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WISCONSIN COURT OF APPEALS  
DISTRICT I

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2020AP000489-CR

JAMES E. BROWN,

Defendant-Appellant.

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On Appeal from the Circuit Court of Milwaukee County, Case No. 2018CM3449,  
The Honorable Daniel J. Gabler, Presiding

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**REPLY BRIEF OF DEFENDANT-APPELLANT JAMES E. BROWN**

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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
ARGUMENT .....	1
I.    POLICE COULD NOT REASONABLY SUSPECT THAT MR. BROWN COMMITTED A CRIME BASED SOLELY ON HIS RESEMBLANCE TO THE VAGUE PHYSICAL DESCRIPTION PROVIDED BY THE 911 CALLER.....	1
II.   OFFICERS UNREASONABLY EXTENDED THE DURATION OF THE TRAFFIC STOP.....	3
A.   Mr. Brown raised the issue of whether officers unreasonably extended the duration of the traffic stop before the circuit court, and even if Mr. Brown had not, this Court should exercise its discretion to address the issue.....	3
B.   The stop was unlawfully extended.....	5
CONCLUSION .....	7
FORM AND LENGTH CERTIFICATION.....	9
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12).....	10
CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY .....	11

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>Cases</b>	
<i>Maclin v. State</i> , 92 Wis. 2d 323, 284 N.W.2d 661 (1979) .....	4
<i>State v. Evans</i> , 187 Wis. 2d 66, 522 N.W.2d 554 (Ct. App. 1994).....	4
<i>State v. Griffith</i> , 2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72 .....	7
<i>State v. Pendelton</i> , 2018 WI App 45, 383 Wis. 2d 602, 918 N.W.2d 128 (unpublished).....	1, 2, 3
<i>State v. Smith</i> , 2018 WI 2, 379 Wis. 2d 86, 905 N.W.2d 353 .....	6
<i>State v. Young</i> , 2006 WI 98, 294 Wis. 2d 1,717 N.W.2d 729 .....	1

## ARGUMENT

### **I. POLICE COULD NOT REASONABLY SUSPECT THAT MR. BROWN COMMITTED A CRIME BASED SOLELY ON HIS RESEMBLANCE TO THE VAGUE PHYSICAL DESCRIPTION PROVIDED BY THE 911 CALLER.**

Police stopped Mr. Brown's vehicle while he was legally driving down a public street because Mr. Brown was a black male wearing a dark-colored sweatshirt, thereby matching the vague physical description provided by a 911 caller. The State alleges that this was a "specific and articulable fact" on which police could reasonably believe that "criminal activity [was] afoot. *See State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729; (State's Br. at 6). Under the State's analysis, any black man in dark clothing driving down the street could have been seized. That simply cannot be.

The facts of this case are akin to those in *State v. Pendelton*, 2018 WI App 45, 383 Wis. 2d 602, 918 N.W.2d 128 (unpublished). In *Pendelton*, police officers responded to a dispatch involving suspicious persons around 1:34 a.m. *Id.*, ¶¶ 5-6. The caller reported observing two suspicious males, one of whom was wearing a black hoodie, who appeared to be looking in vehicles in a church parking lot or loitering in the area. *Id.* The caller provided no other physical descriptors of the suspicious persons.

When officers arrived at the church, they observed a black male, later identified as Marquis Lakeith Pendelton, in dark clothing, who appeared to be exiting the church parking lot and moving through the nearby alley. *Id.*, ¶ 7. The

police followed Mr. Pendelton through the alley. *Id.*, ¶ 8. They then asked him to stop, but Mr. Pendelton continued walking. *Id.*, ¶ 9. Police then asked Mr. Pendelton to stop a second time. Mr. Pendelton complied with the instruction and began walking towards the police. *Id.* As he did so, Mr. Pendelton made a motion that led police to believe he may have been concealing contraband or weapon. *Id.*, ¶ 11. They patted him down and discovered a weapon. *Id.*

This Court concluded that when the police told Mr. Pendelton to stop, they lacked articulable facts to support reasonable suspicion for the seizure, thereby violating Mr. Pendelton's Fourth Amendment rights. *Id.*, ¶¶ 25-32.

Mr. Pendelton's only resemblance to the 911 caller's description of the suspicious person was that they were both men wearing dark-colored clothing in a closed church parking lot around 1:30 a.m. Consequently, this Court concluded that under the totality of the circumstances at the time of the seizure, the police did not have reasonable suspicion to stop Mr. Pendelton, and the evidence of the gun taken from his person was the fruit of an illegal seizure and should have been suppressed.

Here, the connection between Mr. Brown and the 911 caller's report is even more attenuated than the connection between Mr. Pendelton and the 911 caller's report. Like Mr. Pendelton, Mr. Brown was a male wearing dark clothing, consistent with the 911 caller's report. (R. 33:9; App. 9.) While police did have one additional physical descriptor—that the gunman was black—they had no additional information regarding his height, build, or hair. However,

Mr. Pendelton, was observed at the exact location reported by the 911 caller and was on foot, consistent with the caller's report. Moreover, it was inherently suspicious for Mr. Pendelton to be walking through a church parking at 1:30 a.m. when the church was closed. Mr. Brown, on the other hand, was observed by police legally driving his car down a public street, contrary to the 911 caller's report, which did not mention a vehicle. (R. 33:9-10, 21; App. 9-10, 21.) Consequently, like in *Pendelton*, the police lacked reasonable suspicion to justify their seizure and this Court should find that seizure unlawful.

## **II. OFFICERS UNREASONABLY EXTENDED THE DURATION OF THE TRAFFIC STOP.**

### **A. Mr. Brown raised the issue of whether officers unreasonably extended the duration of the traffic stop before the circuit court, and even if Mr. Brown had not, this Court should exercise its discretion to address the issue.**

As an initial matter, the State asserts that Mr. Brown cannot raise the issue of whether officers unreasonably extended the duration of the traffic stop because, according to the State, Mr. Brown did not raise the issue before the circuit court. The State's assertion is neither factually nor legally accurate.

During the hearing on the motion to suppress, the circuit court asked Mr. Brown's counsel if Mr. Brown was challenging the stop, the arrest, or both. Mr. Brown's counsel responded: "I'm not challenging the arrest. I guess some of the issue with the stop *could also extend to challenging the extension of the traffic stop*, but I'm not challenging the arrest of Mr. Brown." (R. 33:15-16; App. 15-16; emphasis added.) In other words, contrary to the State's representation,

Mr. Brown's counsel expressly clarified for the court that Mr. Brown *was* challenging "the extension of the traffic stop ..." but that he *was not* challenging the arrest. (*Id.*) On appeal, Mr. Brown does the same. He is challenging the extension of the traffic stop, but he has not raised an issue on appeal related to his arrest. Because the issue was properly raised before the circuit court, Mr. Brown has not waived the issue and it should be addressed by this Court.

But even if Mr. Brown had failed to raise this issue before the circuit court, this Court may nevertheless "in the interests of justice, address the merits of an issue ... otherwise waived if constitutional issues are raised and there are no factual issues that need resolution." *See State v. Evans*, 187 Wis. 2d 66, 85, 522 N.W.2d 554 (Ct. App. 1994); *Maclin v. State*, 92 Wis. 2d 323, 328-29, 284 N.W.2d 661 (1979).

Here, Mr. Brown raises a constitutional issue—whether his Fourth Amendment rights were violated when the police continued to detain him after they realized, or should have realized, that he did not match the description of the man reported by the 911 caller—and it is in the interests of justice that his claim be resolved. *See id.* Moreover, there are no factual issues that need resolution. *See id.* The video from Officer Schlei's body cam is in the record in its entirety, as are the videos from the body cams of numerous other officers on the scene. (R. 36.) Those videos, when put together, depict Mr. Brown's entire encounter with the police, from the moment Mr. Brown's vehicle was pulled over, until the moment of his arrest. These body cam videos provide complete and objective

depictions of the traffic stop and eliminate the need for any further fact finding by the circuit court. Because the constitutional issue raised is purely legal, and there are no factual issues that need resolution, this Court should exercise its discretion and consider Mr. Brown's constitutional claims. *See Evans*, 187 Wis. 2d at 85.

**B. The stop was unlawfully extended.**

When police stopped Mr. Brown's vehicle, he was legally driving down a public street. There is no evidence in the record that he was speeding or that he otherwise was violating a traffic law that may have validated the traffic stop. Officers only stopped Mr. Brown's vehicle because he was a black man wearing a dark-colored sweatshirt. When officers approached Mr. Brown's vehicle, they could immediately see that he did not even match the vague physical description of the man described by the 911 caller. (R. 33:13, 26-27; App. 13, 26-27; R. 36, Ex. 1 at 0:45-0:52.) Officer Schlei can be heard on the body cam video commenting that Mr. Brown's sweatshirt was maroon, not black, and it is readily apparent from the video that Officer Schlei can observe that Mr. Brown was wearing pants and not shorts. (*Id.*) Yet, despite the fact that Mr. Brown did not match the physical description provided by the 911 caller and the fact that the 911 caller did not observe a vehicle near the gunman, officers continued to detain Mr. Brown.

Assuming for argument's sake only that officers had reasonable suspicion to initially stop Mr. Brown's vehicle, the State contends that Officer Schlei had a right to ask Mr. Brown for identification, even if that reasonable suspicion

dissipated when officers approached the vehicle and realized Mr. Brown did not match the 911 caller's description. (State Br. at 7-8 (citing *State v. Smith*, 2018 WI 2, ¶ 2, 379 Wis. 2d 86, 91, 905 N.W.2d 353).) Even if that is true, Officer Schlei did not ask Mr. Brown for identification.

When Officer Schlei approached Mr. Brown's vehicle, he observed that the driver's side window of the vehicle was rolled down approximately one inch, and body cam video demonstrates that Officer Schlei was able to effectively communicate with Mr. Brown inside the vehicle. (R. 33:14; App. 14; R. 36, Ex. 1 at 0:45-1:10.) Despite his ability to effectively communicate with Mr. Brown, Officer Schlei did *not* ask Mr. Brown for identification. Instead, he immediately asked Mr. Brown to step out of the vehicle. (*Id.*) Officer Schlei asked Mr. Brown to get out of the car even though he knew that Mr. Brown did not match the description provided by the 911 caller and even though, at all times during the stop, Mr. Brown kept his hands visible—as he had a cigarette and cell phone in his hands—and Officer Schlei testified that Mr. Brown posed “no immediate concern at that time.” (*Id.*)

Mr. Brown declined to immediately step out of the vehicle, repeatedly explaining to officers that he did not “feel comfortable” doing so until there was a supervisor on the scene. (R. 36, Ex. 1 at 3:10-3:30.) Mr. Brown's reluctance to step out of the vehicle is understandable under the circumstances. He was a black man, with no criminal record (R. 35:20), legally driving down the road at night, when he was pulled over by police. His vehicle was almost immediately

surrounded by numerous police officers (at least four can be viewed on the body cam) who were demanding he get out of his vehicle, insisting that he matched the description of a man in the area with a gun. (R. 36.) It was only a few minutes into the stop when Officer Schlei began banging on the driver's side window with his baton screaming at Mr. Brown to "get out of the fucking car." (R. 36, Ex.1 at 4:00-4:10.)

Officer Schlei did not extend the traffic stop to ask Mr. Brown for his identification. He continued to treat Mr. Brown as a suspect, impermissibly extending the traffic stop, even after it became apparent (if it was not apparent before Mr. Brown was stopped) that he was not the man described by the 911 caller. *See State v. Griffith*, 2000 WI 72, ¶ 54, 236 Wis. 2d 48, 613 N.W.2d 72 (A reasonable seizure can transform into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop.). Accordingly, this Court should reverse the ruling of the circuit court, suppress all evidence obtained as a result of Mr. Brown's impermissible seizure, and remand for further proceedings.

### **CONCLUSION**

Mr. Brown respectfully requests that this Court reverse the circuit court's ruling, and remand this case back to the circuit court, directing the circuit court to suppress all evidence obtained as a result of Mr. Brown's impermissible seizure.

Dated this 17th day of August, 2020.

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**FORM AND LENGTH CERTIFICATION**

Pursuant to Wis. Stat. § 809.19(8)(d), I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this brief is 1,891 words.

Dated this 17th day of August, 2020.

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**CERTIFICATE OF COMPLIANCE  
WITH WIS. STAT. § 809.19(12)**

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 17th day of August, 2020.

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**CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY**

I certify that on the 17th day of August, 2020, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief was correctly addressed.

Dated this 17th day of August, 2020.

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