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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

REPLY BRIEF

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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.

The State's response leaves unaddressed many of the reasons articulated in Evans's brief-in-chief for why a reasonable person would not feel free to leave when two police cars rolled up to his car from either side with their spotlights trained on him.

For instance, Evans pointed out that a reasonable person could conclude that the spotlights were "a visual or audio signal from a… marked...police vehicle" and that he would be guilty of the crime of eluding a police officer if he attempted to drive away. Wis. Stat. §§ 346.04(3) and 346.17(3)(a). (Evans Br. at 9-10). The State does not dispute that this is a reasonable application of Section 346.04(3) to the facts, conceding the point. "The State does not directly respond to [the] argument, and therefore concedes the issue. We will not abandon our neutrality to develop arguments for the parties, so we take the [respondent's] failure to brief the issue as a tacit admission…." *State v. Anker*, 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 855 N.W.2d 483 (citation omitted).

The State does posit that "[i]f the officers had wished to demonstrate that Evans was not free to leave, they could have easily … turned their flashing lights on." (Response Br. at 13). However, it is not the officers' subjective intent that matters, but whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 554 (1980).

Further, while the officers could have activated their emergency lights, this simply means that the officers had more than one way to signal that a person was not free to leave. Again, under Section 346.04, operators of a motor vehicle must stop their vehicles at *any* "visual" signal from a marked police car. The crime of eluding is not limited to those who ignore a police officer's flashing red and blue lights.

The legal obligation to yield the right of way to an emergency vehicle is similarly triggered not by an officer's flashing lights, but by an "authorized emergency vehicle giving audible signal by siren[.]" Wis. Stat. § 346.19(1). In fact, the only legal significance of a police officer's flashing red and blue lights is that when activated they exempt the vehicle from various rules of the road, such as the speed limit, when engaged in an authorized activity. Wis. Stat. § 346.03(3).

Thus, the use of flashing red and blue lights has no greater legal effect regarding a vehicle operator's obligation to stop than any other "visual

signal." And, as discussed in Evans's brief-in-chief, a person could reasonably conclude that the spotlight shining on his or her car was a "visual signal" that the person should stay in that spot, *i.e.* that they were not free to leave. (Evans Br. at 8-12).

Nor does the State challenge Evans's argument that as a Black man, he could reasonably be concerned about the practical consequences of misinterpreting the officers' actions and attempting to maneuver between the two squad cars. (Evans Br. at 11-12). As discussed in Evans's brief-in-chief, for decades young Black men have been warned by their parents that a failure to abide a police officer's instructions may have lethal consequences. (Evans Br. at 6-7). Evans could reasonably conclude that if he attempted to drive in reverse between the two police vehicles would be viewed as an aggressive act that the officers would respond to with force.

The State does offer that the squad cars did not block Evans in. (State Br. at 13). While physically preventing a person from moving is sufficient to create a seizure, it is not necessary. A "person is 'seized' only when, by means of physical force *or a show of authority*, his freedom of movement is restrained." *Mendenhall*, 446 U.S. at 553 (emphasis supplied). As discussed in Evans's brief-in-chief, the police flexed their muscles and showed their authority by (a) arriving in two squad cars, (b) shining spotlights not found on civilian cars on Evans's car, and (c) ignoring the parking lot line markings in order to point the squad car and the

spotlight directly at Evans as he was sitting behind the steering wheel. (Evans Br. at 8-9). A reasonable person could conclude that this was a signal that they were not free to leave.

Finally, the State repeatedly makes a subtle but important misstatement of the relevant legal standard, asserting that there is no seizure if a reasonable person would have felt free to leave. (State Br. at 13). However, the Supreme Court has repeatedly stated that "a person has been 'seized' … if … a reasonable person would have believed that he was not free to leave." *Mendenhall,* 446 U.S. at 554; *see also Brendlin v. California*, 551 U.S. 249, 255 (2007) (collecting cases).

This distinction is significant, because if reasonable minds could differ on whether the person was free to leave, the tie goes to the defendant. That is, if a reasonable person would believe that he or she was not free to leave, a seizure has occurred, full stop. It does not matter that a reasonable person could also conclude that they were free to leave. The idea that reasonable minds can reach different conclusions when confronted with the same law and facts is common in life and in the law. For example, an appellate court will uphold a circuit court's discretionary decision if "there exists a reasonable basis for the circuit court's determination … even if the reviewing court would have reached a different conclusion than the circuit court." *Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 191, 557 N.W.2d 67, 81 (1996)

(citations and quotation marks omitted). When reasonable minds can differ over the question of whether a person was free to leave a police encounter, that person was seized.

For these reasons, and the reasons set out in Evans's brief-in-chief, a Fourth Amendment seizure occurred when the two squad cars flanked Evans's car and shined their spotlights on Evans.

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

The State's response brief significantly mischaracterizes Officer Brown's testimony. The State asserts that Officer Brown "testified that the conduct he observed Evans engage in was consistent with his drug cases[.]" (Response Br. at 4, 9, *citing* R. 39:18). This is false.

Here is Officer Brown's actual testimony:

Q. Have you made drug arrests in this area?

A. Yes, I have.

Q. And have you observed conduct consistent with your drug cases?

A. Yes, I have.

(R.39:18).

The prosecutor's use of the present perfect verb tense ("Have you observed?") instead of the simple past (*e.g.*, "Did you observe?") indicates that the

prosecutor was referring to something in the indefinite past, not a specific incident.[1] That is, the prosecutor was asking whether Officer Brown had *ever* "observed conduct consistent with [his] drug cases" in the area, not whether Evans's *specific* conduct was consistent with drug activity. Likewise, Officer Brown's use of the present perfect rather than the simple past in his response – "Yes, I have" instead of "Yes, I did" – indicates that Officer Brown was referring to the indefinite past, not to Evans's specific conduct.

At no point does Officer Brown testify, as the State claims, "that the conduct he observed Evans engage in was consistent with his drug cases[.]" (Response Br. at 4, 9.) The closest Officer Brown comes to such testimony is claiming that the *time* he arrested Evans was consistent with the time that he makes other drug arrests.

> **Q.** Is the time of day that this happened significant to you at all?
>
> **A**. Yes, it is.
>
> **Q**. Why?
>
> **A.** It's consistent with the time frame in which I make a lot of my drug arrests, and it's just unusual for, given the circumstances of this incident, for people to be up and moving at that time of the day.

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[1] https://www.grammarly.com/blog/present-perfect-tense/

(R. 39:18). Thus, Officer Brown does *not* testify that Evans's conduct – leaving the hotel, going to a nearby apartment, and then returning – was consistent with conduct Officer Brown observed in his drug cases. The State's repeated assertion that Officer Brown testified that this specific conduct was consistent with his drug cases is simply false. (State Br. at 8-9).[2]

It should go without saying that being "up and moving" early in the morning does not create "reasonable suspicion" that a crime is afoot. Otherwise, the police can pull over every car on the road at 2:30 in the morning simply because it is "unusual" for people to be "up and moving" that time of day. However, it must be said, because the State justifies the seizure with Officer Hoffman's claim that "not really anything else … goes on in that area at that time of day" other than criminal activity. (Response Brief at 8, *quoting* R. 39:45). Thus, according to the State's logic, the State had reasonable suspicion to detain Evans as soon as he got in his car after leaving the hotel. After all, it was "unusual" to be "up and moving" at that time of day, and nothing goes on other than criminal activity.

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[2] It should be noted that earlier this year the Seventh Circuit granted habeas relief to a Wisconsin prisoner where the State's brief had "overstated perhaps the most material facts in the case." *Cook v. Foster*, 948 F.3d 896, 903 (7th Cir. 2020). The Seventh Circuit admonished that the "State shoulders a weighty obligation to play entirely straight with facts that affect a person's liberty. Too much is at stake for all involved to see what we did here from the State." *Id.* at 904 n. 1.

This would be an absurd result, eliminating Fourth Amendment protections for anyone who happens to be in a so-called "high crime area" in the early morning hours. This court has rejected this kind of thinking.

> [M]any, many folks, innocent of any crime, are by circumstances forced to live in areas that are not safe—either for themselves or their loved ones. Thus, the routine mantra of "high crime area" has the tendency to condemn a whole population to police intrusion that, with the same additional facts, would not happen in other parts of our community.

State v. Gordon, 2014 WI App 44, ¶ 15, 353 Wis. 2d 468, 479, 846 N.W.2d 483, 489.

Gordon also explains that while it is true that otherwise innocent acts may "trigger an objective 'reasonable suspicion' to permit the further investigation that [*Terry v. Ohio*, 392 U.S. 1 (1968)] and its progeny permit, there must be other circumstances that prime that trigger." *Id*. at ¶ 13. 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." *State v. Houghton*, 2015 WI 79, ¶ 21, Wis. 2d 234, 868 N.W.2d 143 (citation and quotation marks omitted) (emphasis supplied). (*See* Evans Br. at 9). The "circumstances must not be so general that they risk sweeping into valid law-enforcement

concerns persons on whom the requisite individualized suspicion has not focused." *Gordon*, 2014 WI App 44, ¶ 12.

The *Gordon* court observed that "many folks, most innocent of any nefarious purpose, may occasionally pat the outside of their clothing to ensure that they have not lost their possessions." *Gordon*, 2014 WI App 44, ¶ 17. The court then concluded that "the additional facts here—high crime area and recognizing the police car as a police car—are far too common to support the requisite individualized suspicion here." *Id.* Likewise, simply being "up and moving" in a high crime area in the early morning hours is too general to support reasonable suspicion of a crime.

Finally, the State claims that there is no authority for Evans's claim that the State must articulate during the suppression hearing what crime it was investigating when it made the seizure. On the contrary, Evans quoted *Houghton*'s plain statement that "police must have reasonable suspicion that a crime or violation has been or will be committed" and that "the police officer must be able to point to specific and articulable facts." (Evans Br. at 9). This admonition to be "specific" precludes the state from just hand-waving and asserting a general suspicion of "criminal activity."

In addition, Evans explained how in the case relied upon by the motion judge, *State v. Young*, 2006 WI 98, ¶ 1, 294 Wis. 2d 1, 10, 717 N.W.2d 729,

734, the officer provided the specificity lacking here. (Evans Brief at 14-15). The officer testified that the specific conduct he observed – five people sitting in a car outside a local bar for an extended period of time – "correlated" to specific crimes he had investigated earlier – drunk driving and illegal narcotics use. *Id*.

Similarly, in the case relied upon by the state, *Terry*, while the defendant's actions of walking back and forth in front of a store and peering in the windows were not criminal, the officer explained that he believed that the defendant was conducting reconnaissance in preparation for robbing the store. 392 U.S. at 8. Accordingly, there is clear legal authority for the proposition that the officers making the seizure must articulate what crime they were investigating and why when they made the investigatory stop.

Because the officers lacked reasonable suspicion to conduct the investigatory stop, the court should have granted the motion to suppress evidence, and suppressed all evidence derived from the stop.

CONCLUSION

For the reasons stated above and in Evans's brief-in-chief, 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 15th day of September, 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 2,342 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 this 15th day of September, 2020.

Signed:

Thomas B. Aquino
Assistant State Public Defender