

FILED
08-10-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2020AP000372 CR

JALEN F. GILLIE,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order from
Milwaukee County Case No. 2018CM4005 Denying Defendant's
Motion to Suppress Evidence entered by the Honorable Daniel
J. Gabler, Circuit Court, Branch 29, Milwaukee County

REPLY BRIEF OF DEFENDANT-APPELLANT

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215
Mayer Law Office, LLC
120 N. Main Street, Suite 360
West Bend, WI 53095
262-338-1415

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

ARGUMENT.....1

I. THE OFFICER DID NOT HAVE REASONABLE SUSPICION TO BELIEVE THAT MR. GILLIE’S VEHICLE’S WINDOWS WERE ILLEGALLY TINTED IN ORDER TO CONDUCT A TRAFFIC STOP.....1

II. THE OFFICER DID NOT HAVE REASONABLE SUSPICION TO CONDUCT A PROTECTIVE SEARCH OF MR. GILLIE’S VEHICLE.....4

CONCLUSION.....13

CERTIFICATION.....14

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12).....15

TABLE OF AUTHORITIES

Wisconsin Cases

<i>State v. Bailey</i> , 2009 WI App 140, 321 Wis. 2d 350, 773 N.W.2d 488.....	6-8
<i>State v. Johnson</i> , 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182.....	5-7, 9-12
<i>State v. Kyles</i> , 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449.....	12
<i>State v. Moretto</i> , 144 Wis. 2d 171, 423 N.W.2d 841(1988).....	4-5
<i>State v. Popke</i> , 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569.....	2

United States Supreme Court Cases

<i>Michigan v. Long</i> , 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).....	7
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	6-7

ARGUMENT**I. THE OFFICER DID NOT HAVE REASONABLE SUSPICION TO BELIEVE THAT MR. GILLIE'S VEHICLE'S WINDOWS WERE ILLEGALLY TINTED IN ORDER TO CONDUCT A TRAFFIC STOP.**

Officer Jose Rivera testified at the motion hearing that he pulled Mr. Gillie's vehicle over for suspected illegal window tint. (24:8.) Yet he never testified to any details regarding the windows, what he observed or the reason he believed the windows were illegally tinted.

As noted by the State in its brief, there is window tinting that is legal. (Brief of Plaintiff-Respondent, p. 6.) Wisconsin statutes §§ 305.32(4)(b) and 305.32(5)(b) permit tinting that is performed by the vehicle's manufacturer during manufacturing. These statutes also permit window tinting as long as it allows a certain percentage of light to pass through it.

Officer Rivera's testimony never explained how he distinguished Mr. Gillie's vehicle's windows as being illegally tinted versus legally tinted. His mere hunch that the windows were illegally tinted without any articulable facts does not support reasonable suspicion to conduct a traffic stop. Reasonable suspicion cannot be based on an "officer's inchoate and unparticularized suspicion or

hunch.” *State v. Popke*, 2009 WI 37, ¶ 23, 317 Wis. 2d 118, 132, 765 N.W.2d 569, 576.

“The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *Id.* Officer Rivera’s testimony did not include any specific and articulable facts regarding Mr. Gillie’s vehicle’s windows. The fact that Officer Rivera’s non-specific hunch was later confirmed through testing, *after the traffic stop*, is not sufficient to find reasonable suspicion for the traffic stop.

The State also argued that it was clear that the windows were so dark as to obstruct the officer’s view of the inside of the vehicle because Officer Rivera ordered the driver to lower his window so he could see properly. (Brief of Plaintiff-Respondent, p. 8.) However, Officer Rivera never testified as to what he could or could not see inside of the vehicle with the windows up. He never indicated that he could not see anything inside the vehicle.

Officer Rivera only testified that upon approaching Mr. Gillie’s vehicle, he ordered the occupants to lower the windows down so he could see. (24:9.) Contrary to the

State's claim, it is not clear from this un-descriptive statement that the windows were so dark as to obstruct the officer's view of inside the vehicle.

The State further asserted that Officer Rivera's body camera video showed that the windows were so dark that one cannot clearly see the driver. (Brief of Plaintiff-Respondent, p. 9.) In reviewing the video, you can only see Mr. Gillie's vehicle's windows from a distance for a matter of seconds. (Motion Hearing Exhibit 1-CD.) Officer Rivera then immediately pulled Mr. Gillie's vehicle over and immediately asked Mr. Gillie to roll his windows down, which he did. (*Id.*)

The vehicle's windows are outside of the camera's view after Mr. Gillie is pulled over until Officer Rivera is standing next to the vehicle, at which time the windows were already down. (*Id.*) So it is not clear from the video what was visible inside of the vehicle.

Officer Rivera did not have reasonable suspicion to conduct a traffic stop of Mr. Gillie's vehicle because his testimony and body camera video lacked specific and articulable facts to support a finding that Mr. Gillie's vehicle's windows were tinted illegally.

II. THE OFFICER DID NOT HAVE REASONABLE SUSPICION TO CONDUCT A PROTECTIVE SEARCH OF MR. GILLIE'S VEHICLE.

The State argued that Wisconsin statute § 968.25 "permits an officer to search the passenger compartment of a vehicle for weapons where the individual who recently occupied the vehicle is stopped for temporary questioning under sec. 968.24, and the officer reasonably suspects that he or another is in danger of physical injury." (Brief of Plaintiff-Respondent, p. 9-10 citing *State v. Moretto*, 144 Wis. 2d 171, 174, 423 N.W.2d 841, 842 (1988)).

In *Moretto*, police were dispatched to the residence of an individual who indicated that he received a threatening phone call from Moretto. *Id.* The individual stated that Moretto threatened to "kick his ass up and down the street, that he had better have lots of cops around because he would need them." *Id.* He also indicated that Moretto had held two friends up at his apartment two weeks prior with a weapon and he heard from friends that Moretto would carry a gun or a knife. *Id.*

The individual provided police with a description of Moretto and his vehicle. *Id.* at 175. The police located a car matching the description and conducted a stop. *Id.* Police instructed Moretto, the driver of the vehicle, to step out and put his hands up. *Id.* Moretto and the

passenger of the car were patted down and nothing was found. *Id.* The officer then searched the car and found a knife. *Id.*

The Supreme Court of Wisconsin upheld the search of the vehicle finding reasonable grounds for the officer to believe that Moretto may have been harboring a weapon in his vehicle and that he posed a danger to the officer. *Id.* at 187. The court noted that the detail and substantial corroboration of the accuracy of the reporting person's information made it not unreasonable for the officer to believe the statements regarding Moretto's threat and that he was usually armed. *Id.* at 186.

In the present case, there was no report of Mr. Gillie being armed or making any threats toward anyone. Officers had no reasonable basis to believe that Mr. Gillie was dangerous or posed any threat. The fact that Mr. Gillie bent forward and reached down in his vehicle does not support a reasonable belief that the officer was in danger of physical injury and could search his vehicle. See *State v. Johnson*, 2007 WI 32, ¶ 36, 299 Wis. 2d 675, 699, 729 N.W.2d 182, 194.

The State further argued that *Johnson* was distinguishable from this case and that Wisconsin courts

have distinguished numerous cases from *Johnson*. (Brief of Plaintiff-Respondent, p. 11-12.) One of the cases cited by the State as distinguished from *Johnson* was *State v. Bailey*, 2009 WI App 140, 321 Wis. 2d 350, 773 N.W.2d 488.

In *Bailey*, an officer conducted a traffic stop of a vehicle for having darkened tint greater than the limit set by ordinance. *Id.* at ¶ 2. A backup officer arrived on scene and observed Bailey make three to five distinct and repeated kick motions with his right foot as if he were trying to hide something under the driver's seat. *Id.* at ¶ 3. An officer informed Bailey he was going to test the windows with a tint meter and asked that he step out of the vehicle, which he did. *Id.* Bailey also consented to a pat down of his person. *Id.*

One of the officers then observed a white plastic bag under the driver's seat that was partially exposed. *Id.* He thought it might contain a weapon. He asked Bailey what was in the bag to which he replied "candy." *Id.* The officer entered the car, removed the bag and felt a hard object inside. *Id.* at ¶ 4. He opened the bag and found suspected cocaine and a digital scale. *Id.*

The court in *Bailey* concluded that the search of the vehicle was permissible under *Terry v. Ohio*, 392 U.S. 1, 88

S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The court also found the case distinguishable from *Johnson* based on four key distinctions: (1) "Bailey's furtive-type movements were repeated; (2) Bailey was given a chance to explain and gave an apparently disingenuous response; (3) Bailey's stop was in a high crime area; and (4) [the officer] had experience recovering guns under similar circumstances and was genuinely concerned for his safety." *Id.* at ¶ 37.

Although *Bailey* is distinguishable from *Johnson*, *Bailey* is also distinguishable from the present case. First, *Bailey* made three to five furtive-type movements, not one, with his foot in attempts to try to hide something. *Id.* at ¶ 38. In this case, Mr. Gillie made one movement by bending forward and reaching down. (24:9.) The court in *Bailey* found that *Bailey's* persistent gesture was a "specific, articulable measure of his strong intent to hide something from the view of the police officer who was stopping him." *Id.* A factor that is not present here.

Second, when *Bailey* was given an opportunity to explain what was in the bag, he stated candy. *Id.* The court found it was reasonable for the officer to doubt the

truthfulness of that response and that it created another articulable suspicion to support the inference that Bailey was trying to hide a gun. *Id.* In the present case, Officer Rivera asked Mr. Gillie what he was reaching for and he responded "I was on the phone." (Motion Hearing Exhibit 1-CD.) Unlike Bailey's disingenuous response, Mr. Gillie's response was likely because he actually had a cell phone on his lap, which was clearly visible in Officer Rivera's body camera video (Motion Hearing Exhibit 1-CD) and Officer Rivera testified that he observed the cell phone as well. (24:16.)

Third, although the traffic stops in *Bailey* and this case involved high crime areas, the officer in *Bailey* testified that he had experience with recovery of guns in similar situations. *Bailey*, 2008 WI App at ¶ 39; (24:7.) In this case, there was no such testimony made by Officer Rivera.

The court in *Bailey* also explained that the potential of a gun under the seat was a significant safety concern because Bailey could have access to it. *Id.* at ¶ 41. Bailey was not arrested or in handcuffs at the time of the search. *Id.* Even though he was outside of the vehicle, he was free to move around. *Id.* However, in this case Mr. Gillie was

not only outside of the vehicle, he was also handcuffed at the time his vehicle was searched. (Motion Hearing Exhibit 1-CD.) Therefore, there was not a significant safety concern because he did not have access to anything inside of the vehicle.

The present case is more analogous to *Johnson*. The State argued that *Johnson* is distinguishable because in *Johnson* the reason for the traffic stop was resolved before the protective search, unlike in this case. However, that is not accurate. In *Johnson*, the defendant was stopped for having a suspended registration for an emissions violation and for failing to signal for a turn. *Johnson*, 2007 WI 32 at ¶ 2.

Although the court in *Johnson* explained that prior to the protective search Johnson gave the officer paperwork showing that he passed an emissions test and the suspended registration had been lifted, the court also explained in a footnote that it "recognize[d] that the officers noted that Johnson failed to signal a turn prior to the stop, [but] the record [did] not establish whether the officers had finished their investigation with respect to his failure to signal a turn. *Id.* at ¶ 45 and footnote 17.

Therefore, it was not clear from the record in *Johnson* whether the reason for the traffic stop had been resolved prior to the protective search. *Id.*

The State went on to argue that *Johnson* is distinguishable from the present case because unlike *Johnson*, the officers' suspicion was based on more than just the driver's furtive movement. (Brief of Plaintiff-Respondent, p. 12.) The State noted that Mr. Gillie was non-compliant with officers, the officers were experienced and well-trained, the location of the traffic stop was in a high crime area, it was dark outside and officers observed Mr. Gillie make a furtive movement toward the floorboard. (*Id.*)

However, those factors do not support reasonable suspicion for a protective search of a vehicle as most of those factors were also present in *Johnson*. In *Johnson*, the defendant was not compliant with the officers. See *Johnson*, 2007 WI 32 at ¶¶ 6, 8. Although Johnson exited his vehicle upon the officer's request, when officers reached his left pant leg during the pat down, Johnson "acted like he fell down" twice. *Id.* at ¶¶ 5, 6.

Also, after Johnson was arrested, police attempted to search his person, but he put his hand in his left pocket

and would not remove it upon the officer's request. *Id.* at ¶ 8. The officer had to conduct a focus strike by hitting Johnson's left arm to get him to remove his hand from his pocket. *Id.* Police then found a baggie of crack cocaine in his pocket. *Id.*

In the present case, Mr. Gillie complied with the officer's commands by pulling his vehicle over immediately, rolling down his windows and putting his hands up. (Motion Hearing Exhibit 1-CD.) Although he did not immediately exit his vehicle as requested because he was asking "why," he did ultimately exit the vehicle. (*Id.*) Clearly Mr. Gillie was confused as everything happened so quickly. (*Id.*) After being pulled over, within seconds, Officer Rivera was opening Mr. Gillie's door and asking him to step out of the vehicle. (*Id.*)

Additionally, just like in *Johnson*, the officer testified that based on his training and experience he believed that the driver's movement was consistent with attempting to conceal a weapon or contraband. *Johnson*, 2007 WI 32 at ¶ 3. (24:10.)

Also, the traffic stops in both *Johnson* and the present case occurred when it was dark outside. *Johnson*, 2007 WI 32 at ¶ 3. (24:19.) In *Johnson*, the area was

illuminated by street lamps. *Id.* So too in this case there were street lamps illuminated and Officer Rivera shined a spotlight from his squad car directly on Mr. Gillie.

(Motion Hearing Exhibit 1-CD.)

Further, just like in *Johnson*, the officer in this case observed the driver make one furtive movement by bending forward. *Johnson*, 2007 WI 32 at ¶ 3. (24:9.)

The only difference between *Johnson* and the present case is that Officer Rivera testified that the stop occurred in a high crime area whereas there was no such testimony by the officer in *Johnson*. (24:7.)

However, that one differing factor does not make the protective search in this case reasonable. See *State v. Kyles*, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449 (concluding officers lacked reasonable suspicion to conduct a protective search even though the stop occurred in a high crime area at night time, the suspect was unusually nervous and he refused to remove his hands from his pockets).

The protective search of Mr. Gillie's vehicle was not supported by reasonable suspicion. Therefore, the evidence obtained from the search should be suppressed.

CONCLUSION

For the foregoing reasons, Mr. Gillie respectfully requests that the Court reverse the circuit court's decision and grant his motion to suppress evidence.

Dated this 6th day of August, 2020.

Respectfully Submitted,

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215

Mayer Law Office, LLC
120 N. Main Street, Suite 360
West Bend, WI 53095
262-338-1415

CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 13 pages.

Dated this 6th day of August, 2020.

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: this electronic brief is identical in content and format to the printed form of the brief as of this date.

A copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this 6th day of August, 2020.

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215