STATE OF WISCONSIN

C O U R T O F A P P E A L S

District I

Case No. 2020AP000878 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

AVAN NIMMER,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON OCTOBER 16, 2019, ENTERED IN THE CIRCUIT COURT
OF MILWAUKEE COUNTY, THE HONORABLE GLENN YAMAHIRO PRESIDING.

BRIEF AND APPENDIX OF APPELLANT

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ISSUE PRESENTED

I. Whether or not the trial court had correctly denied Defendant's Fourth Amendment Suppression Motion seeking suppression

of the evidence resulting from the stop of his person when there was insufficient reasonable suspicion to justify that stop?

Trial Court Answered: The Motion had been denied.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Appeal involves issues of law which are not settled. Arguments need to be presented in more detail in oral argument. Therefore, oral argument and publication are requested.

STATEMENT OF THE CASE

On June 17, 2019, Defendant Avan Nimmer was charged in a one Count Criminal Complaint in Milwaukee County. The one Count charged Defendant with Possession of a Firearm by a Felon, contrary to Wis. Stats. Sec. 941.29(1m)(a), and 939.50(3)(g). This was Criminal Case 19 CF 2611. This was a Class G felony which carried a maximum possible penalty of a fine of not more than Twenty Five Thousand Dollars or imprisonment not to exceed ten years or both. (1:1-2).

The Criminal Complaint charged Defendant with possessing a firearm as a felon. According to the Complaint, police officers responded to a Shotspotter alert on their portal at approximately 10:04 p.m.. The alert indicated that the shots had been fired at 3390 N. 21st Street, Milwaukee. Upon arrival at the scene, the

police saw the Defendant away from the Shotspotter alert. Defendant had his right hand in his pocket. According to the police, upon seeing the police vehicle, the Defendant started to walk away. One of the officers in the vehicle exited the police car and began approaching the Defendant. At that time, the Defendant began reaching towards his left side and blading his left side away from the officer. The police officer began patting down the Defendant. The Defendant admitted that he had a firearm on his waistline. The police recovered a firearm. Defendant had previously been convicted of a felony. (1:1-2).

On June 18, 2019, an initial appearance occurred. At that time, the Court Commissioner had informed the Defendant of the charge and the maximum possible penalties. (22:1-2).

On June 25, 2019, the trial court conducted a preliminary hearing. After taking testimony and other evidence, probable cause was found and the Defendant was bound over for trial. (23:12).

On June 25, 2019, the State filed an Information charging Defendant with the one Count charged in the Criminal Complaint. This was immediately after the preliminary hearing. (4:1-1). On that date, the Defendant entered a plea of Not Guilty to the one Count. (23:12).

Subsequently, Defendant filed a Motion to Suppress Fruits of Illegal Detention and Frisk. Defendant filed this Motion on July 10, 2019. By this Motion, Defendant had alleged that the police did

not have enough evidence to stop Defendant on June 15, 2019. According to the Motion, the police lacked reasonable suspicion to conduct this stop. Defendant sought to suppress any and all physical evidence taken from him at the scene of his detention and arrest. This physical evidence consisted of the firearm indicated in the Criminal Complaint. (5:1-3).

On August 19, 2019, the trial court conducted an evidentiary motion hearing on Defendant's Suppression Motion. After the evidentiary hearing, and hearing oral arguments, the trial court orally denied Defendant's suppression motion. (25:35-37; A 104-106).

Defendant entered a guilty plea to the one charge in the Information on October 16, 2019. The plea was pursuant to plea negotiations. After conducting a plea colloquy, the trial court found Defendant guilty. (26:2-7).

On October 16, 2019, the trial court conducted a sentencing hearing immediately after the guilty plea hearing. On that date, the trial court sentenced Defendant to four years in the Wisconsin State prison system. This consisted of two years of initial confinement and two years of extended supervision. (26:18). That same day, the trial court issued a Judgment of Conviction. (14:1-2; A 101-102). Defendant subsequently timely filed his Notice of Intent to Pursue Postconviction Relief. (16:1-1).

Defendant filed his Notice of Appeal in a timely manner.

(20:1-1). This Brief has been filed within the schedule established by the Court.

STATEMENT OF THE FACTS

On June 17, 2019, Defendant Avan Nimmer was charged in a one Count Criminal Complaint in Milwaukee County. The one Count charged Defendant with Possession of a Firearm by a Felon, contrary to Wis. Stats. Sec. 941.29(1m)(a), and 939.50(3)(g). This was Criminal Case 19 CF 2611. This was a Class G felony which carried a maximum possible penalty of a fine of not more than Twenty Five Thousand Dollars or imprisonment not to exceed ten years or both. (1:1-2). The ten years would consist of a maximum possible initial confinement period of five years, with a maximum possible extended supervision period of also five years.

The Criminal Complaint charged Defendant with possessing a firearm as a felon. According to the Complaint, police officers Boyack and Milone responded to a Shotspotter alert on their portal at approximately 10:04 p.m.. Officer Boyack had prepared the police reports that had formed the basis for the Criminal Complaint. The alert indicated that the shots had been fired at 3390 N. 21st Street, Milwaukee. Upon arrival at the scene, the police saw the Defendant. Defendant had his right hand in his pocket. According to the police, upon seeing the police vehicle, the Defendant started

to walk away. One of the officers in the vehicle exited the police car and began approaching the Defendant. At that time, the Defendant began reaching towards his left side and blading his left side away from the officer. The police officer began patting down the Defendant. The Defendant admitted that he had a firearm on his waistline. The police recovered a firearm. Defendant had previously been convicted of a felony. (1:1-2).

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On June 25, 2019, the trial court conducted a preliminary hearing. The State's sole witness had been Officer Chad Boyack. After taking testimony and other evidence, probable cause was found and the Defendant was bound over for trial. (23:12).

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On August 19, 2019, the trial court had conducted an evidentiary motion hearing on Defendant's Suppression Motion.

On August 19, 2019, the State's sole witness had been police officer Anthony Milone. He testified that on June 15, 2019, he was working as a late power shift officer along with officer Chad Boyack. Milone had been alerted to a Shotspotter call in the area of 3390 N. 21st Street, Milwaukee. The alert arrived at about 10:06 p.m.. At the time, he and Boyack were traveling northbound on North 20th Street from West Hopkins street. Upon receiving the alert, they continued traveling northbound on 20th Street towards the Shotspotter alert, 3390 N. 21st Street, with four rounds having been fired in that location. Upon arrival, they turned west onto West Townsend Street, which is the 3400 block from North 20th Street. At the corner of 21st Street and Townsend, the officers observed the Defendant. At that time, he had his right hand in his right pants pocket. Defendant then turned and looked at the squad and began walking away at an "accelerated pace." (25:6-8). After walking away, Milone observed the Defendant digging around his left side with his left hand. Milone stepped out of the vehicle and began approaching the Defendant. Defendant then began turning his left

side away from him. His left hand was not visible. Boyack had then drove past the Defendant and after he drove past him, Boyack had stepped out. The Defendant had then stopped walking. Milone then conducted a pat down of the Defendant. Defendant had then indicated "the gun is in my waistband, bro'." Milone had then recovered a gun on the left side of the Defendant's waistband. (25:9-10).

At the time the police had received the alert on June 15, 2019, they were approximately three blocks away from where the alert had occurred. When they get the alert, they do not get any description of the potential suspect or suspects. The alert does not give any identifying information for who the shooter might have been. The address for the alert is a distance from south of 21st and Townsend. 21st and Townsend is where the police had stopped the Defendant. At 3390 N. 21st Street is the last house on the corner of that intersection and then there is a field, and then there is the sidewalk and Townsend Street. At the time the police saw the Defendant, he was walking west on Townsend, on the southeast corner. At the time the police approached the Defendant, they did not have their flashing lights or sirens on. After the Defendant looked at the vehicle, he did not start to run. (25:13-15). He did not attempt to flee. He never went into a full sprint. While the squad was behind the Defendant, Milone had exited the squad. Milone had to walk past the squad to get to the Defendant. Milone got behind the Defendant. When Milone first got past the Defendant, he

was twenty to twenty five feet past Milone. At some point, while Milone was behind the Defendant, Milone told the Defendant to raise his hands. Defendant did raise his hands upon command. As he was walking away, he had raised his arms when directed to raise his arms. He was just walking away from Milone. (25:16-17). Upon exiting the vehicle, it is possible that Officer Boyack grabbed the Defendant's left wrist. Defendant was seized. Milone then immediately started to pat him down. Defendant then volunteered that he had a firearm in his left waistband. Defendant did not resist. He was cooperative. (25:18-19).

Defendant subsequently testified on his own behalf.

After the evidentiary hearing, and hearing oral arguments, the trial court orally denied Defendant's suppression motion. The court found that the police conduct was completely appropriate in the investigation of the Shotspotter complaint. (25:35-37; A 104-106).

Defendant entered a guilty plea to the one charge in the Information on October 16, 2019. The plea was pursuant to plea negotiations. The plea negotiations were that the State would be recommending eighteen months initial confinement followed by twenty four months extended supervision. (26:2). After conducting a plea colloquy, the trial court found Defendant guilty. (26:2-7).

On October 16, 2019, the trial court conducted a sentencing hearing immediately after the guilty plea hearing. On that date, the trial court sentenced Defendant to four years in the Wisconsin

State prison system. This consisted of two years of initial confinement and two years of extended supervision. (26:18). That same day, the trial court issued a Judgment of Conviction. (14:1-2; A 101-102). Defendant subsequently timely filed his Notice of Intent to Pursue Postconviction Relief. (16:1-1).

Defendant filed his Notice of Appeal in a timely manner. (20:1-1). This Brief has been filed within the schedule established by the Court.

ARGUMENT

I. LAW ENFORCEMENT'S STOP OF DEFENDANT ON JUNE 15, 2019 WAS ILLEGAL AND IMPERMISSIBLE. CONTRARY TO THE TRIAL COURT, THERE WAS INSUFFICIENT REASONABLE SUSPICION TO WARRANT THE STOP. THE TRIAL COURT HAD MATERIALLY ERRED IN REFUSING TO SUPPRESS THE RESULTING SEIZED FIREARM.

Searches conducted without a warrant are generally unreasonable. State vs. Matejka, 241 Wis.2d 52, 621 N.W.2d 891 (2001). The State has the burden of proof that a warrantless search was legal. Id. at 60.

Unreasonable seizures are prohibited. An "inchoate and unparticularized suspicion or 'hunch'..." will not suffice. Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences

from those facts, that the individual has committed a crime. State vs. Guzy, 139 Wis.2d 663, 407 N.W.2d 548 (1987).

Evidence seized as the result of illegal search and seizure is to be suppressed by virtue of the exclusionary rule. Wong Sun vs. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); State vs. Knapp, 285 Wis.2d 86, 700 N.W.2d 899 (2005); State vs. Harris, 199 Wis.2d 227, 544 N.W.2d 545 (1996).

The Court of Appeals applies a two step standard of review to the question of whether or not reasonable suspicion exists to justify a stop. The Court will uphold the circuit court's findings of fact unless clearly erroneous. However, the Court of Appeals will determine de novo whether the facts as found demonstrate a constitutional violation. State vs. Williams, 241 Wis.2d 631, 623 N.W.2d 106 (2001). State vs. Kolk, 298 Wis.2d 99, 726 N.W.2d 337 (Ct.App. 2006). Questions of the existence of reasonable suspicion are constitutional facts. Id. at 298 Wis.2d 99 at 107.

An individual has a right to walk away from a police officer. Without more, backing away from a police officer is not sufficient objective evidence supporting a reasonable suspicion that criminal activity is afoot or that the individual was a threat. Further, an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable particularized suspicion that a person is committing a crime. State vs. Pugh, 345 Wis.2d 832, 826 N.W.2d 418 (Ct.App. 2012), citing

Illinois vs. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.ED.2d 570 (2000).

Seeing a suspect in front of a vacant house is insufficient reason to stop him even though: (1) the officer knew that the suspect did not live in the area, (2) the suspect had been previously arrested for selling narcotics, and (3) the police had received a complaint that someone was loitering or drug sales at that house. State vs. Washington, 284 Wis.2d 456, 700 N.W.2d 305 (Ct.App. 2005).

In Pugh, the Court of Appeals had further concluded that Defendant's conduct of "blading" insufficient to constitute reasonable suspicion. This, even coupled with Pugh being near some illegally parked cars and his presence directly to the south of an apartment building that the arresting officers had been personally involved in several drug dealing investigations. In Pugh, the officers first saw him five to ten feet from two cars that were parked below a No Parking sign at the back of an apartment building. Five seconds after first seeing Pugh, the officer turned his squad spotlight on him. After shining the light on Pugh, who had been walking a little to the south, went back between the cars. The police had then walked over to Pugh and had begun to ask him some questions about what he was doing at the location. Pugh had no information about any drug dealing at the house. The drug house was some fifty feet from where they were standing. The officer never

saw Pugh any closer. There were no lights on the drug house. Nevertheless, the police physically seized Pugh. The police testified that Pugh was blading the right side of his body away from them as he was walking away just immediately prior to this physical seizure. State vs. Pugh, 345 Wis.2d 832 at 835-838.

In Pugh, the Court had concluded that Pugh's conduct did not arise to the level of reasonable suspicion. With respect to the "blading," the Court had asked "How does a person walk away from another (as Pugh had the right to do) without turning his or her body to some degree? Calling a movement that would accompany any walking away "blading" adds nothing to the calculus except a false patina of objectivity." Id. at 843. The Court found that the officers had no objective reasonable suspicion to justify a Terry stop, and seizure. Id. at 843-844. This, even with the "blading" conduct, the high crime area, the relatively close proximity to a well known drug house of approximately fifty feet, and Defendant's conduct of walking away upon seeing the police.

In State vs. Washington, the police had been on patrol on the 1600 block of West Locust Street in the city of Milwaukee. This, in order to investigate a specific complaint of loitering and drug sales at an allegedly vacant house. Washington had been in front of that specific house. After one of the police officers recognized him from past encounters, the police had ordered him to stop. Washington stopped initially, but also took a few steps backwards,

and allegedly "looked nervous." He then threw his hands up and a towel flew from his hand. At that point, the police pushed him to the ground and seized him. The towel had contained cocaine. State vs. Washington, 280 Wis.2d 456 at 459-460.

In Washington, the Court had concluded that Washington had stopped when ordered to do so. This, even though he had taken a few steps backwards. He stopped when the police had told him to stop. Id. At 469. Further, the Court had found that at the time the police initially pulled over and ordered Washington to stop, they lacked the requisite reasonable suspicion Investigating a vague complaint of loitering and drug sales, and observing Washington in the area near a house that the officer believed to be vacant, even taken in combination with the officer's past experiences with Washington and his knowledge of the area, had not supplied the requisite reasonable suspicion for a valid investigatory stop. People have a right to walk down the street without being subjected to unjustified police stops. Id. at 471. The police had suppressed the drugs by virtue of the exclusionary rule. Id. at 472.

In the present situation, the case for finding that the police had lacked reasonable suspicion to conduct the stop of the Defendant is more persuasive than the facts in either Pugh or Washington. Here, the police had observed the Defendant away from the Shotspotter alert. He was past a field and on a completely different street. This had been a residential area. He was merely

walking away. The police did not see any weapon, or have any indication that he was committing, or had committed any crime, specifically any shooting that had led to the alert. He had his hand in his right pocket. Upon the police following him, the Defendant began walking away, but faster. However, he raised his hands upon command. Although he had been "blading" his body, this is a subjective opinion by Milone. As the Court had clearly indicated in Pugh, such purported conduct is insufficient to justify reasonable suspicion. Here, as discussed, unlike the situation in Pugh, Defendant was away from the Shotspotter alert location. Pugh was just south of the alleged drug dealing house, approximately fifty feet away. In Pugh, Pugh had turned and had walked away, getting between two parked cars. Here, Defendant had been walking away, but had raised his hands upon command. Further, unlike Washington, the police had no history with the Defendant. In that case, Washington had taken a few steps backwards, but with his hands raised. Also, in Washington, like here, the police had an alert as to criminal conduct. However, in both Pugh and Washington, the Court of Appeals had found that the police had found insufficient reasonable suspicion to justify the warrantless stop. The situation here is no different, and under the circumstances, contained even less reasonable suspicion than either of those two cases. The trial court's oral decision conclusion that the police had acted appropriately is materially erroneous. It must be

reversed.

Under the circumstances, there is insufficient totality of the circumstances to justify the stop. The police had lacked reasonable suspicion to justify the stop. This Court must order suppression of any the firearm evidence seized from the Defendant. The Court must also reverse the Judgement of Conviction.

CONCLUSION

The trial court had materially erred in Denying Defendant's Fourth Amendment Suppression Motion. Law enforcement did not have reasonable suspicion to justify the stop of the Defendant. This Court must reverse the trial court's Denial of the Stop Motion, and Order suppression of the results of the search of Defendant's person, to consist of the seized firearm.

Based upon the foregoing, Defendant respectfully requests that this Court reverse the Judgment of Conviction and enter all appropriate Decisions consistent with the issue that Defendant has raised in this Brief.

Respectfully Submitted, this _____ day of May, 2020.

Mark S. Rosen
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INDEX TO APPENDIX

CERTIFICATION

I hereby certify that the Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Avan Nimmer, 2020AP000878 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is seventeen (17) pages.

Dated this _____ day of May, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Avan Nimmer, Case No. 2020AP000878 CR is identical to the text of the paper brief in this same case.

Dated this _____ day of May, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

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 Wis. Stats. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

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 first names and last initials 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 _____ day of May, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant