STATE OF WISCONSIN

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

District I

Case No. 2020 AP 000878-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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE RESPONDENT'S BRIEF DOES NOT ADEQUATELY REBUT APPELLANT'S ARGUMENT THAT THERE HAD BEEN INSUFFICIENT REASONABLE SUSPICION FOR THE POLICE TO STOP THE DEFENDANT. CONTRARY TO THE RESPONDENT, THE FACTS ADDUCED AT THE HEARING DID NOT SUPPORT REASONABLE SUSPICION.

ALSO, THE RESPONDENT HAS NOT ADEQUATELY REBUTTED APPELLANT'S CASE LAW. CONTRARY TO THE RESPONDENT, THIS CASE LAW IS MATERIALLY RELEVANT TO THE PRESENT MATTER.

A. The Respondent's Recitation of the Facts of this Case are Materially Inaccurate. The Facts Do Not Support Reasonable Suspicion.

The Respondent's Brief has failed to adequately rebut the Defendant's Appellant's Brief. Contrary to the Respondent, the police had insufficient reasonable suspicion to stop the Defendant.

Here, the Respondent has argued that the location where the police had observed the Defendant had been "basically the same location where the ShotSpotter came in." (Resp.Brf, page 4). The Respondent has essentially argued that the location of the stop had been the location of the Shot Spotter alert. Although Officer Milone had initially made this statement during his testimony, the word "basically" had couched this location. Further, on cross-examination, Officer Milone had clarified that the location where the police had first observed the Defendant had not been the location of the alert. As Defendant had indicated in his Appellant's Brief, the location of the stop had been south of the alert. The location of the alert had been at 3390 N. 21st Street, which had been the last house on the corner of the intersection. However, there had been a field and a sidewalk between that spot and Townsend Street. Defendant had been walking west on Townsend. This had been the location of the stop. (25:14-15; App. Brf, page

8). Hence, the Respondent's reliance upon the location assisting a finding of adequate reasonable suspicion is materially incorrect. Contrary to the Respondent, the stop had not been the location of the alert. Respondent's Brief has materially mischaracterized this location.

Also, the Respondent has indicated essentially that Defendant had fled the police. Respondent has referred to the Defendant's conduct as having been "evasive." (Resp.Brf, page 6). However, Officer Milone had never testified as to such. As also indicated in Appellant's Brief, the police had never turned on their flashing lights or siren upon observing Defendant. Although Defendant had accelerated his pace, he had never started to run. He never went into a full sprint. Officer Milone had never testified that he had fled. Defendant had asked the question "And he didn't attempt to flee, did he?" In response, the officer had merely testified that "...I don't know what his intentions were. He never went into a full sprint." He did raise his hands upon command. He was just walking away from the witness. (25:16-18; App. Brf, pges 8-9). Clearly, had Defendant actually fled, Officer Milone would not have been so equivocal.

Further, Respondent had relied upon Milone's testimony that the Defendant had bladed the left side of his body away from the witness. The Respondent had cited this testimony as support for its position that the police officer's Terry stop had been legal.

(Resp.Brf, pges 5-6). See Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, the Court of Appeals Decision in State vs. Pugh, 345 Wis.2d 832, 826 N.W.2d 418 (Ct.App. 2012) has materially rebutted a conclusion that blading provides reasonable suspicion. Defendant had cited, and argued, this case in his Appellant's Brief. He had cited the facts of this case in that Brief. He will not re-recite those arguments, and those facts, herein. He will further argue later in his present Reply Brief why Respondent's attempt to distinguish this case from the present situation had failed.

Based upon the foregoing, the Respondent has materially erred in arguing that the facts of this present matter support Reasonable Suspicion. As discussed herein and in Appellant's Brief, and essentially contrary to the Respondent, Officer Milone could not testify that Defendant had tried to flee the police. Further, as discussed herein and in Appellant's Brief, Defendant was not at the actual location of the Shot Spotter alert at the time of his stop. Finally, Defendant's "blading" does not support a finding of reasonable suspicion. This, even in conjunction with the other facts of this case. This Court should reject this Respondent's argument that reasonable suspicion had factually existed to support the stop.

B. Contrary to the Respondent, Defendant's Case law of Pugh and Washington are Materially Applicable and Relevant to the Present

Situation.

The Respondent has argued that Defendant's cited case law of State vs. Pugh, and State vs. Washington, 284 Wis.2d 456, 700 N.W.2d 305 (Ct.App. 2005) are inapplicable and materially distinguishable from the present situation. However, this argument is materially erroneous.

The Respondent has indicated that in State vs. Pugh, the police were merely on patrol and there had not been any active incident that they were investigating. This, as opposed to the present situation where there had been an actual Spot Shotter alert. (Resp.Brf, pges 7-8). However, this argument is materially erroneous. In Pugh, Pugh had been approximately fifty feet away from the location of the expected criminal activity, the drug house located at 4463 N. Hopkins. He was in the rear of 4475 N. Hopkins, an apartment building. The officer who had testified at the suppression hearing had testified that he and his partner "had been personally involved in several investigations regarding drug dealing from that 4463 N. Hopkins address." Further, even at 4475 N. Hopkins, Pugh had parked his car under a no parking sign. Pugh had never indicated that he had permission to park there. Finally, Pugh's conduct had involved more than mere blading. When the police first saw Pugh, he was five to ten feet from two cars that were parked below a no parking sign at the back of the apartment building. However, when the police shined their lights on him, he

had changed his direction from walking a little to the south to going back between the cars, essentially clearly to hide. The police first saw Pugh at about 11:00 p.m.. State vs. Pugh, 345 Wis.2d 832 at 835-836.

In Pugh, contrary to Respondent, the testimony had involved Pugh's involvement in more than the drug house located at 4463 N. Hopkins. The testimony had involved him parking his car illegally. The Court in Pugh had cited other case law to support a legal conclusion that a Terry stop may be justified to investigate a forfeiture offense. Id. at 840-841 citing State vs. Griffin, 183 Wis.2d 327, 333-334, 515 N.W.2d 535, 538 (Ct.App. 1994). Respondent has failed to indicate this critical fact. Further, contrary to the Respondent, the Court had indicated that Pugh's conduct of walking away, not the blading, had prompted the police to seize him. Id. at 841. Respondent has failed to note that Pugh had walked away from the police upon noting their presence, and before being stopped by them. Hence, contrary to Respondent, Pugh had involved far more than mere blading, and there had been factually more than this mere blading in that case. There had been walking away from the police upon initially noting their presence, and the forfeiture offense violation. Nevertheless, as in this case, the Court had indicated that backing away from a police officer, and an individual's presence in an area of expected criminal activity, even together as in Pugh, are insufficient to support reasonable suspicion to

justify a Terry stop. State vs. Pugh, 345 Wis.2d 832 at 842-843. Further, as litigated in Defendant's provided Briefs to this Court, the blading does not add any reasonable suspicion.

In the present matter, the police officer's reasonable suspicion had been based upon Defendant's walking away "in an accelerated manner", an area of expected criminal activity in a residential area, and his blading. However, as discussed previously, Officer Milone did not testify that the walking away had amounted to actual fleeing. This, even in response to actual questioning as to that matter. Nevertheless, as discussed herein and in Appellant's Brief, Pugh holds that all three of these factors, even taken together and cumulatively, do not support reasonable suspicion. Respondent has materially erred in indicating that Defendant has misinterpreted and misapplied Pugh, and that this case does not support his position. On the contrary, this case is thoroughly dispositive both factually and legally with respect to this present matter. Based upon this case and its facts, the police did not legally have reasonable suspicion to conduct a Terry stop upon the Defendant.

Similarly, the Respondent has materially erred in indicating that Washington does not assist the Defendant. In that case, similar to this present case, Washington had walked back a few steps upon the stop. True, he had initially stopped. However, he then had taken a few steps backwards. State vs. Washington, 284

Wis.2d 456 at 459-460. In that case, the Court had found that such conduct had not constituted fleeing. He did not run. Id. at 471-472. Here, as discussed herein, Officer Milone had never testified that Defendant had fled. This, even upon a direct cross-examination question by the Defendant. Similar to Washington, Defendant had never run. Further, in Washington, Washington was directly in front of a house that police had been investigating for drug dealing. There had been a complaint about loitering. Id. at 459. As discussed previously with respect to Pugh, reasonable suspicion that an individual is committing, or has committed, a forfeiture offense may constitute reasonable suspicion for a Terry stop. All that Washington had been doing had been walking down the street. Importantly, unlike here, Washington had been walking down the street right in front of the area of criminal activity in question. Here, Defendant had been walking somewhat south of the area of the alert, with a sidewalk and a field between him and that alert spot. This, in a residential area. Milone had testified that there were houses in that area. (25:14; App.Brf, page 8). As in Washington, Defendant was simply walking away from law enforcement. True, the present situation involves Defendant allegedly blading his left side away from the police. However, Pugh has materially rebutted that fact as being a ground for reasonable suspicion, as discussed herein and in Appellant's Brief. As the Court had indicated in Washington, Defendant had a right to walk down the street without

being subjected to the unjustified police stop. Id. at 471. Accordingly, contrary to the Respondent, Washington does assist the Defendant and is highly applicable and relevant to the present situation.

Based upon the foregoing, and contrary to the Respondent, both Washington and Pugh are highly applicable and relevant to the present situation and this present matter.

Furthermore, Respondent has not provided any case law rebutting either Washington or Pugh. Respondent has simply provided general case law providing the general law relevant to a Terry stop. Respondent has not provided any case law rebutting, factually, the present situation, as supported by both Washington and Pugh. As discussed herein and in Appellant's Brief, Respondent has materially erred in arguing that these two cases do not assist the Defendant. Therefore, for the reasons presented herein and in Appellant's Brief, Respondent cannot effectively argue that these cases are not binding precedent. Contrary to the Respondent, these cases are highly relevant and precedential to the present matter.

Here, the trial court had materially erred in denying Defendant's Motion to Suppress. This Court should reverse that Decision, Order suppression of the seized firearm, and vacate Defendant's guilty plea and Judgement of Conviction. Respondent's arguments fail to adequately and materially rebut such a conclusion. These arguments must be rejected.

CONCLUSION

As indicated within this Reply Brief and within Appellant's original Brief, the trial court had erred in denying Defendant's Motion to Suppress. Law enforcement did not have reasonable suspicion to stop the Defendant on the night in question. This Court should reverse this trial court Decision, Order suppression of the seized firearm, and vacate the existing Judgement of Conviction.

Dated this 5th day of August, 2020.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Avan Nimmer, 2020 AP 000878 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 ten (10) pages.

Dated this 5th day of August, 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 Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Avan Nimmer, Case No. 2020 AP 000878 CR is identical to the text of the paper brief in this same case.

Dated this 5th day of August, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant