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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP644

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEANGELO D. TUBBS,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

This case is about the legality of the warrantless search of Mr. Tubbs' vehicle. The state bears the burden to prove that a warrantless search was reasonable and in conformity with the Fourth Amendment. *State v. Quartana*, 213 Wis. 2d 400, 570 N.W.2d 618 (Ct. App. 1997). In his brief-in-chief, Mr. Tubbs set forth two main arguments explaining why the search of Mr. Tubbs' vehicle violated the Fourth Amendment. First, he argued the police did not have probable cause to believe his vehicle contained evidence of a crime. (Brief-in-chief p.11-15). Second, Mr. Tubbs argued that police did not have reasonable suspicion to justify a protective search of his vehicle. (Brief-in-chief p.15-17).

The state's brief insufficiently responds to Mr. Tubbs' well-developed arguments. (Response p.6-8). Though its argument section ostensibly spans from pages 5-8, the majority of that space is dedicated to boilerplate law, a protracted recital of the *Secrist*[1] case, and copying and pasting facts from its fact section—albeit, without actually applying the law it cites to those facts in order to develop a legal argument. (Response p.5-8). Its response appears to boil down to its comparison of Mr. Tubbs' case to the facts of *State v. Secrist*, (Response p.6-8), and these

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[1] *State v. Secrist*, 224 Wis. 2d 201, 589 N.W.2d 387 (1999)

two lines, which simply restate the circuit court's suppression decision:

> The trial court correctly concluded there was reasonable suspicion to stop or approach Tubbs and remove him from the vehicle. (R30:8). Further, once Tubbs was removed, the discovery of the digital scale on the floor coupled with the smell of marijuana allowed the officer to search the immediate area for contraband or a gun. (R30:8).

(Response p.8).

As an initial matter, Mr. Tubbs explicitly noted in his brief-in-chief that reasonable suspicion for the stop was not being challenged in this appeal. (Brief-in-chief p.6 n.1).

Moreover, Mr. Tubbs presented a cogent argument, supported with legal authority. Having acknowledged that the odor of marijuana provides probable cause for a warrantless search of a vehicle pursuant to *Secrist*, he argued that the circuit court's credibility finding that the defense had successfully impeached the "smell of evidence" was not inherently incredible. (30:8; App.108; Brief-in-chief p.10-11). The state did not argue that this credibility finding was incredible as a matter of a law, thereby conceding this argument. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

Mr. Tubbs then argued that the circuit court's subsequent reliance on the smell of marijuana was clearly erroneous because it was directly contradicted by its own credibility finding. (Brief-in-chief p.11-12). Mr. Tubbs cannot discern a meaningful response to this argument in the state's response. (Response p.5-8); *Charolais*, 90 Wis. 2d at 108-109.

The only argument the state seems to set forth is its assertion that this case "shares similarities" with *Secrist*. (Response p.6). Yet, *Secrist* is inapposite.

In *Secrist*, the denial of the suppression motion involved an explicit finding that the police officer smelled a strong odor of marijuana coming directly from the area where the defendant, the sole occupant of the vehicle, was seated. 224 Wis. 2d 201, 206. However, here, the circuit court stated, "Now the smell of evidence was impeached by a very clever demonstration and whether at that point I certainly wanted to grant the motion based on that, but the facts here is that there is a scale and a gun and I think that dictates the result here." (30:8; App.108). As noted above, the state did not refute, and thereby conceded, Mr. Tubbs' argument that the circuit court made a finding that the smell of evidence was impeached, and that its subsequent reliance on the smell of marijuana was therefore clearly erroneous. (Response p.5-8). Therefore, the state's reliance on *Secrist* is misplaced given *Secrist* did not involve the successful impeachment of the smell of marijuana, nor did that decision consider whether the rest of the

facts of the case supplied probable cause for a search—independent from the smell of marijuana.

However, those very considerations were at issue in this Court's decision in *State v. Jackson*, 2013 WI App 66, 348 Wis. 2d 103, 831 N.W.2d 426. Mr. Tubbs accordingly discussed that decision and distinguished the facts in his case from those in the *Jackson* case that had provided probable cause for the search: $1961 in small denominations and a digital scale covered in marijuana residue. (Brief-in-chief p.13-15). Mr. Tubbs argued there was not a fair probability that law enforcement would find evidence in his vehicle based on the observation of a clean digital scale and the presence of a lawfully-owned weapon, and thus, the police did not have probable cause for the search of his vehicle, independent from the smell of marijuana. (Brief-in-chief p.12-15; *see* 30:9; 31:2; App.109, 114). The state did not cite *Jackson* in its response brief, much less respond to the argument Mr. Tubbs made. (Response p.5-8); *Charolais*, 90 Wis. 2d at 108-109.

Last, Mr. Tubbs argued that, under the totality of the circumstances, there was no reasonable suspicion to justify a protective search of his vehicle for the presence of weapons. (Brief-in-chief p.15-17). He explained that the officers lacked reasonable suspicion, based on specific and articulable facts, to reasonably warrant a belief that he was dangerous and may gain immediate control of weapons. (Brief-in-chief p.16-17). Mr. Tubbs contrasted the testimony elicited at his suppression hearing with the facts that

had previously been found to support reasonable suspicion for a protective search in *State v. Buchanan*, 2011 WI 49, ¶¶11-12, 19, 334 Wis. 2d 379, 799 N.W.2d 775. (Brief-in-chief p.16). The state did not bother to cite or discuss *Buchanan*, or offer any response to this argument. *Charolais*, 90 Wis. 2d at 108-109.

Overall, the state failed to directly respond to Mr. Tubbs' arguments. (Response p.5-8). This Court should construe the state's failure to meaningfully respond as a tacit admission. *State v. Anker*, 2014 WI App 107, ¶13, 357 Wis. 2d 565, 855 N.W.2d 483.[2]

[2] In *Anker*, this Court concluded the state had conceded by failing to directly respond to the defendant's arguments, "The State does not directly respond to [the defendant's] argument, and therefore concedes the issue. *See Charolais Breeding Ranches*, 90 Wis. 2d at 109, 279 N.W.2d 493. We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission that there was no probable cause for Anker's arrest. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82." *State v. Anker*, 2014 WI App 107, ¶13, 357 Wis. 2d 565, 855 N.W.2d 483.

CONCLUSION

For the reasons stated above and in his brief-in-chief, Mr. Tubbs respectfully requests that this Court reverse and remand to the circuit court with directions to suppress the evidence discovered in the illegal vehicle search, and permit Mr. Tubbs to withdraw his plea.

Dated this 13th 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 1,164 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 13th day of August, 2019.

Signed:

CARLY M. CUSACK
Assistant State Public Defender