evidence suggests the opposite; Ms. Monn was compliant, cooperative, and non-disruptive during the entire ordeal. Her detention was therefore unlawful.

B. Ms. Monn's detention became unreasonable.

The state also argues that Ms. Monn's detention was reasonable because it was only ten minutes long and because "she was clearly told that she was going to be free to leave." Respondent's Br. at 12. Despite the state's assertion that Ms. Monn was only detained for ten minutes, Respondent's Br. at 4, 5, 12, 15, Ms. Monn was actually detained closer to twenty minutes. The timestamp on Officer Hodek's body camera footage shows that Ms. Monn exited the trailer and was handcuffed at 3:00 a.m., (9A[2]); that

[2] 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, will be cited as 9A in this brief. The sixth video on the disc, identified by system ID 47022, will be cited as 9B. The seventh video on the disc, identified by system ID 47021, will be cited as 9C.

officers told her "we'll get you out of here" at 3:16 a.m., (9B); and that officers began searching Ms. Monn's purse at 3:18 a.m. (9C). Ms. Monn remained handcuffed[3] and was detained this entire time. While it is true that Ms. Monn was questioned for ten minutes, (38:37), her detention lasted longer than just her questioning.

Further, the detention extended after Mr. Perzichilli had been arrested, a protective sweep of the trailer had been performed, and officers had determined there were no warrants for Ms. Monn's arrest. At this point, the officers admitted that they had no reason to hold her. And yet she remained detained.

The fact that officers told Ms. Monn that she was "going to be free to leave" shows that she was still not free to leave. The statement indicates that at some point in the future, officers were going to release her, but that at that moment, she was still being detained despite the fact that officers had determined they had no reason to continue to hold her. Clearly, even if Ms. Monn's initial detention was

[3] The state asserts that there is a discrepancy about whether Ms. Monn remained handcuffed throughout her twenty-minute-long detention. Respondent's Br. at 6. However, there is no discrepancy. Officer Hodek's testified that the handcuffs were never removed. (38:13, 15). There was no evidence presented that officers ever removed the handcuffs during Ms. Monn's detention, and this fact is, therefore, unrefuted.

reasonable, her continued detention after execution of the arrest warrant, a protective sweep of the home, questioning Ms. Monn, checking for outstanding warrants, and determining there were no grounds to hold her, was unreasonable. It was only at this point that she consented to the search of her purse.

C. Ms. Monn's consent to the search of her purse was not voluntary.

The court must only determine whether Ms. Monn's consent was voluntary if it determines that Ms. Monn was still legally detained at the time she gave consent. If she was illegally detained at the time she consented, her consent is per se invalid. *Florida v. Royer*, 460 U.S. 491, 501 (1983); *State v. Kolk*, 2006 WI App 261, ¶20, 298 Wis. 2d 99, 726 N.W.2d 337.

The state points to a list of factors considered in *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), and *State v. Artic*, 2010 WI 83, 327 Wis. 2d 392, 786 N.W.2d 430, in arguing that Ms. Monn's consent was voluntary. However, these factors are "non-exclusive," and the true test of whether consent is voluntary is to look at "the totality of the circumstances." *Artic*, 2010 WI 83, ¶33. By limiting its analysis to the six factors discussed in *Phillips*, the state fails to address all of the circumstances relevant to consent.

For example, the state does not address the fact that the incident took place in the middle of the night, outside in a gravel pit. It does not address the

fact that the incident took place after police officers forced entry into the trailer where she was sleeping, threatening that she would be bitten by police dogs if she didn't cooperate. It does not address the fact that Ms. Monn was detained and handcuffed for almost twenty minutes. It does not address that Ms. Monn had no access to her phone, keys, shoes, or purse.

Further, the state fails to apply all of the facts of the case to the *Phillips* factors. For example, the second *Phillips* factor is whether the police threatened or intimidated the victim. *Artic*, 327 Wis. 2d 392, ¶33. Just prior to the detention, officers forcibly entered the trailer in which Ms. Monn had been sleeping and threatened her with police dogs. They then handcuffed her. *See Phillips*, 218 Wis. 2d at 200 (considering whether officers placed a defendant in handcuffs in determining whether officers threatened or intimidated the defendant). They questioned Ms. Monn for approximately ten minutes and prolonged her detention, despite having no reason to suspect her of any wrongdoing. *See id.* (considering whether officers prolonged the encounter in determining whether officers threatened or intimidated the defendant).

The third *Phillips* factor is whether the conditions attending the request for consent were congenial, non-threatening, and cooperative. *Artic*, 327 Wis. 2d 392, ¶33. Ms. Monn was respectful and answered questions, but that is not the end of the analysis. Officers had just forced entry into her trailer and threatened her with police dogs. *See Artic*,

327 Wis. 2d 392, ¶¶43-44 (considering whether officers made a show or force in determining whether conditions were cooperative). Additionally, Ms. Monn was handcuffed and detained at the time the officers sought consent, negating any sense of a "congenial tone." *Artic*, 327 Wis. 2d 392, ¶44.

The state argues that the fourth *Phillips* factor, how Ms. Monn responded to the request to search, indicates that her consent was voluntary because Ms. Monn volunteered that she had a pipe in her purse. Respondent's Br. at 14. However, as will be discussed in more detail below, the record is clear that Ms. Monn only volunteered this information *after* consenting to the search and while officers were searching the area of her purse where the pipe was located. Further, Ms. Monn's disclosure that the pipe was in the purse indicates that her consent was not voluntary; she gave consent despite knowing that incriminating evidence was in her purse. *See Artic*, 327 Wis. 2d 392, ¶58 (considering defendant's belief that no incriminating evidence would be found to support the conclusion that consent was voluntary).

The fifth *Phillips* factor is the characteristics of the defendant, such as "age, intelligence, education, physical and emotional condition, and prior experience with the police." *Artic*, 327 Wis. 2d 392, ¶33. The state contends that there is no evidence in the record that goes towards this factor. But we know that at the time of the incident, Ms. Monn was only 19 years old, had no education past high school, and had no prior convictions and was inexperienced with

law enforcement. (21:1; 46:6). These facts tend to weigh against a finding of voluntariness.

The state has conceded that the fifth *Phillips* factor, whether the police informed Ms. Monn that she could refuse consent, weighs against a finding voluntariness. Respondent's Br. at 14. Thus, when all of the facts are applied to the *Phillips* factors, it weighs against a finding of voluntariness.

D. Officers did not have probable cause to search the purse.

For the first time on appeal, the state appears to argue that officers had probable cause to search Ms. Monn's purse even without consent because, it asserts, Ms. Monn told officers that she had a pipe in her purse before she consented to the search of her purse. Respondent's Br. at 2, 4, 6, 7, 12, 14. However, the record is clear that Ms. Monn mentioned the pipe *after* consenting to the search and the search had begun. Officer Weise testified that "Sergeant Hodek asked if we could look inside the purse and she stated we could." (38:40). After consenting, according to Officer Weise, Ms. Monn "stated, well, there's a dope pipe in there." (38:40). Officer Hodek similarly testified, "I asked her if we could have consent to search the purse," to which Ms. Monn responded, "Yes, you can search the purse." (38:8-9). Officer Hodek was then asked, "And do you have any further conversation with her before you go through her purse?" to which he responds, "Not before I go through her purse, no." (38:8-9). He is then asked,

"Do you have any conversation with her as you start looking through her purse?" (38:8-9). Only at this point, according to Officer Hodek, does Ms. Monn say "that there is a dope pipe in there." (38:9).

The body camera footage confirms that Ms. Monn consented to the search of her purse before disclosing the pipe. Officer Hodek's body camera footage shows that at 3:18am, he asked Ms. Monn, "Can we check and see" if there are any weapons in your purse, to which Ms. Monn responded, "Yep." (9C). There is then a conversation about the size of Ms. Monn's wallet as Officer Hodek begins the search. At 3:19am, after Officer Hodek says that he is going to put her wallet back in the purse, Ms. Monn discloses that there is a pipe in the purse. (9C). This clearly occurred after Ms. Monn had consented to the search and the search had begun.

Because Ms. Monn consented to the search of her purse and the search had begun prior to her disclosure of the pipe, officers had no reason to suspect that Ms. Monn had drug paraphernalia in her purse prior to asking for consent or prior to beginning the search.

II. The entry into the trailer was unconstitutional because officers had no reason believe Mr. Perzichilli was there at the time of entry.

The circuit court concluded that the officer's forcible, warrantless entry into the trailer violated the Fourth Amendment. The state does not argue

that Ms. Monn lacked standing to bring a Fourth Amendment claim and therefore concedes that her status as an overnight guest vested her with a Fourth Amendment privacy interest. *Minnesota v. Olson*, 495 U.S. 91 (1990). The state also does not argue that the landlord, Mr. Sellent, could legally consent to entry of the trailer and, therefore, concedes that Mr. Sellent could not authorize officers to enter the trailer. *State v. Kieffer*, 217 Wis. 2d 531, 577 N.W.2d 352 (1998). Rather, the state limits its argument about the legality of the entry to a factual analysis of whether *Payton v. New York*, 445 U.S. 573 (1980), authorized entry.

A. *Payton* does not authorize entry into the trailer.

When officers are executing an arrest warrant, they may "enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 603. The state argues that officers were therefore authorized to enter the trailer to arrest Mr. Perzichilli because he lived there. Respondent's Br. at 11. However, the state ignores the requirement that officers have "reason to believe the suspect is within." *Payton*, 445 U.S. at 603.

Here, the facts do not support a reasonable belief that Mr. Perzichilli was inside the trailer at the time the officers forced entry. The state asserts that the owner of the trailer, Mr. Sellent, told officers that he "believed Perzichilli was at the trailer, but wasn't completely certain." Respondent's Br. at 11; *see also*

Respondent's Br. at 5, 10. The record, however, does not support this characterization. According to Officer Hodek, Mr. Sellent told officers that Mr. Perzichilli "comes and goes" from the trailer. (38:33). Further, Officer Hodek was specifically asked, "But Mr. Sellent couldn't tell you at the time that Mr. Perzichilli was actually there at that moment, is that fair?" (38:34). Officer Hodek answered, "He didn't know anybody's comings and goings, no." (38:34).

Officers had also checked the registration of the two vehicles parked in front of the trailer, and neither was registered to Mr. Perzichilli. (38:34). Before entering, officers knocked loudly for five minutes with no answer. (4:2). During those five minutes, dogs inside the trailer were barking. (4:2). Despite the repeated loud knocking and dogs barking, no one answered the door, and the officers did not observe any movement inside the trailer. (4:2). In a situation where officers only know that the subject of a warrant sometimes stays in a trailer but has no specific information that he is there that night, and five minutes of barking dogs and knocking do nothing to produce movement inside the trailer, it is unreasonable to believe the subject of the warrant is inside the trailer at the time.

B. The attenuation doctrine does not apply because Ms. Monn's consent to the search of her purse was not voluntary.

The circuit court concluded that despite the entry into the trailer being illegal, Ms. Monn's consent to the search of her purse severed the link between the illegal entry and the discovery of the evidence in Ms. Monn's purse. The state does not discuss attenuation in its response, relying solely on the argument that the entry into the trailer was legal under *Payton*.

The attenuation doctrine does not apply because, as discussed above, Ms. Monn's consent to the search of her purse was per se invalid and involuntary, and her invalid consent does not serve as an "intervening independent act of free will" required to break the causal chain between the unlawful entry and the discovery of the evidence. *Brown v. Illinois*, 422 U.S. 590, 598 (1975).

III. The proper remedy is to reverse the circuit court and order that Ms. Monn's plea be withdrawn.

The state does not contest that plea withdrawal is the proper remedy in this case and therefore concedes. *Bauer*, 327 Wis. 2d 767, ¶11.

CONCLUSION

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

Dated this 15th day of November, 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 2,877 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 15th day of November, 2019.

Signed:

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Assistant State Public Defender