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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2019AP1830-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATELYN MARIE LEACH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Waupaca County Circuit Court, the
Honorable Vicki L. Clussman Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

During a traffic stop, a police officer asked Ms. Leach if she had marijuana or paraphernalia on her. He told her that he was going to search her regardless, but she might receive leniency if she consented. She acquiesced.

> Should Ms. Leach's motion to suppress have been granted given that the officer did not have Fourth Amendment authority to search Ms. Leach when he told her he was going to search her regardless of whether she consented, such that Ms. Leach's consent was invalid?

The circuit court denied Ms. Leach's motion to suppress.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the briefs will adequately address all relevant issues. Publication is not warranted because the appeal can be decided by applying well-established case law to the facts of the case.

STATEMENT OF THE CASE AND FACTS

In March of 2018, Officer Justin Malueg was on patrol in the City of Weyauwega. (26:4-5; App. 104-05).[1] He saw a car turn around in a church parking lot, which he thought was "odd," and then swerve abruptly twice and brake two times in its lane. The vehicle also did not stop for a stop sign. (26:5-6; App. 105-06).

Officer Malueg pulled the car over. There were two people in the car: the driver, Katelyn Leach, and a passenger, Gina Pecha. Upon approaching, Officer Malueg smelled a "light odor of raw marijuana." (26:7; App. 107). Officer Malueg individually removed the Ms. Pecha and Ms. Leach from the car and questioned them. (*Id.*). First, he questioned Ms. Pecha. He told her that if she had something minor, like a small amount of marijuana or a marijuana pipe, he would just issue a municipal citation. (26:8; App. 108). He told her that he was going to search her regardless. (26:24-25; App. 124-25). Ms. Pecha turned over a methamphetamine pipe with residue and marijuana items, including a marijuana grinder and a rolled joint. (26:8-9; App. 108-09).

[1] These facts come from the hearing on Ms. Leach's motion to suppress and the court's factual findings. Portions of body camera footage was introduced as defense exhibit 1. (26:13-20; App. 113-20). However, the officer also testified to what the video showed. (*Id.*).

Next, Officer Malueg removed Ms. Leach from the car. He told her the same thing he told Ms. Pecha: if she had paraphernalia or a small amount of marijuana that he would issue municipal citations, and that he was going to search her regardless. (26:15; App. 115). Ms. Leach removed a marijuana pipe from her person. (26:9; App. 109).

Officer Malueg asked Ms. Leach about her recent drug use and she said she had smoked marijuana earlier that day, before getting in the car. (26:10-11; App. 110-11). Police also searched the car and found a very small amount of raw marijuana flakes spread throughout. (26:9-10; App. 109-10). Officer Malueg had Ms. Leach do field sobriety tests, but he could not recall the results of those tests. (26:12; App. 112). He ultimately arrested her. (26:11; App. 111). A blood draw was conducted revealing the presence of Delta-9-THC. (1:3).

The State charged Ms. Leach with operating with a detectible amount of a controlled substance as a second offense, a violation of Wis. Stat. § 346.63(1)(am). (1:1-3).

Ms. Leach filed a motion to suppress. (6). As relevant to this appeal, Ms. Leach argued that there was no legal authority to search her when Officer Malueg claimed such authority. Given that Officer Malueg used a false claim of authority to obtain consent, the consent was coerced. (6:2, 26:27-28; App. 127-28) (no "authority to search . . .the individual person"; "consent was coerced"). Ms. Leach requested

suppression of all marijuana and marijuana related items, any statements she subsequently made, the results of field sobriety tests, and the blood evidence. (6:1). The State argued there had been no coercion because "everything that Officer Malueg told them was the truth." (26:26; App. 126). The circuit court made factual findings consistent with the officer's testimony and denied the motion to suppress. (27:2-5; App. 127-30). The court found that the stop:

> was conducted in a reasonable manner for trying to determine whether or not the girls were in possession of any illegal substances, and then whether or not the driver of the vehicle was driving with restricted substances in her system.
>
> I will further find that the officer, based on the totality of the circumstances, the admissions that were made to him, as well as the odor that he smelled, that there was reasonable -- or there was probable cause in this case to search the vehicle, and there was probable cause to arrest Ms. Leach, again, considering the admissions that were made.

(27:4; App. 104). The court subsequently made additional factual findings, consistent with the officer's testimony, as stated above. (29:3-4; App. 135-36).

Ms. Leach entered a no contest plea and was sentenced. (16). This appeal follows.[2]

[2] *See* Wis. Stat. § 971.31(10) (suppression motion not waived by plea).

ARGUMENT

I. Ms. Leach's Motion to Suppress Should Have Been Granted Because Officer Malueg Did Not Have Fourth Amendment Authority to Search Ms. Leach When He Told Her He Was Going to Search Her Regardless of Whether She Consented, and Therefore, Her Consent Was Invalid.

A. Introduction and standard of review

On appeal, Ms. Leach does not challenge the initial stop its duration. Her sole challenge is to the Fourth Amendment violation caused by Officer Malueg's claim of authority to search Ms. Leach and her acquiescence thereto. Officer Malueg claimed to have authority to search Ms. Leach, and used this purported authority to obtain her consent. But, as will be demonstrated, this claim of authority was false. Acquiescence to a false claim of authority is not valid consent. The remedy for a Fourth Amendment violation is exclusion of the evidence it produced. Ms. Leach's motion to suppress should have been granted.

When reviewing a motion to suppress, this Court employs a two-step analysis. It reviews a circuit court's findings of fact under the clearly erroneous standard, but reviews the circuit court's application of constitutional principles to those facts de novo. *State v. Anker*, 2014 WI App 107, ¶ 10, 357 Wis. 2d 565, 855 N.W.2d 483 (citations omitted). Ms. Leach does not challenge the court's factual findings. This appeal concerns only legal questions.

B. Officer Malueg did not have Fourth Amendment authority to search Ms. Leach when he told her he was going to search her regardless of whether she consented.

At the time Officer Malueg asked Ms. Leach if she had marijuana or paraphernalia and told her he was going to search her regardless (but that she might receive leniency if she consented), he did not in fact have legal authority to search her.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, provide protection from unreasonable searches and seizures.[3] A warrantless search is per se unreasonable unless it falls within a well-recognized exception to the warrant requirement. *State v. Howes*, 2017 WI 18, ¶ 23, 373 Wis. 2d 468, 893 N.W.2d 812. (citation omitted). Here, it is undisputed that Officer Malueg did not have a warrant.

The circuit court did not determine what authority the officer had to search Ms. Leach when he claimed such authority. However, the court stated it found probable cause to arrest, (27:4; App. 104), suggesting reliance on the search incident to arrest

[3] Wisconsin follows the United States Supreme Court's interpretations when construing both constitutions' search and seizure provisions. *State v. Sykes*, 2005 WI 48, ¶ 13, 279 Wis. 2d 742, 695 N.W.2d 277.

exception. As will be demonstrated, this exception does not apply because the search was not incident to Ms. Leach's arrest.

Law enforcement may search a suspect incident to a lawful arrest. A search incident to arrest is valid if (1) it is based on probable cause and (2) it is "contemporaneous to an actual arrest." *State v. Sykes*, 279 Wis. 2d 742, ¶15, 31 ("[T]he relevant inquiry is whether the officer was aware of sufficient objective facts to establish probable cause to arrest before the search was conducted, as well as whether an actual arrest was made contemporaneously with the search.").

Ms. Leach was not under arrest when Officer Malueg claimed authority to search her and her arrest was not contemporaneous to the claim of authority. Officer Malueg denied he was planning to arrest her at that time. (26:12; App. 112). He arrested her later, after additional conversation, a search of the car, and field sobriety tests.

Nor was there probable cause to arrest Ms. Leach at that time. "Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Anker*, 2014 WI App 107, 357 Wis. 2d 565, 855 N.W.2d 483 (citation omitted). Officer Malueg smelled a light odor of raw marijuana coming from

the car when he initially approached it, but by the time he confronted Ms. Leach, he had already found the source of the odor: Ms. Pecha's joint.

In *State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999), the court explained that: "the strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug." However, "the probability diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor." *Id.*

Here, the factors set forth in *Secrist* that diminish probable cause are present: the odor of unburnt marijuana was light; there was more than one person in the car; and Ms. Pecha's joint was the reasonable explanation for the odor of unburnt marijuana. Under the totality of the circumstances, probable cause was lacking. *See also, State v. Ford*, 211 Wis. 2d 741, 749, 565 N.W.2d 286 (Ct. App. 1997) (no probable cause to arrest one of member of a group of companions who smelled like marijuana because it was "unclear as to whether the odor emanated specifically from Ford or from any particular place on his person."); *c.f. State v. Mata*, 230 Wis. 2d 567, 602 N.W.2d 158 (Ct. App. 1999) (by the time police searched Mata, they had already searched the other two occupants and no marijuana or other contraband had been discovered and thus, "the odds of Mata possessing the suspected marijuana had increased.").

Yet, even if there was probable cause to arrest Ms. Leach, when it comes to a search of someone's person, there is no "exception to warrantless searches based solely on probable cause with no resulting arrest." *Sykes*, 279 Wis. 2d 742, ¶ 26. Here, there was no contemporaneous arrest, so it was not a search incident to arrest.

Likely, Officer Malueg realized he did not have probable cause to arrest Ms. Leach, and so he attempted to obtain evidence another way—by getting Ms. Leach to consent to a search of her person. But instead of asking for permission, he coerced consent by claiming authority to search that he did not in fact have. Thus, as explained next, Ms. Leach's consent was not valid.

C. Ms. Leach's consent was invalid because it was coerced by Officer Malueg's false claim of legal authority to search.

After Officer Malueg claimed to have authority to search Ms. Leach and told her he was going to search her regardless of whether she consented, Ms. Leach acquiesced. Consent is another exception to the warrant requirement. *State v. Blackman*, 2017 WI 77, ¶ 54, 377 Wis. 2d 339, 898 N.W.2d 774. But, as will be shown, Ms. Leach's consent was invalid because it was not freely and voluntarily given.

"If the State establishes consent in fact, the State must prove that the consent was given

voluntarily and freely." *State v. Blackman*, 377 Wis. 2d 339, ¶ 56 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 225 (1973)). Voluntariness is determined based upon an evaluation of the totality of the circumstances. *Id.* (citing *State v. Artic*, 2010 WI 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430.). Some non-exclusive factors include:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent.

Id. (quoting *State v. Phillips*, 218 Wis. 2d 180, ¶ 33, 577 N.W.2d 794 (1998)).

"[T]he most pertinent consideration" in this case is "whether misrepresentation rendered [ ] consent coerced." *Blackman*, 377 Wis. 2d 339, ¶ 60. The next most important factor is "whether the police informed the defendant that [s]he could refuse consent." *Artic*, 327 Wis. 2d 392, ¶ 32. Officer Malueg did not inform Ms. Leach she could refuse consent. To the contrary, he said he would search her regardless,

conveying that she in fact could not refuse consent and had no right to refuse consent. Ms. Leach's consent here was not the result of "an essentially free and unconstrained choice." *Schneckloth*, 412 U.S. at 225. Instead, it was the product of Officer Malueg's false claim of authority.

"Acquiescence to an unlawful assertion of police authority is not equivalent to consent." *State v. Wilson*, 229 Wis. 2d 256, 269, 600 N.W.2d 14 (Ct. App. 1999) (citing *Bumper v. North Carolina*, 391 U.S. 548–49 (1968). "This includes when the police incorrectly assert that they have a right to conduct a warrantless search, or indicate that they are going to search absent legal authority to do so, as opposed to asking for permission to search." *State v. Johnson*, 2007 WI 32, ¶ 16, 299 Wis. 2d 675, 729 N.W.2d 182.

For example, in *Bumper v. North Carolina*, 391 U.S. at 550, the police claimed to have a warrant to search a home, and the occupant permitted the search. There was no proof of any valid warrant. So the United States Supreme Court held that there was no lawful consent. The consent was "no more than acquiescence to a claim of lawful authority." And "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.*

In sum, Ms. Leach's acquiescence to Officer Malueg's false claim of legal authority to search was not valid consent. With no legal authority to search, and no valid consent, this was an unreasonable Fourth Amendment intrusion.

D. Ms. Leach's motion to suppress should have been granted.

Ms. Leach has demonstrated a Fourth Amendment violation. The remedy for a Fourth Amendment violation is exclusion of the evidence obtained therefrom. *Wong Sun v. United States*, 371 U.S. 471 (1963). The first piece of evidence obtained by exploitation of the illegality was the marijuana pipe. That evidence led to Ms. Leach's statement admitting that she had used marijuana recently (presumably from that pipe), field sobriety tests and, ultimately, a blood draw. This derivative evidence was discovered by exploitation of the Fourth Amendment violation; it is "taint[ed]" and must also be excluded. *See id.* at 488; *see also*, *State v. Dearborn*, 2010 WI 84, ¶ 15, 327 Wis. 2d 252, 786 N.W.2d 97 (the exclusionary rule applies to both tangible and intangible evidence). Ms. Leach's motion to suppress should have been granted.

Ms. Leach should, in turn, be permitted to withdraw her plea. When a defendant enters a plea in a case where a motion to suppress should have been granted, the defendant is entitled to withdraw the plea if the defendant would not have pled as she did had the motion to suppress been granted.

State v. Semrau, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376. Here, had Ms. Leach's motion to suppress been granted, all of the State's evidence in this case would have been excluded. The State cannot show that Ms. Leach would have pled as she did had her motion to suppress been granted.

CONCLUSION

Ms. Leach respectfully asks the Court to reverse the circuit court and remand with directions to grant Ms. Leach's motion to suppress and to permit her to withdraw her plea.

Dated this 13th day of December, 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 2,662 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 December, 2019.

Signed:

COLLEEN MARION
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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.

Dated this 13th day of December, 2019.

Signed:

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A P P E N D I X

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TO
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