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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2020AP000286-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHONDRELL EVANS,

Defendant-Appellant.

Appeal of an Order Denying A Suppression Motion
and of A Judgment of Conviction
Entered In Dane County Circuit Court,
the Hon. Susan M. Crawford, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

This appeal involves two Fourth Amendment issues arising from an investigatory stop:

1. Whether a reasonable person would not have felt free to leave when two police cruisers flanked the Black defendant's vehicle from either side and shone their spotlights on the defendant's vehicle, and a barrier prevented the defendant from pulling forward.

2. Whether a couple leaving a hotel early in the morning without luggage and then returning a short time later created reasonable suspicion that a crime has been or will be committed.

The circuit court denied a motion to suppress raising these issues.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant does not request oral argument. Publication is unlikely to be warranted, as the case involves well-settled legal principles.

STATEMENT OF THE CASE

On May 23, 2018, the Dane County District Attorney's office filed a criminal complaint charging Defendant-Appellant Shondrell Evans with possession of a firearm by a felon, Wis. Stat. § 941.29, and carrying a concealed weapon, Wis. Stat. § 941.23(2). (R. 2). According to the criminal complaint,

police searched a car being driven by Evans, who is Black, and found a gun in the glove compartment. (R. 2:1-2). Evans had previously been convicted of felony theft. (R. 2:3).

On August 13, 2018, Evans moved to suppress all evidence gathered during the search of the vehicle, on the grounds that the police did not have reasonable suspicion to perform an investigatory stop. (R. 18:1-2).

The court held an evidentiary hearing on the suppression motion on October 16, 2018. (R. 39:1; App. 101). Officer Logan Brown of the Town of Madison Police Department testified first for the State. (R. 39:4; App. 104). At approximately 2:30 in the morning of March 8, 2018, Officer Brown was on patrol in his squad car by the Clarion Suites Hotel. (R. 39:5-6; App. 105-06). Officer Brown saw a man (later identified as Evans) and a woman leave the hotel from the front door, enter a motor vehicle, and then drive off the parking lot. (R. 39:6; App. 106). Officer Brown thought that it was "significant" that the two people were leaving the hotel room at 2:30 in the morning without any luggage, because "[g]enerally people don't" do that. (R. 39:17; App. 117). Officer Brown decided to follow the pair in his squad car. (R. 39:6; App. 106).

The car drove to a parking lot of a nearby apartment complex. (R. 39:7; App. 107). Officer Brown continued and pulled into the next parking lot on the road. *(Id.)* After about one minute, the other

car left the parking lot, and returned to the hotel parking lot. (R. 39:7-8; App. 107-08).

Officer Brown observed that the vehicle remained running and that the occupants did not immediately exit it upon returning to the hotel. (R. 39:12; App. 112). Officer Brown then contacted his partner, Officer Hoffman, who was in another squad car down the road, and they decided to make contact with the vehicle. (*Id.*)

The parking lot was organized in the usual fashion, with parking stalls perpendicular to the flow of traffic. (R.21; App. 172). The defendant's car was pulled, front first, into a parking stall.[1] In front of the defendant's vehicle was a curb and then a median. (R. 39:31-32; App. 131-32). Officer Hoffman's squad cam shows that another vehicle was parked in the stall next to the passenger side of the vehicle. Officer Brown's squad car was on the driver side of the defendant's vehicle, but perpendicular. That is, the front of Officer Brown's vehicle was facing, and level to, Evans' driver side door. Officer Brown's vehicle

[1] The State introduced a disk (R. 23) that contained three videos depicting the orientation of the vehicles at the time of the putative stop: one from Officer Hoffman's body cam, one from Officer Brown's squad cam, and one from Officer Hoffman's squad cam. (R. 39:19-23). Specifically, the State played 2:37:08 – 2:39:19 of Officer Hoffman's body cam; 2:40:18 - 2:40:34 of Officer Brown's squad cam; and 2:40:31-43 of Officer Hoffman's squad cam. (*Id.*) The description of the vehicles' orientation here is based on the officer testimony as well as the indicated portions of the video evidence.

was thus straddling multiple empty parking stalls, and not in the regular traffic lane.

Officer Hoffman's vehicle was behind the car parked next to the passenger side of Evans' vehicle. Unlike Officer's Brown's cruiser, Officer Hoffman's vehicle was in the lane of traffic. (R. 23). Notably, both the regular headlights and the officers' squad cars overhead spotlights were shining on the defendant's car. (R. 23; 39:27-28, 39; App. 127-28, 39).

Below is a still from Officer Hoffman's squad cam showing the orientation of the vehicles. (R. 23: Hoffman Squad at 2:40:37).

Officer Brown exited his patrol car and walked up to the driver side door. (R. 39:14; App. 114). Officer Brown saw smoke inside the vehicle and smelled marijuana, though the windows were up. (R. 39:14-17; App. 114-17). Officer Brown made contact with the driver of the vehicle. (*Id.*) Officer Brown confirmed that the driver was the man he had earlier seen leave the hotel and entered the vehicle, and

identified him as Evans. (*Id.*) Officer Brown then made him leave the car so that he could conduct the search that was the subject of the motion. (R. 39: 23; App. 123).

After hearing argument, the court denied the motion to suppress. (R. 39:65-69; App. 165-69). The court held that Evans was not seized until the officers began questioning him, after they had smelled marijuana and thus had probable cause to arrest him. (R. 39:68; App. 168). The court also held that even if the seizure occurred at the time that the officers surrounded Evans with their squad cars, there was no Fourth Amendment violation.

> The court also believes that even prior to that point of seizure, based on the officer's observations of the individuals coming and going at that hour from the hotel parking lot in a way that seemed unusual and not explainable in a high crime area, that there was suspicious conduct that was happening that…the officer would have had reason to stop the defendant to resolve the ambiguity of that situation, notwithstanding the fact that there could have been innocent explanations for that conduct.

(R. 39:68-69; App. 168-69).

Evans ultimately pleaded guilty to possession of a firearm as a felon, and was sentenced to three years of probation with 60 days of conditional jail. (R. 35). This appeal follows.

ARGUMENT

I. A reasonable person would not have felt free to leave when two police cruisers flanked the Black defendant's vehicle from either side and shone their spotlights on the defendant's vehicle, and a barrier prevented the defendant from pulling forward.

Recent tragedies have brought to the fore why so many Black Americans reasonably believe that a failure to heed to the whims of law enforcement may be fatal. The senseless deaths of George Floyd and Breonna Taylor – and before them, Botham Jean, Freddie Gray, Michael Brown, Eric Garner, and Tamir Rice – at the hands of the police demonstrate why it is quite reasonable for a Black person to be scared that misinterpreting a police officer's instructions may result in their death. Indeed, for generations Black parents have felt compelled to give their sons "The Talk": a warning that as young Black men, they may be racially profiled by the police; and that if they are not careful, innocuous police encounters may turn deadly. *Utah v. Strieff*, 579 U.S. __, 136 S.Ct. 2056, 2070 (2016) (J. Sotomayor, dissenting).[2]

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[2] For popular accounts of "The Talk," see Saundra Young, *Depths Shape How Black Parents Navigate "The Talk"*, WebMD, June 8, 2020, https://www.webmd.com/mental-health/news/20200608/deaths-shape-how-black-parents-navigate-the-talk; German Lopez, *Black Parents Describe "The Talk" They Give To Their Children About Police*, Vox, August 8,

It is with these unfortunate circumstances in the backdrop that the Court must apply the test[3] for whether a Fourth Amendment seizure occurred in this case: "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Cty. of Grant v. Vogt*, 2014 WI 76, ¶ 20, 356 Wis. 2d 343, 356, 850 N.W.2d 253, 259 (*quoting United States v. Mendenhall,* 446 U.S. 544, 554 (1980)). Here, it would be eminently reasonable for a young Black man such as Evans to conclude that he was not "free to leave," in either a legal or a practical sense, when the officers flanked his vehicle in a pincer formation.

The Wisconsin statutes empower law enforcement officials to detain a person for questioning "when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime," Wis. Stat. § 968.24, and to arrest a person when "[t]here are reasonable grounds to believe that the person is committing or has committed a crime." Wis. Stat. § 968.07(1)(d).

2016, https://www.vox.com/2016/8/8/12401792/police-black-parents-the-talk; and Geeta Gandbhir and Blair Foster, *A Conversation With My Black Son*, N.Y. Times, March 17, 2015, https://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html.

[3] The historical facts of the police encounter are not in dispute, only the circuit court's application of them to the constitutional standard. Accordingly, review is de novo. *Vogt*, 2014 WI 76, ¶ 17.

When the officers pulled up on either side of Evans, it would have been reasonable to conclude that the officers were exercising their authority under either statute. Officer Brown ignored the parking stall markings and pointed his cruiser and spotlight directly at Evan's driver-side door.

(R. 23: Hoffman Squad at 2:40:37).

Evans could reasonably interpret this flouting of the parking lot rules as a "show of authority," not as a solicitation for a friendly chat. *Vogt*, 2014 WI 76, ¶ 25. Likewise, the use of a spotlight unique to police cruisers – and reminiscent of the stereotypical interrogation lamp -- In addition, Officer Hoffman's cruiser was on the other side and behind Evans's vehicle, suggesting that he was there to support what he believed would be a confrontation, not just a conversation. In short, Evans could reasonably believe that the officers intended to exercise their statutory authority to detain or arrest Evans based on their suspicions that he was involved in criminal activity.

Importantly, this belief would be reasonable even to a wholly innocent person. After all, even when an officer's suspicions are mistaken, there is no Fourth Amendment violation if the mistake of fact is reasonable. *State v. Houghton*, 2015 WI 79, ¶ 75, 364 Wis. 2d 234, 266, 868 N.W.2d 143, 159. Thus, for all an innocent person knows, the approaching officers are lawfully attempting to question or arrest him or her based on some mistake of fact not yet known to that person.

In addition, a reasonable person, knowledgeable in the law, will know that there is no bright line rule for when a Fourth Amendment seizure has occurred, and will err on the side of assuming that they have in fact been seized. Similarly, real world studies have shown that the average citizen believes that they are not free to leave in situations where judges have theorized that they would feel free to leave. *See* David K. Kessler, *Free To Leave: An Empirical Look at the Fourth Amendment's Seizure Standard,* 99 J.Crim. L. & Criminology 51 (2009).

Moreover there are serious legal consequences for failing to abide by a police officer's lawful order to stop a vehicle. For example, fleeing or eluding a police officer is a Class I felony. Wis. Stat. §§ 346.04(3) and 346.17(3)(a). The felony is committed when a person (1) operates a motor vehicle "after having received a visual or audio signal from a… marked...police vehicle" and (2) "knowingly flee[s] or attempt[s] to elude any officer by" either (a) "willful

or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle [or] … the law enforcement officer, other vehicles, or pedestrians" or by (b) increas[ing] the speed of the operator's vehicle." Wis. Stat. § 346.04(3). *See also* Wis JI-Criminal 2630.

Here, Evans could reasonably conclude that the spotlights from the police cruisers were a "visual … signal" under the statute, and that by "increas[ing] the speed" of his vehicle – that is, by going from parked to trying to drive in reverse between the two cruisers – he committed the second predicate act for the crime of eluding. Wis. Stat. § 346.04(3). Similarly, a reasonable person could be worried that by attempting to maneuver his vehicle around the officers, he would be seen as trying to "interfere with or endanger the operation of the police vehicle[s] [or] … the law enforcement officer[s]." Wis. Stat. § 346.04(3).

In sum, a reasonable person could conclude in these circumstances that as a matter of law they were not free to leave. Importantly, the standard is whether a reasonable person would believe that they were not free to leave; the standard is not whether a reasonable person would believe that they were free to leave. *Vogt*, 2014 WI 76, ¶ 20. In other words, if reasonable minds could differ on whether, under the circumstances, they were free to leave, a Fourth Amendment seizure has occurred. This standard was met here.

But even if a reasonable person correctly concluded that *legally* they were free to leave, they would have to strongly consider the practical consequences of attempting to maneuver their vehicle around two police cruisers. A reasonable person would have to be concerned that if they came too close to officers or drove too quickly, the officers would view that as an act of aggression, and defend themselves with their firearms. And a Black man such as Evans would also have to be concerned that a police officer's biases, subconscious or otherwise, would make the officer quick to pull the trigger.

A comparison to the facts of the *Vogt* case is instructive. In a 5-2 opinion that even the majority conceded was "a close case," the court decided that an officer pulling up to the only car in a parking lot early Christmas morning, and knocking on the window, was not a "seizure." *Vogt*, 2014 WI 76, ¶¶ 3-5. One of the importance factors in the court's decision was that "Vogt was not subject to the threatening presence of multiple officers." *Id*. at ¶ 53. In addition, the cruiser parked behind Vogt's vehicle, so Vogt's vehicle could pull forward and away from the officer. *Id*. at ¶¶ 6, 42.

Here, there were two officers, and for Evans to avoid them he would have had to have, in reverse, maneuvered past both of their squad cars. In addition, Officer Brown's cruiser was astride the marked parking stalls, in violation of the parking lot rules, and pointed directly at Evans sitting in the driver's seat, an aggressive "show of authority."

Further, unlike the squad car in *Vogt*, the squad cars here had overhead spotlights shining on Evans's vehicle. *Id*. at ¶ 6. As discussed above, the use of a spotlight not available to "normal" cars was a "show of authority," and signaled to Evans that he should not move.

The bottom line is that a reasonable person would believe that they were not free to go when their car is suddenly flanked by two squad cars with their spotlights shining on their car. A person could reasonably believe that they would face significant legal consequences if they did attempt to leave. And a person, especially a Black person, could reasonably believe that they would be risking their own life by attempting to leave. For these reasons, a Fourth Amendment seizure occurred when the officers flanked Evans's vehicle.

II. The officers lacked reasonable suspicion that a crime had or would have been committed.

The Fourth Amendment does not allow a police officer to detain a person just to satisfy the officer's curiosity about "unusual" activity. In order to conduct an investigatory stop, "police must have reasonable suspicion that a *crime* or violation has been or will be committed; that is, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Houghton*, 2015

WI 79, ¶ 21 (citation and quotation marks omitted) (emphasis supplied).

At no point during the suppression hearing does either officer, the prosecutor, or the judge articulate what crime they thought Evans had been or was about to commit, let alone "point to specific and articulable facts" supporting such a conclusion. *Id*.

The closest the State came to meeting this standard was when Officer Brown testified that he thought that it was "significant" that Evans and his companion were leaving the hotel at 2:30 in the morning without any luggage, because "[g]enerally people don't" do that. (R. 39:17; App. 117).

Thankfully, a person's Fourth Amendment rights do not turn on a police officer's conception of what people "generally" do or don't do. People in this country can act in "unusual" ways without fear of being subjected to an investigatory stop just because a police officer thinks it's not normal. Instead, the question is whether the target's actions suggest *criminal* activity.

There are of course numerous innocent explanations for why a couple would leave a hotel at 2:30 in the morning without luggage and return a short while later. For instance, they could be employees taking a break during the graveyard shift. Or, they could have been hotel guests who left a wallet or purse at a nearby friend's house, and ran over to retrieve it. Regardless, it was incumbent upon

the state to articulate what criminal activity these acts demonstrated and why, and the state failed to meet its burden.

The circuit court relied on *State v. Young*, 2006 WI 98, ¶ 1, 294 Wis. 2d 1, 10, 717 N.W.2d 729, 734 to conclude that the officers had reasonable suspicion to perform an investigatory stop because they are entitled to investigate "unusual" activity in high-crime areas. (R. 39:68-69; App. 168-69). The court read *Young* too broadly. Indeed, the *Young* decision illustrates the shortcomings in this case.

In *Young*, the arresting officer explained that there was a high incidence of drug use and drunk driving in the area, and that the defendant's actions were consistent with someone consuming drugs or alcohol in their car. 2006 WI 98, ¶¶ 61-63. The officer testified that "there was a correlation between people remaining in their cars for an extended time and the use of alcohol and narcotics in those cars" and observed "[f]ive people sitting in a car for about ten minutes, around the corner from a major bar, shortly before midnight." *Id.* It was thus reasonable for the officer to suspect that the occupants of the car were illegally consuming drugs or alcohol. *Id.*

Thus, what was present in *Young* was lacking here: "specific and articulable facts" supporting a "reasonable suspicion that a crime or violation has been or will be committed." *Houghton*, 2015 WI 79, ¶ 21. Again, the officers did not explain what crime they suspected, or how Evans's activities would cause

them to suspect him of such crimes. Because the officers lacked reasonable suspicion to conduct the investigatory stop, the court should have grant the motion to suppress evidence, and suppressed all evidence derived from the stop.

CONCLUSION

For the reasons stated above, the order denying Evans's motion to suppress should be reversed and the judgment of conviction should be vacated.

Dated and filed by U.S. Mail this 25th day of June, 2020.

Respectfully submitted,

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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 3,111 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 and filed by U.S. Mail this 25th day of June, 2020.

Signed:

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APPENDIX

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