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STATE OF WISCONSIN

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

DISTRICT I

Appeal No. 2020AP000999-CR
Milwaukee County Cir. Court Case No. 2018CM1973

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

DAVONTA J. DILLARD,
Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION TO SUPPRESS EVIDENCE, ENTERED BY BRANCH 31, MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE HANNAH C. DUGAN PRESIDING

BRIEF AND ATTACHED APPENDIX OF DEFENDANT-APPELLANT

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The trial court erred when it denied Mr. Dillard's Motion to Suppress.

POSITION ON ORAL ARGUMENT

The relevant facts and the legal issues, positions, and arguments of this appeal should be clearly and exhaustively presented in this Brief. Counsel requests oral argument, if such were to help address this Court's outstanding questions or aid this Court's decision-making.

STATEMENT ON PUBLICATION

Publication may be warranted pursuant to Wis. Stat. § 809.23(1), because this case presents the opportunity to clarify and refine the law surrounding warrantless arrests.

STATEMENT OF THE CASE

A Criminal Complaint filed on May 25, 2018 charged Matthew Davonta J. Dillard ("Mr. Dillard") with Carry of Concealed Weapon, in violation of Wisconsin Statutes Sections a violation of 941.23(2). (R.1:1-2; App. 4-5.)

On August 20, 2018 Mr. Dillard filed a Notice of Motion and Motion to Suppress Evidence, asserting that the law enforcement's search of the vehicle and

seizure of Mr. Dillard was illegal and constitutionally invalid, warranting suppression of any resulting evidence. (R. 9:1-11; App. 6-16.)

The trial court held a hearing on the motions to suppress on October 30, 2018. (R. 71:1-76; App. 22-97.)

On November 5, 2018, after the Motion Hearing, the State filed a Response to Defendants' Motion to Suppress. (R. 12:1-5; App. 17-21.)

On January 11, 2019, the court gave its oral decision denying the motion to suppress finding that there was probable cause and exigent circumstances to search the vehicle, that the investigation was reasonable because it was an intentional violation of law, and that the totality of the circumstances justified a warrantless search. (R. 58:1-16; App. 98-113.)

At Jury Trial on February 27, 2019 – February 28, 2019, Mr. Dillard was found guilty of one count of carrying a concealed weapon at trial. (R. 61-65.)

On May 9, 2019, the Circuit Court withheld sentence and placed defendant on probation for a period up to 12 MONTHS with the following Conditions:

> Court ordered court costs waived due to indigency and any unwaivable costs (Including DNA surcharge) to be paid by May 8, 2020. Failure to pay will result in a civil judgment/tax intercept. 20 Hours of Community service. Absolute sobriety. Court ordered no possession or use of controlled substances without a valid prescription. Maintain full employment, school or combination of both.. No possession of weapons/firearms Probation programming to be determined by agent. (R. 40:1-2.)

On May 22, 2019, Mr. Dillard filed a timely Notice of Intent to Pursue Postconviction Relief. (R. 44:1-2.) On October 8, 2019, Nancy A. Dominski was appointed as appellate counsel. (R. 46:1.)

On April 3, 2020, Appellate Counsel filed a Motion to Extend Time Limits for the Filing of the Postconviction Motion or Notice of Appeal. (R. 48:1-3.) The Appellate Court granted this extending time until June 9, 2020. (R. 49:1.)

On June 8, 2020, Mr. Dillard filed a timely Notice of Appeal. (R. 52 p. 1-2.)

On June 13, 2020, the Clerk of Circuit Court filed the Transmission of record from circuit court to court of appeals. (R. 73:1.)

On June 16, 2020, The Clerk of Circuit Court filed and Amended Transmission of record from circuit court to court of appeals (74:1; App. 114-117.)

On July 16, 2020, Counsel for Mr. Dillard filed an Amended Notice of Appeal.

On July 16, 2020 the Clerk of Circuit Court filed a Supplemental Index.

Mr. Dillard now appeals the Circuit Court's order denying his Motion to Suppress. This Appellate Brief is timely if filed on or before August 25, 2020.

STATEMENT OF THE FACTS

Mr. Dillard was charged as a result of a warrantless vehicle search, arrest, and detention carried out by the Milwaukee Police on May 24, 2018. (R1:1-2.)

At Suppression Hearing on October 30, 20018, officers testified under oath to the following:

- On May 24, 2018, at approximately 10:00 p.m. six Milwaukee Police officers on bicycle patrol at approximately the 2800 block of North 37th Street, officers came upon a silver Infiniti with running lights on. (R. 71:9, 23; App. 30, 44.)
- At first officers believed that there was no one in the vehicle. (R 71:9; App. 30.)
- Officers then illuminated the vehicle and saw someone in the back seat. (R. 71:10, 26; App. 31, 47.)
- Officers claimed Mr. Dillard made a "lunging" movement. (R.71:10; App. 31.)
- Officers opened the driver's side rear door to the vehicle. (R.71:10-11; App. 31-32.)
- Mr. Dillard attempted to exit the vehicle from the passenger side rear door. (R. 71:12: App. 33.)

- The officers immediately took Mr. Dillard to the ground, tased him, handcuffed him, and placed him in custody. (R.71:35, 44; App. 56, 65)
- Officers did not attempt to talk to Mr. Dillard prior to opening the car door. (R. 71:28; App. 49.)
- Officers did not have a warrant. (R. 71:1-76; App. 98-113.)
- The entire incident from the officers first seeing the vehicle to arresting Mr. Dillard took 51 seconds. (R. 71:35-36, 38; App. 56-57, 59.)
- After the detention of Mr. Dillard, officers found a gun inside the vehicle (R. 71:42; App. 63.)

The Court made findings and concluded that there was probable cause and exigent circumstances to arrest Mr. Dillard and Search the vehicle. (R. 58:1-16; App. 98-113.)

The court made the following factual findings in its January 11, 2019 decision :

> "...Officer Domine of the Milwaukee Police Department, has four years of experience with Milwaukee Police Department and stated that – that he was on bike patrol on – eastbound on Center Street. On May 24th, 2018, he was on patrol in what is a – He's assigned to a high – what he testified to is the highest crime area in Milwaukee.
>
> He came upon – a silver Infiniti with running lights on, and the windshield had no tint. However, the rest of it was highly tinted. It was running with nobody in the driver's seat which is a violation of the traffic code.

> He illuminated the van, or the car, the vehicle, from outside with a flashlight, saw a flash of somebody in the back seat, opened the door. He couldn't see through the very dark, tinted—He opened the door and testified to that being an extreme safety issue, that movement of somebody that he said was appearing to hid himself in the back seat.
>
> When the door opened, that person later identified as the defendant attempted to leave on the opposite – exit the vehicle on the opposite side to the – at which time, the officer saw a – a weapon there. He did have body cam video, which was marked as Exhibit 1.
>
> There were other officers involved on that – the patrol, which was roughly – It was in the 2800 block of North 37th Street, at about 10:00 o'clock at night. There had been – Prior to opening the door, there was – had been no communication with the person inside the vehicle.
>
> Finally, this was testified to as a residential area, and the view of the video corroborated the the officer's testimony. After opening the door, he asked for the defendant to show his – 'Show me your hands,' was the quote, which was an indication of concern for his safety.
>
> The second officer was Officer Gaglione, also with the Milwaukee Police Department for four years, also on duty that night, on May 25th, 2018, and testified to having – There were several other officers on patrol in this high-crime district, the same area as – district as was discussed, in the 2800 block of 37th Street.
>
> And he testified to essentially the same facts. However, he did not open the door. He did observe with the flashlight an individual – a person in the back seat, whom he ducked out of sight, attempting to hide from him. And those are the essential facts of the case.

(R: 58:6-8; App. 103-105)

The court made the following conclusions of law in its January 11, 2019 decision:

- "The Court denies that there was not a lack of reasonable suspicion or probable cause in this case." (R.58:10-11; App. 15-16.)
- "This is not being decided exclusively on the high-crime area. It's the totality of the circumstances that are being considered as well as the safety of the officers that this was not an unreasonable search or intrusion..." (R.58:11; App. 16.)
- "Mr. Dillard does have a reasonable expectation of privacy in has vehicle. However, the automobile searches and so forth are not exclusive. It's not the same right. And if there are – rights in homes and businesses, all – automobile exceptions in this case, this was part of an investigation so that the

> *young* principles don't – don't get the same authority in this case." (R.58:11-12; App. 108-109.)

- "Given the totality of the circumstances, it was not unreasonable at that point for the officer to open the door and further his investigation at that point, for his own safety and those of the other officers who were present as well; and, therefore, I'm denying the motion." (R. 58:12; App. 109.)

Defense counsel asked for clarification as to whether the Court was finding that there was probable cause to search when the door was opened or that the actions were justified by exigent circumstances, the Court responded:

- "Well, really, both...There were exigent circumstances. Given all of the factors, it was – the investigation – was reasonable because it was a violation of law, or intentional violation of law, and then the movement and the totality of the circumstances, that made it – there were exigent circumstances in this case to open that door." (R. 58:13;App. 110.)

- "So that I don't find that is a – a violation of the rights of the – Well, let me put it the other way. That justifies a warrantless search." (R. 58:13;App. 110.)

STANDARD OF REVIEW

Whether a given set of facts provided probable cause to search a vehicle is a question of law that is reviewed de novo. *State v. Miller*, 647 N.W.2d 348, 256 Wis.2d 80, 2002 WI App 150 (Wis. App. 2002); *State v. Matejka*, 2001 WI 5, ¶ 22, 241 Wis. 2d 52, 621 N.W.2d 891 (Wis. 2001); *State v. Pallone*, 2000 WI 77, ¶ 59, 236 Wis. 2d 162, 613 N.W.2d 568 (Wis. 2000) overruled on other grounds by *State v. Deerborn*, 2010 WI 84, 327 Wis. 2D 252, 786 N.W. 2D 97 (Wis. 2010).

Reviewing denials of motions to suppress evidence involves questions of constitutional fact requiring application of a two-step analysis. *State v. Robinson*,

2010 WI 80, P.22, 327 Wis.2d 302, 786 N.W.2d 463 (Wis. 2010) (citations omitted). "First, [appellate courts] review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, [they] independently apply constitutional principles to those facts." *Id*. (citations omitted).

ARGUMENT

I. THE DENIAL OF THE MOTION TO SUPPRESS WAS ERROR BECAUSE IT STEMMED FROM CLEARLY ERRONEOUS FACTUAL AND LEGAL DETERMINATIONS BY THE CIRCUIT THE COURT, AND BECAUSE LAW ENFORCEMENT'S ARREST, AND DETENTION OF MR. DILLARD WERE NOT JUSTIFIED

A. The Court's finding that there was a violation of law which justified an arrest and/or search was clearly erroneous.

Here the circuit court's findings may not be upheld because they were "clearly erroneous," *State v. Robinson*, 2010 WI 80, 786 N.W.2d 463, 327 Wis. 2d 302 (Wis. 2010).

Specifically, the Court misstates the law: "It [the vehicle] was running with nobody in the driver's seat, which is a violation of the traffic code. (R. 58:7; App. 104)

The Court further states:

> "State argues that there was probable cause that a violation of an ordinance had occurred because of that running car – vehicle without a person in the driving seat, which is a violation of law, ordinance." (R. 58:8-9; App. 105-106.)

This, however, is a misstatement of the law and clearly erroneous. The Milwaukee Traffic Code Ordinance 101-30 states:

> 101-30. Leaving of Ignition Keys in a Parked Auto. 1. LOCK REQUIRED. Every passenger motor vehicle except a common carrier of passengers is required to be equipped with a lock suitable to lock either the starting lever, throttle, steering apparatus, gear shift lever, brake system or ignition system. 2. ON PUBLIC STREET. No person may permit a motor vehicle in his custody to stand or remain ***unattended*** on any street, alley or in any other public place, except an attended parking area, unless either the starting lever, throttle, steering apparatus, gear shift, brake system or ignition of said vehicle is locked and the key for such lock is removed from the vehicle. This subsection shall not apply to motor trucks when the engine must be kept running while the truck is standing or parked in order to provide power for auxiliary devices, appliances, accessories or machinery that are or is related to nondriving occupational operations, provided that the operator of the motor truck is in the near vicinity of the truck engaged in assigned or related duties while the engine is running, and further provided that the vehicle must be equipped with positive neutral position brake locks plus a safety override, or similar appropriate safety features.
>
> Milwaukee Traffic Ordinance 101-30 ***emphasis added.*** (App. 1)

The court "clearly erroneously" found that there was a violation of the law. (R.58:7,12: App. 104, 109.) That finding is contrary to the Milwaukee Traffic Ordinance 101-30. Which states "No person may permit a motor vehicle in his custody to stand or remain unattended." (App. 1.) Clearly, an occupied vehicle is NOT unattended, nor is there anything in the ordinance that requires someone to be present in the driver's seat.

As soon as officers saw Mr. Dillard in the vehicle, there was no further indication of a violation of Milwaukee Ordinance 101-30 *Id*.

Additionally, Milwaukee Traffic Ordinance 101-30 is not an arrestable offense, but a citation that carries a maximum penalty of $22.00.

> 101-34. Stipulation or Contestation Procedure; Nonmoving Traffic Violations.
>
> 1. PROCEDURE. a. Any person to whom a citation has been issued for a nonmoving traffic violation in this section shall do either of the following within 65 days of the issuance of the citation:
>
> a-1. Enter into a stipulation with the city of Milwaukee providing for a forfeiture of money which may be paid at the city's violation bureau's payment centers.
>
> a-2. Schedule an appearance in municipal court to answer the charges as set forth in the citation.
>
> b. Any person to whom a citation has been issued for a nonmoving traffic violation in this section who fails to either stipulate to the forfeiture or schedule an appearance in municipal court to answer the charges within 65 days of the issuance of the citation may have a default judgment entered against that person for the forfeiture, plus appropriate fees, costs and surcharges as allowed under this section.
>
> c. A citation for a nonmoving traffic violation shall include the date on which the municipal court may enter a default judgment against the person to whom the citation has been issued.
>
> d. The owner of a vehicle involved in a nonmoving traffic violation shall be jointly liable for the violation.
>
> 2. FORFEITURE SCHEDULE. The forfeiture upon stipulation under this section shall be in accordance with the following schedule...
>
> b. Citations issued for violation of ss. 101-27-7-d, 101-27.8, 101-30 and 101-32-6: $22
>
> Milwaukee Traffic Ordinance 101-34; (App. 2-3.)

Contrary to the Court's findings, there is no "investigation" of a $22 parking citation that would require six armed police officers to rush up to a vehicle and open the doors, arrest and detain the occupant, and search the vehicle. There was nothing here to investigate. Had police truly believed there was an unattended

vehicle in violation of traffic ordinance 101-30 they could have issued the citation and left.

The court's finding that a search of the vehicle and detention of Mr. Dillard is justified due to a an "investigation" of a parking citation is clearly erroneous, especially since the officers could see that the vehicle was not unattended., and therefore, there was no violation of the traffic ordinance.

B. The Court's finding that there was "not a lack of reasonable suspicion or probable cause in this case" was clearly erroneous.

Here, the Court states " The Court denies that there was not a lack of reasonable suspicion or probable cause in this case." (R. 58:10-11; App. 107-108.)

1. The Court's finding that there was probable cause was clearly erroneous.

When counsel asked the court if it was finding that there was probable cause to search or exigent circumstances the court responded: "Well, really, both." (R. 58:12; App. 109)

The Fourth Amendment to the U. S. Constitution and the greater protections under Article I, § 11 of the Wisconsin Constitution prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. Art. 1, § 11. These articles protect people from the government intruding on the "the privacies of life." *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84

A.L.R.2d 933 (1961) (quoting *Boyd v. United States*, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886).

". . . A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the U.S. Supreme Court has always regarded probable cause as the minimum requirement for a lawful search. *Almeida-Sanchez*, 413 U.S. 266, at 269-270, 93 S.Ct. 2535, at 2537-2538, 37 L.Ed.2d 596; *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975 1981, 26 L.Ed.2d 419 (1970). *United States v. Martinez*, 526 F.2d 954 (5th Cir. 1976).

There is no question that entering a person's car and searching items inside it constitutes a search. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973). However, because of the reduced expectation of privacy that individuals have in vehicles, a warrantless search of a vehicle is not necessarily unreasonable. See *State v. Matejka*, 2001 WI 5, ¶ 22, 241 Wis. 2d 52, 621 N.W.2d 891; *State v. Pallone*, 2000 WI 77, ¶ 59, 236 Wis. 2d 162, 613 N.W.2d 568. Rather, an automobile may be searched without a warrant so long as there is probable cause to believe that evidence of a crime will be found inside. *Pallone,* 2000 WI 77 at ¶¶ 58 to 60. *State v. Miller*, 2002 WI App 150 at ¶11.

Mr. Dillard had a privacy interest to be free from such police intrusions. *Id.* Any person in a stopped vehicle has standing to challenge the stop, even if he or

she lacks a property interest in the vehicle or its contents. *United States v. Eylicio-Montoya,* 70 F.3d 1158, 1162, (10th Cir.1995).

In this case, six armed officers rode up to the vehicle where Mr. Dillard was in the back seat. (R. 71:9, 23; App. 30,44.) Officers opened the door without a warrant, without probable cause that evidence of a crime would be found within, without even reasonable suspicion that a crime was being committed, and intruded on Mr. Dillard's privacy (R. 71:1-76; App. 98-113.). All this was done although Mr. Dillard had a privacy interest to be free from such police intrusions. See *Miller*, 2002 WI App. 150 at ¶11.

Vehicles still fall under the "persons and effects" portion of the Fourth Amendment, and suddenly opening a car door without reason of a warrant or exception to the warrant requirement for a search is illegal and a violation of the United States Constitution. U.S. Const. amend. IV; *State v. Smith*, 2018 WI 2 at ¶34.

The state, in it's State's Response to Defendant's Motion to Suppress (filed after the suppression hearing) conceded that "while opening the vehicle's door may not have been a 'full-blown search,' it is a sufficient intrusion to be considered a search under the Fourth Amendment." citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). (R.12:3; App. 19.)

Once the officer saw Mr. Dillard in the back seat of the vehicle, his pretense of an investigation of a non-moving city ordinance violation of an unattended vehicle pursuant to Milwaukee City Ordinance 101-30 falls apart.

Furthermore, the "crime" of a parking violation would not contain evidence within the vehicle. Officers had no probable cause to believe that there was evidence of a crime inside of the vehicle and therefore violated Mr. Dillard's privacy upon opening the car door. Without a warrant, an invasion of that area is "presumptively unreasonable." *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan J., concurrence).This presumption is overcome if the officer who conducts the search has probable cause do so despite the person's expectation of privacy, or where the officer has attempted communication prior to the search in the form of "ordinary inquiries," which are related in scope to the purpose of a traffic stop. See *Smith*, 2018 WI 2, ¶2.

In *State v. Miller,* The Wisconsin Supreme Court has stated that to search a vehicle without a warrant, officers must have "probable cause to believe that evidence of a crime will be found inside." *State v. Miller*, 2002 WI App 150 at ¶11.

In *State v. Smith*, The court recognized that suddenly opening a car door without reason of a warrant or exception to the warrant requirement was illegal and a violation of the United States Constitution. *State v. Smith*, 2018 WI 2 at ¶34.

Here, the record establishes that no complaints to the police had been made about Mr. Dillard's presence in the area. (R: 1:1-2, 71:1-76; App. 4-5, 22-97.) There was no evidence of a property crime. (R: 1:1-2, 71:1-76; App. 4-5, 22-97.) Simply Mr. Dillard making a "lunging" movement in the back seat of a vehicle.

The facts in this case did not rise to the level of probable cause required to search the vehicle and arrest Mr. Dillard. Officer Domine's four years of experience as a police officer, the neighborhood where the vehicle was stopped, nor Mr. Dillard's movements rise to the level of probable cause that a crime was being committed. The State has the burden to prove that a warrantless search was reasonable and in compliance with the Fourth Amendment. *See State v. Boggess,* 217 Wis.2d 542, 115 Wis.2d 443, 449, 340 N.W.2d 516 (1983). The State bears that burden of proof by clear and convincing evidence. *State v. Kieffer,* 577 N.W.2d 352, 357, 217 Wis.2d 531, (Wis. 1998).

In this case, there was no finding that evidence of a crime would be found within the vehicle, no findings of probable cause of a crime to arrest Mr. Dillard, and unlike *Smith*, no attempt at communication was made prior to the search of the vehicle. (R. 71:1-76; App. 22-97.) Therefore, the stated failed in its substantial burden to show there probable cause to search the vehicle. As such, the Court's was clearly erroneous in its findings, or lack thereof, and all evidence obtained by unreasonable searches and seizures in violation of the Constitution is inadmissible

in court. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961)

2. The Court's finding that reasonable suspicion justified a search and arrest was clearly erroneous.

As the facts in this case do not meet the higher standard of probable cause necessary to search a vehicle, neither do they meet the lower standard of reasonable suspicion necessary to conduct an investigatory stop of a moving vehicle. Furthermore, this was not a moving vehicle or a person out in public, at no time was Mr. Dillard free to leave, so the higher standard of probable cause would be required to justify the search of the vehicle and the immediate detention and arrest of Mr. Dillard.

The Court clearly erroneously stated: "The Court denies that there was not a lack of reasonable suspicion or probable cause in this case." (R. 58:10-11; App. 107-108.)

The Court further erred in concluding: "...this was part of an investigation so that the *Young* principles don't –don't get the same authority in this case." (R. 58:12; App. 109.)

Here, the Court not only disregards the higher standard of probable cause necessary to overcome the privacy considerations in a vehicle but fails to take

even the *Young* protections into consideration stating that the "investigation" of a $22.00 parking ticket somehow negates *Young.*

Contrary to the statement by the court, *Young* stands for the proposition that the police must "reasonably suspect .. . that some kind of criminal activity has taken or is taking place." in order to stop someone in a public area. *State v. Young*, 569 N.W.2d 84, 212 Wis.2d 417 (Wis. App. 1997) (citing *State v. Richardson*, 456 N.W.2d 830, 156 Wis.2d 128 (Wis. 1990)).

Investigatory stops by the government of people or cars are prohibited by the Fourth Amendment to the United States Constitution unless supported by reasonable suspicion. *See U.S. v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744 U.S. (2002). Reasonable suspicion is necessary in an investigation, contrary to the Court's statement that the investigation negates the necessity for reasonable suspicion.

In *State v. Young*, Police detained Mr. Young while he was walking on the street. Police based this detention on: (1) presence in a high drug-trafficking area; (2) a brief meeting with another individual on a sidewalk in the early afternoon; and (3) the officer's experience that drug transactions in this neighborhood take place on the street and involve brief meetings. *State v. Young*, 212 Wis.2d 417, 429. The *Young* Court held there was no particularized information concerning Young's conduct and the conduct described a large numbers of innocent persons in

the neighborhood. *Id.* The Court concluded that the factors were not sufficient to give rise to the reasonable, articulable suspicion of criminal activity that justifies the intrusion of an investigative stop. *Id*.

If the law enforcement interest is so substantial that an articulable basis for suspecting criminal activity justifies a warrantless stop, it is reasonable. *Id*. However, to conduct a stop on this basis there must be specific articulable facts that could lead to an inference that the intrusion or violation was warranted. *Terry v. State of Ohio*, 392 U.S. 1.

Here, officer Domine could not articulate any suspicion that a crime was being committed which required violation of Mr. Dillard's right to privacy. At one point he suggests: "As far as I was concerned,the vehicle could have been stolen..." (R.71:14; App. 35.) alternatively, officer Domine states that Mr. Dillard "may be arming himself." (R.71:11; App. 32.). Under cross-examination, officer Domine admits he did not know why Mr. Dillard "lunged." (R 71:29; App 50.) And when asked about seeing someone that "ducked"Officer Domine replied "Well, that definitely heightened my suspicion that there was a crime afoot." (R 71:14; App. 35) Despite Officer Domine's unsupported suspicions that "there was a crime afoot,' there was no corroborating facts to support his speculations. He gave no explanation as to what statute "ducking" violates nor did could he articulate a *particular* crime. (R: 71:1-76; App. 22-97.) Given the absence of

individualized suspicion that Defendant was violating the law, this detention was illegitimate. *Terry v. Ohio*, 392 U.S. 1, 21.

Further, there are logical explanations as to Mr. Dillard's movements while waiting in the back of a vehicle – such as he dropped something, was looking for something, tying his shoe, laying down waiting for for the driver, avoiding the bright light the officer was shinning in his eyes, did not wish to talk to police, or has a distrust of police – an understandable sentiment in the recent climate and incidents of excessive police force.

Mr. Dillard's conduct not only had a lawfully discernible explanation -- waiting in a car for other passengers and a driver – but his conduct is that which many people partake in for wholly innocent purposes. Most people waiting in a car in a high-crime neighborhood are not conducting criminal activity. And more importantly other courts have found that even where there was conduct that is more readily associated with crime, as assumed by the officer, there needed to be more facts and conduct to support that suspicion. See *State v. Young*, 212 Wis.2d 417, 429; *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

In *Young,* the Court found that while some seemingly innocent conduct may also give rise to reasonable suspicion, "conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in …

neighborhoods where drug trafficking occurs" is insufficient for finding reasonable suspicion of criminal activity. *State v. Young*, 212 Wis.2d 417, 429.

As in *Young*, neither the individual facts in this case, nor the totality of those facts—including Officer Domine's four years of experience as a police officer, the neighborhood where the vehicle was stopped, nor Mr. Dillard's movements in the back seat of a vehicle—support a finding of reasonable suspicion to support an "investigatory stop."

It is well-settled law that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *State v.Washington,* 2005 WI App 123, 284 Wis. 2d 456, ¶18, 700 N.W.2d 305.

Additionally, opening the car door along with the immediate detention, tasing, and arrest of Mr. Dillard (within 51 seconds of the police seeing the vehicle) are not indicative of an "investigatory stop" but search and arrest. Furthermore, the prosecutor conceded that this was a search in State's Response to Defendant's Motion to Suppress filed after the motion hearing. (R.12:3; App. 19.) Therefore, the issue here is not one of reasonable suspicion for an investigatory stop, but of probable cause to search and arrest.

C. The Court's finding that the arrest and/or search were necessary due to exigent circumstances was clearly erroneous.

Here, the lower court states "Given the totality of the circumstances, it was not unreasonable at that point for the officer to open the door and further his investigation at that point, for his own safety and those of the other officers who were present as well; and, therefore, I'm denying the motion." (R. 58:12; App. 109.)

When asked if the Court was finding that there was probable cause to search or that the actions were justified by exigent circumstances, the Court replied:

> The Court: Well, really both. (R. 58:12; App. 109)
>
> The Court: Yeah. There were exigent circumstances. Given all of the factors, it was -- the investigation -- was reasonable because it was a violation of law, or intentional violation of law, and then the movement and the totality of the circumstances, that made it – there were exigent circumstances in this case to open that door. (R. 53:13; App. 110.)

Wisconsin Courts recognize recognize four circumstances which, when measured against the time required to procure a warrant, constitute exigent circumstances that justify a warrantless entry: (1) an arrest made in "hot pursuit," (2) a threat to the safety of the suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee. *State v. Hughes*, 2000 WI

24, 233 Wis.2d 280, ¶ 25, 607 N.W.2d 621 (Wis. 2000); *State v. Richter*, 2000 WI 58, ¶29, 235 Wis. 2d. 524, 540-541, 612 N.W. 2D 37.

The items expressed by the court: "...because it was a violation of law, or intentional violation of law, and then the movement and the totality of the circumstances" do not justify a warrantless search under the exigent circumstance exception. Especially in this case where the alleged "violation of law" is an invalid "investigation" of a parking ticket . *See supra.*

An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, application of the exigent-circumstances exception should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. *Welsh v. Wisconsin*, 466 U.S. 740, 740-741, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

In *Welsh*, the defendant drove his car off the road, left the scene and walked home. *Id*. at 742. The police, having determined the defendant's identity, and suspecting that he was intoxicated, entered his home without a warrant and placed the defendant under arrest. *Id*. at 742-43. The state attempted to justify the entry based upon, among other things, the exigency of destruction of evidence: by the

time they could obtain a warrant, Welsh's body would metabolize the alcohol, and thus destroy the evidence of his intoxication. *Id.*

The U.S. Supreme Court held that the minor, nonjailable traffic violation in the Welsh case (first offense drunk driving) was insufficient to justify a warrantless entry. *Id.* At 740-741. *Welsh* essentially holds that the less significant the offense, the more significant the exigent circumstances must be in order to justify a warrantless home entry under the Fourth Amendment. *Id.*

Here, as in *Welsh*, we have a minor, non-jailable traffic offense. Although this is not a home entry, Mr. Dillard had a right to privacy in the vehicle. *State v. Miller*, 2002 WI App. 150 at ¶11.

The determination of whether exigent circumstances are present turns on considerations of reasonableness. The test is "[w]hether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." *State v. Richter*, 612 N.W.2d 29, 2000 WI 58, 235 Wis. 2d 524 (Wis. 2000).

Here, the Court found “In this case, the officers stated they had a reasonable concern for safety. His actions, his attempt to conceal themselves and exit the vehicle, the unknown-ness, the high-crime area, the time of night, the high-tint it

was running with nobody in the driver's seat, which is a violation of the traffic code. (R. 58:10; App. 107.)

A "reasonable concern for their safety" does not rise to the level of exigent circumstance. Presumably, every police officer has a reasonable concern for his/her safety. The totality of the circumstances – a "lunging" action, the "unknown-ness", the high-crime area, the time of night, the high-tint and a running vehicle with someone in the back seat does not rise to the level of exigent circumstances.

The lower court continues throughout its decision to discuss the investigation of a crime. However, once the officer saw Mr. Dillon, his suspicions about a vehicle left unattended were nullified. At that time, the "investigation" of the minor municipal traffic ordinance should have been terminated. To then rush to the vehicle and open the car door only exacerbates any safety issues.

Further, by opening the car door without probable cause that evidence of a crime would be found within, the officers manufactured any safety concerns that would not have existed had they simply walked away. The officers created previously non-existent exigent circumstances and therefore cannot rely on them to avoid obtaining a warrant. Wisconsin courts have recognized that police officers may not benefit from exigent circumstances that they themselves create. *State v. Robinson*, 2010 WI 80, ¶32, 786 N.W.2d 463, 327 Wis. 2d 302 (Wis. 2010)

The police officer had to reasonably believe that delay in procuring a warrant would ***gravely endanger life*** or ***risk destruction of evidence*** or ***greatly enhance the likelihood of the suspect's escape***. *Robinson*, 2010 WI 80, ¶30. Again, at the time the Officer Domine opened the car door, there was no probable cause that evidence of a crime would be found within. There are no findings as to why officer Domine and the five other armed police officers with him believed that a person moving around in the back of a running vehicle *gravely endangered life*. (R. 71:1-76; App. 22-97.)

The State, bears the "heavy burden" of proving by clear and convincing evidence that the exigent-circumstances exception applies. *Welsh v. Wisconsin*, 466 U.S. 740. The State bears the burden of proving "by clear and convincing evidence" that a warrantless search "was reasonable and in compliance with the Fourth Amendment."). *State v. Kieffer*, 217 Wis. 2d 531, 541-42, 577 N.W.2d 352 (1998). Here, the State failed to meet that burden.

To put this situation into perspective – had the officer been shining his light in a picture window of a home, at night, in an “initiative” zip code, and suddenly seen a person move evasively, that would not meet the exigent circumstance exemption and allow the officer to burst into someone's home, detain and arrest (R. 58:10; App. 107.)

Additionally, the Court's statement demonstrates bootstrapping. It is improper to include the items discovered *after* a warrantless search as probable cause and/or exigent circumstances *for* the warrantless search. Items not known to the officers prior to the illegal entry of the vehicle cannot be used to justify the illegal entry.

The government bears the burden of showing that the warrantless entry was both supported by probable cause and justified by exigent circumstances. See *Welsh*, 466 U.S. At 750. Here, the evidentiary facts were insufficient to justify the warrantless entry into the vehicle, and the arrest of Mr. Dillard. See *State v. Richter*, 2000 WI 58, ¶26 . Because the state did not meet its burden, the Court was clearly erroneous in denying defendant's motion to suppress.

CONCLUSION

Mr. Dillard respectfully asks this Court to enter an order reversing the trial court's denial of his motion to suppress evidence, reversing his conviction and any judgments against him as a result of this case, and any other relief the Court deems appropriate.

Dated this 27th day of July, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7026 words.

Dated this 27th day of July, 2020.

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

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. 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 27th day of July, 2020.

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STATE OF WISCONSIN

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

DISTRICT I
Appeal No. 2020AP000999-CR
Milwaukee County Cir. Court Case No. 2018CM1973

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

DAVONTA J. DILLARD,
Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION TO SUPPRESS EVIDENCE, ENTERED BY BRANCH 31, MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE HANNAH C. DUGAN PRESIDING

APPELLANT'S APPENDIX

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CERTIFICATION AS TO APPENDIX

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; and (3) 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 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 27th day of July, 2020.

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