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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP1539-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FREDERICK JENNINGS,

Defendant-Appellant.

On appeal from a judgment of conviction entered in the circuit court for Milwaukee County, the Honorable Janet C. Protasiewicz and Honorable Lindsey Canonie Grady presiding.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. Under either officer's version of events, the officers lacked reasonable suspicion to detain Mr. Jennings.

Mr. Jennings denies that Officer Newport's account (that he shined a searchlight on Mr. Jennings and observed him making a furtive movement and quickly exiting the car) happened at all. That account is not only inconsistent with Officer Schwarzhuber's account, but also belied by that officer's body camera recording, which shows the officers driving up, getting out of their car and seizing Mr. Jennings with no apparent opportunity for the shining of the searchlight or the observations Officer Newport testified to.[1] But Mr. Jennings maintains that even if Officer Newport observed what he claimed to observe, there was no reasonable suspicion to detain Mr. Jennings. Therefore, this argument assumes that Officer Newport's testimony was true. The State attempts unsuccessfully to spin the

[1] Schwarzhuber's body camera recording was admitted as Exhibit Three at the continued motion hearing. (66: 29; App.191). Defense counsel called the circuit court's attention to this portion of the recording in his post-hearing brief and urged the court to carefully review it. (14: 4). The recording is included in the record before this Court. (46, 73).

claimed observations of Mr. Jennings' innocuous behavior into reasonable suspicion.

Window Tint:

The State insists that one factor contributing to reasonable suspicion was the tint on the windows of the car Mr. Jennings was sitting in. The State implicitly concedes that he could not have been cited for an equipment violation based on his presence in the passenger seat of the parked car. (Response Brief at 18-19). Nonetheless, the State finds that some degree of suspicion attached to Mr. Jennings due to his presence there.

The State cites *State v. Floyd*, 2016 WI App 64, ¶ 16, 371 Wis. 2d 404, 885 N.W.2d 156, aff'd on other grounds, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560. The language the State quotes from that case demonstrates the problem with the State's reliance on it. The Court said, "[T]inted windows add to suspicion because they suggest a possible desire of the operator to conceal from outside observation [of] persons, items, or activity in the vehicle." Mr. Jennings was not the owner of the car, and police had no reason to believe he was. Therefore, the officers had no reason to infer that Mr. Jennings had tinted the windows or purchased a vehicle so-equipped in order to conceal his criminal wrongdoing. He was not the operator. Therefore, officers had no reason to infer that he chose to drive a motor vehicle equipped with heavily tinted windows to transport contraband or conceal criminal activity. It is a ridiculous stretch

to suggest that a person opens himself up to suspicion by merely sitting in the passenger seat of a parked car that he does not own and has not operated because someone else elected to drive a car with tinted windows.

The State attempts to bolster the officers' reliance on the window tint by describing the car as "occupied and *controlled*" by Mr. Jennings. (Response Brief at 17, 19). The only evidence of "control" of the car by Mr. Jennings that State cites is Officer Newport's testimony that Mr. Jennings had the keys in his hand. (Response Brief at 5, 8, 18). But there is no suggestion in the record that the officers knew that Mr. Jennings had the keys until after they detained him.

"Furtive Movement":

The State relies, of course, on Officer Newport's description of the "furtive movement," *i.e.* the dip of Mr. Jennings' shoulder. In his initial brief, Mr. Jennings pointed out that while the appellate courts of this state have often considered "furtive movements" as a factor justifying a pat down search when officers independently have a reasonable suspicion to detain a person, the precedent of the Wisconsin appellate courts does not support the notion that officers can shine lights on people who have done nothing suspicious and then evaluate their resulting movements for "furtiveness" to use as a basis to detain them in the first instance. The State does not acknowledge this and has no answer to it.

Nor does the State acknowledge the flaw in its reliance on Officer Newport's self-serving conclusion that "typically, those movements are of somebody, especially when they observe law enforcement, somebody discarding contraband or a weapon or trying to recover contraband or a weapon." (65: 10; App. 124). The Wisconsin Supreme Court has criticized that kind of reasoning and observed that any number of innocent actions by a person in a car could be described as a "furtive movement." *State v. Johnson*, 2007 WI 32, ¶ 43, 299 Wis. 2d 675, 729 N.W.2d 182. The State does not address this except to say that while the "furtive movement" may not have been enough to generate reasonable suspicion on its own, the "cumulative effect of all the circumstances" was sufficient. (Response Brief at 21). But this is truly a case where zero plus zero plus zero really does equal zero.

Other Observations of Mr. Jennings:

The other factors contributing to the "cumulative effect" the State describes included the fact that Mr. Jennings exited the car "quickly" and "quickly" walked toward the house. (Response Brief at 19). The State relies on *Florida v. Rodriguez*, 469 U.S. 1, 105 S. Ct. 308. In that case, Rodriguez's cohort saw police and told Rodriguez to "get out of here," after which Rodriguez fled with his legs "pumping up and down very fast." *Id.,* at 3–4. The behavior in *Rodriguez* was bizarre and constituted actual flight. It cannot be equated with Mr. Jennings'

act of quickly exiting a car and walking toward a house.

The State similarly relies on *State v. Anderson*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). Here the State engages in a bit of sleight of hand. The State says that *Anderson* stands for the proposition that "[w]hile *evasion or flight* alone might not constitute probable cause, they can certainly indicate 'that all is not well' and justify a brief stop for further inquiry." (Response Brief at 16, emphasis added). Thus, the State suggests that "flight" and "evasion" stand on equal footing as contributors to reasonable suspicion. But that is not true, and it is not at all what *Anderson* stands for.

In *Anderson*, the Wisconsin Supreme Court concluded that Anderson's behavior—turning into an alley and then onto a city street and accelerating away from officers—constituted actual flight, as opposed to mere evasion. *Id.*, at 79, 80, 86. In fact, the holding in *Anderson* depended on that conclusion. The majority specifically disputed the charge of the concurring justices that the majority had "transmute[d] the trial judge's finding of fact that the defendant *avoided* contact with the police into a finding that the defendant was '*fleeing*' from the police." *Id.*, at 85 (emphasis added). The actual language of the Court, which is incorrectly paraphrased by the State is: "Although it does not rise to a level of probable cause, *flight at the sight of a police officer* certainly gives rise to a reasonable

suspicion that all is not well." *Id.,* at 84 (emphasis added).

Contrary to the State's assertion, nothing in *Anderson* suggests that mere evasion or avoidance of police contact can furnish reasonable suspicion. Such a conclusion would conflict with the U.S. Supreme Court's pronouncements in *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319 (1983), and *Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382 (1991), that an individual who is approached by police who do not have a reasonable suspicion of criminal activity has a right to ignore them and go about his business and that his refusal to cooperate with police does not furnish reasonable suspicion to detain him.

Police officers, without a reasonable suspicion that he had done anything wrong, shined a searchlight in Mr. Jennings' face. His response was perfectly reasonable and predictable, not to mention constitutionally protected. In light of recent well-publicized tragedies, it is particularly perverse to suggest that a young, African-American[2] man draws suspicion upon himself that justifies a detention simply because he does not wish to engage with police.

The State also finds it damning that when the officers told Mr. Jennings to stop, he "questioned this command, saying 'what, what, what,' continuing

[2] The demographic information on the Department of Corrections indicated that Mr. Jennings is a 28 year old black male. https://appsdoc.wi.gov/lop/detail.do

towards the house and eventually stopping." (Response Brief at 19). First, the State does not explain how it is suspicious that Mr. Jennings would question why officers wanted him to stop. Again, this was a perfectly reasonable and predictable response by any innocent person to the circumstances Mr. Jennings found himself in. Second, although the State describes Mr. Jennings "continuing towards the house," that is not a complete picture of the testimony. The officer clarified that he did not recall exactly when he told Mr. Jennings to stop. (65: 12; App. 126). Ultimately, he was asked "when you made the commands for him to stop, did he actually stop?" (65: 12; App. 126). His answer was as follows:

> Yeah. He was facing me saying. "what, what," and I was waving him to come to me, and he was still standing on the top of the stairs, and he it's kind of a disadvantage for me of him being at a higher level ground than I was.

(65: 12; App. 126). So, Mr. Jennings was on the top step, and when the officer told him to stop, he asked why he was being stopped and stood there. The State urges this Court to mark that down in the "suspicious" column.

The State also posits that it was suspicious that when Officer Schwarzhuber asked Mr. Jennings what he was doing after he exited the car, he told the officer that he was "wiping the vehicle . . . down." (Response Brief at 19). The State considers this suspicious because Mr. Jennings said this "without any further explanation," as if this statement was

inherently suspect. This argument is truly strange because far from being suspicious, this statement by Mr. Jennings would have gone some distance toward *dispelling* reasonable suspicion — if there had been any in the first place. Consistent with Mr. Jennings' statement, Officer Schwarzhuber testified that Mr. Jennings "had a towel or a moist towelette, some sort of cloth in his hand." (66: 25; App. 187).[3]

Mr. Jennings pointed out in his initial brief that when it denied his postconviction motion, the circuit court included the odor of marijuana coming from the car among the factors justifying the detention. This was improper because the odor was not observed until after Mr. Jennings was detained and could not have contributed to reasonable suspicion to detain him. The State claims that Mr. Jennings has misread the circuit court's decision, and that the circuit court considered the marijuana odor only as it bore upon probable cause for the ultimate vehicle search and not as part of the reasonable suspicion for the detention. (Response Brief at 24). The State is simply wrong. The circuit court said:

> The defendant argues that the furtive movement Officer Newport observed was not enough by itself to give the officers reasonable suspicion to detain him, but Judge Witkowiak relied on other

[3] This is clearly seen on Officer Schwarzhuber's body camera recording. Mr. Jennings holds up the cloth and protests that he was wiping down the car. One of the officers (in a dismissive tone) says, "No, you ain't." Mr. Jennings waives the cloth and says "Look. It's wet."

> circumstances in this case which supported the officers' actions, particularly the odor of fresh marijuana emanating from the vehicle the defendant had just exited.

(59: 5; App. 105). The circuit court plainly factored the marijuana odor into its analysis of reasonable suspicion for the detention. And that was the only way the court could arrive at the decision to deny the motion.

It is unsurprising that the State relies on *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560, because that decision went farther than any previous precedent of the Wisconsin appellate courts to find reasonable suspicion in the aggregation of circumstances having innocent explanations. However, even *Floyd* does not give cover to the officers in this case.

First, the question in *Floyd* was not one of reasonable suspicion to seize a citizen. It was clear that Floyd had been subjected to a valid traffic stop. The question was whether there was reasonable suspicion sufficient to support a very brief extension of that valid stop. As the State points out, the touchstone of Fourth Amendment jurisprudence is reasonableness. *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120. What may be reasonable in the context of briefly extending a detention that was valid at its inception is not necessarily reasonable as a basis to seize a person on the street in the first instance.

Second, while *Floyd*, like this case, involved tinted windows, Floyd was *driving the car*, which, in addition to the tinted windows was also equipped with a ridiculous number of air fresheners. 2016 WI App 64, ¶15. Because Floyd was driving the car, the desire to avoid detection and the desire to mask the odor of contraband, which such accoutrements indicate to police, could reasonably be attributed to Floyd. Had Floyd been merely seated in the passenger seat of a parked car so equipped, the result would, no doubt, have been different.

Additionally present in *Floyd* but absent here was testimony that the deputy knew "that the area of the stop was a 'high crime area' with 'large quantities' of drug and gang activity,'" which was precisely the kind of activity the deputy suspected Floyd was involved in. *Id*., at ¶13.

It is worth noting that the Court's conclusion in *Floyd* that reasonable suspicion was present was not actually necessary to the Court's decision, since the Court had already concluded that the deputy did not need reasonable suspicion because he did not improperly extend the traffic stop. *Id*., at ¶11.[4] The unnecessary language in *Floyd* pushes the boundaries of reasonable suspicion. Certainly this Court should not push the boundaries of *Floyd*.

[4] On review, the Supreme Court of Wisconsin specifically declined to address the question of reasonable suspicion. *State v. Floyd*, 2017 WI 78, ¶ 34, 377 Wis. 2d 394, 898 N.W.2d 560.

To get a true sense of this stop, it is necessary to review Officer Schwarzhuber's body camera recording. Police stops unsupported by reasonable suspicion are commonplace in Milwaukee.[5] This is one of them. Here, contraband was found, and so a scramble to assemble the innocuous factors into reasonable suspicion inevitably followed. Again, this is a case where zero, plus zero, plus zero does not add up to more than zero. Only result-oriented hindsight can lead to a conclusion that somehow the innocent factors here aggregated to reasonable suspicion to detain a citizen.

II. The testimony of the two officers cannot be reconciled, and the circuit court made a clearly erroneous factual finding when it credited the two conflicting accounts.

As Mr. Jennings explained in detail in his initial brief, the two officers' versions of events cannot both be true if we respect the laws of physics and the linear nature of time. The State has no real answer for this except to repeat the circuit court's conclusion that the incident "happened fast" and that "the officers' allegedly conflicting testimony was based on their unique perspectives and on the fast-moving series of events leading up to the investigative stop of Jennings." (Response Brief at

[5] A recent report found that police failed to document a justification for as many as 80 percent of the frisk incidents in the first half of 2019. https://www.jsonline.com/story/news/2020/02/19/80-milwaukee-police-frisk-incidents-unjustified-report-says/4806860002/

29). The State speculates that "the court may have noticed that Schwarzhuber was more hesitant in his memory or sounded less sure about his testimony, something that the transcript would not reflect." (Response Brief at 29). The State is undeterred by the lack of even a hint of support for this speculation in the record.

Mr. Jennings also pointed out in his initial brief that Officer Newport's account of seeing Mr. Jennings in the car making his furtive movement after the squad car turned onto Chambers street cannot be squared with Officer *Schwarzhuber's* body camera recording, which begins nine seconds before the squad car turns onto Chambers Street. (Initial Brief at 22). He pointed out that the recording shows the officers pulling up and immediately getting out of the squad and approaching Mr. Jennings. No shining of a searchlight can be seen, and it does not appear possible for Officer Newport to have made the observations he described. The State has no answer to this. Instead, the State responds with a description of Officer *Newport's* testimony about the recording *from his own* body camera, which bears not at all on the events preceding the stop. (Response Brief at 30).

Ultimately, despite the fact that it is physically impossible for both versions to be true, and despite the fact that the body camera footage is inconsistent with Officer Newport's account, the State suggests that this Court should ignore all of that. The State simply urges this Court not to "second-guess" the circuit court's findings. Deference to the circuit court

is one thing. Complete disregard of the facts in the record that render the circuit court's findings clearly erroneous is another.

Even if the "wide eyes," "furtive movement," and quick exit of the car that Officer Newport described really happened, there was no reasonable suspicion for this stop. But without those observations, the justification for the detention falls apart entirely.

CONCLUSION

Wherefore, Mr. Jennings respectfully requests that the Court reverse the decisions of the circuit court denying the suppression motion and the postconviction motion and order the suppression of all evidence discovered subsequent to the illegal seizure of Mr. Jennings.

Dated this 9th day of March, 2020.

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 2,991 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 9th day of March, 2020.

Signed:

Pamela Moorshead
Assistant State Public Defender