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

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

The following is Defendant-Appellant, Davonta Dillard's, Reply to State's Response to Appeal from An Order Denying Motion to Suppress Evidence, Entered by Branch 31, Milwaukee County Circuit Court, The Honorable Hanna C. Dugan Presiding.

Defendant-Appellant reiterates and directs the Court's attention to the arguments set forth in his initial Appeal Brief filed July 27, 2020. Many of the Plaintiff's arguments in its Response Brief were addressed in Defendant-Appellant's initial Brief. In addition, Defendant-Appellant states the following in response to the Brief of Plaintiff-Respondent filed December 16, 2020. Defendant-Appellant received that Brief on December 17, 2020 and this Reply is timely if filed by January 4, 2021.

ARGUMENT

I. THE PLAINTIFF-RESPONDENT INCORRECTLY ARGUES THAT THE OFFICERS' ACT OF OPENING THE VEHICLE DOOR WAS JUSTIFIED BY THE THREAT TO SAFETY EXIGENCY.

The State attempts to argue that *State v. Richter* allows an officer to search a vehicle without a warrant based on "Safety Exigency." However, the proper test outlined in *Richter* "is whether 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***." See *State v. Richter,* 2000 WI 58, 235

Wis. 2d 524, N.W.2d 29. ¶ 30. ***emphasis added.*** This test fails in this case on at least two counts.

First, "Exigent Circumstances" are an exception to the warrant requirement when there exists probable cause to obtain a warrant, but not the time to do so. Exigent Circumstances are not a means to wholly bypass the Fourth Amendment. 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. 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). Contrary to Plaintiff-Respondent's claim in its Response, the entry into the vehicle and immediate detention and tasing of Mr. Dillard was more than a minor intrusion, this was a full-blown search and detention. See *State v. Smith*, 131 Wis. 2D 220, 228, 388 N.W.2d 601 (1986).

Officers must have probable cause for a search warrant. As explained in Appellant's brief, the police did not have probable cause to believe a crime was being committed, and that evidence of the crime would be found within the vehicle. See Appellant's Brief. In other words, the Police must have probable cause, worthy of procuring a warrant, *prior* to invoking an exception to the warrant requirement. 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." *Richter*, 2000 WI 58, ¶ 30.

In *Richter*, "a Marinette County sheriff's deputy responded to an early-morning dispatch of a burglary in progress at a trailer park. The victim flagged down the deputy as he arrived on the scene and told him that someone had broken into her mobile home, and that she had seen the intruder flee her trailer and enter the defendant's trailer across the street. The deputy observed signs of forced entry at the defendant's trailer—a window screen was knocked out and lying on the ground." *Richter*, 2000 WI 58, ¶1.

The *Richter* Court stated: "In such circumstances, we weigh the urgency of the officer's need to enter ***against the time needed to obtain a warrant.***" *Richter*, 2000 WI 58, ¶ citing *State v. Smith*, 131 Wis. 2D 220, 228, 388 N.W.2d 601 (1986) ***emphasis added.***

Unlike *Richter*, in this case, there was nothing in this case to support a search warrant. While the State initially claimed investigation of a parking ticket provided probable cause for a search, it appears they have abandoned this pretext in their Response Brief. Response p. 5. Now, Plaintiff-Appellant claims without authority: "[I]f police officers reasonably suspect a threat to their safety, they may take action without a warrant." Response p. 7. This, however, completely

disregards the probable cause requirements of the The Fourth Amendment to the U. S. Constitution and the greater protections under Article I, § 11 of the Wisconsin Constitution which prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. Art. 1, § 11.

Warrantless entry is permissible only where there is urgent need to do so, coupled with insufficient time to secure a warrant. *Smith,* 131 Wis. 2D 220 at 228. The burden to justify warrantless entry is on the state. The state must prove that ***there was probable cause to arrest*** and, in addition, exigent circumstances that could not brook the delay incident to obtaining a warrant. *See, Laasch v. State,* 84 Wis.2d 587, 267 N.W.2d 278 (Wis. 1978) (citing *Dorman v. United States,* 435 F.2d 385, 390-92 (D.C. Cir. 1970)); *Welsh v. Wisconsin,* 466 U.S. 740, 740-741, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). ***emphasis added***.

Second, the exigent circumstance exception requires a threat to the safety of a suspect or others. A person moving in the back seat of a vehicle, even in a bad zip code, does not rise to that level. Here, the officer had no reports of physical violence, threats or weapons. No reports of alleged crimes (other than the alleged parking ticket for unattended vehicle, which was void upon seeing that vehicle was attended – discussed further in Defendant-Appellant's Brief). The officer had nothing other than a man moving around in the back seat of a vehicle, at night, in an "initiative" area.

The facts in this case are insufficient to support an officer's reasonable belief "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." *Smith at 228. emphasis added.*

Plaintiff's claim in its response that "Officer Domine reasonably believed that there was a grave threat to his safety and the safety of the officers around him" has no basis in the facts nor the findings of the Circuit Court. (R 72:1-76; App 22-97; R 59:1-16; App. 98-113)

Rather, Officer Domine testified that he did not know why Mr. Dillard "lunged." (R 72:29; App 50.) And when asked on cross-examination about seeing someone that "ducked"Officer Domine's response was: "Well, that definitely heightened my suspicion that there was a crime afoot." (R 72:14; App. 35). While Officer Domine stated "officer safety" he also stated that "officer safety" is an issue at every traffic stoop.

> Q. And is officer safety typically a concern at a vehicle stop?
> A. Its the first concern
> Q. And why is that? How Could--
> A. I guess, in our training, now that you talk about training, officer safety, you as well as your partner's is the first concern when conducting traffic and vehicle stops due to they're the most dangerous part of an officer's duties. (R: 72:12; App. 33)

Here, Officer Domine indicated the same safety concerns he has at every traffic stop. Certainly, the safety concerns while conducting every traffic stop does

not allow an officer to claim "Exigent Circumstances" to search every vehicle and arrest and taser the occupants.

Heightened suspicion does not equate to a reasonable belief that delay in procuring a warrant would gravely endanger life. See *Smith*, at 228. Nor did the Circuit Court make any finding that delay in procuring a warrant would gravely endanger life.

Furthermore, Constitutional protections do not dissipate in certain zip codes. See *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). 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.

Finally, 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. Here, the state has failed to meet that burden.

II. THE PLAINTIFF-RESPONDENT'S ARGUMENT THAT THE "PLAIN VIEW" EXCEPTION APPLIES TO EVIDENCE LOCATED IN THE VEHICLE AFTER THE ILLEGAL ENTRY IS INVALID.

Here, the Plaintiff argues that ***after*** Officer Domine opened the door to the vehicle, evidence of a crime was in plain view. However, opening the car door is a search in violation of the Fourth Amendment. The state, in it's State's Response to

Defendant's Motion to Suppress 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.)

The police did not see anything in "plain view" prior to opening the car door. (R: 72:37; App. 58) Vehicles are protected under the "persons and effects" portion of the Fourth Amendment, and suddenly opening a car door without reason of a warrant for a search is illegal and a violation of the United States Constitution. U.S. Const. amend. IV; *State v. Smith*, 2018 WI 2, 34, 905 N.W.2d 353, 379 Wis.2d 86 (Wis. 2018). Therefore, all evidence obtained after the illegal intrusion must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963).

Finally, the state admits in its Response "Unfortunately, the record is not totally clear on whether the trial court concluded that probable cause existed to justify opening the vehicle's door or in some other context." Response p. 11.

In this case, there was no finding that evidence of a crime would be found within the vehicle and no findings of probable cause of a crime to arrest Mr. Dillard prior to the illegal search and arrest. Therefore, the state fails in its substantial burden to show probable cause to search the vehicle and arrest Mr. Dillard. As such, the Circuit Court was clearly erroneous in its conclusions of law

and findings of fact (or lack thereof). 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); *Wong Sun v. United States*, 371 U.S. 471 (1963)

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.

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 29th day of December, 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 2200 words.

Dated this 29th day of December, 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 29th day of December, 2020.

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