STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP000311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONTE QUINTELL MCBRIDE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court, the
Honorable J.D. Watts, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether police had reasonable suspicion to seize Mr. McBride, a passenger in a vehicle parked in an alley late at night in a "high-crime area," upon his movement when the officer shined a spotlight into the vehicle?

   The circuit court concluded the seizure was lawful.

2. If the initial seizure was lawful, may an officer handcuff and remove a passenger from a parked car as part of a *Terry* stop?

   The circuit court answered yes.

3. Whether police lawfully searched Mr. McBride and seized a pill bottle from his jacket pocket after removing him from the vehicle?

   The circuit court answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are requested as this court has not previously addressed whether a passenger may automatically be removed from a vehicle in a non-traffic stop or whether an unlabeled pill bottle may serve as a basis for arrest. Wis. Stat. § 809.23(1)(a)1 and 2. This court may find it

helpful in addressing the issues presented in this case. Wis. Stat. § 809.22(1).

STATEMENT OF THE CASE

The State filed a criminal complaint against Donte Q. McBride, alleging possession with intent to deliver controlled substances (heroin) (>3-10 grams), in violation of Wis. Stat. §§ 961.41(1m)(d)(2) and 939.50(3)(e) and possession of narcotic drugs, in violation of Wis. Stat. §§ 961.41(3g)(am) and 939.50(e)(i). (1:1). The allegations were based upon a police seizure and search of Mr. McBride, a passenger in a vehicle police observed stopped in an alley on October 27, 2018. (1:2).

An amended information later charged Mr. McBride with one count of possession with intent to deliver a controlled substance (heroin) (>3-10 grams), second and subsequent offense, in violation of Wis. Stat. §§ 961.41(1m)(d)(2), 939.50(3)(e) and 961.48(1)(b) (Count 1) and two counts of possession with intent to deliver narcotics, second and subsequent offense, in violation of Wis. Stat. §§ 961.41(1m)(a), 939.50(3)(e) and 961.48(1)(b) (Counts 2 (oxycodone) and 3 (fentanyl)). (6:1-2).

Counsel for Mr. McBride filed a motion to suppress the evidence which alleged the police seizure and search violated the Fourth Amendment. (7). A hearing on the suppression motion was held on September 27, 2019. (40; 46). Milwaukee Police Officer Jose Rivera, who seized, searched and arrested Mr.

McBride, was the State's sole witness. (40). Video recorded by law enforcement body cameras was introduced as Exhibit 1 (40:14-15; 12).[1] Both parties then offered argument before the court issued its oral ruling. (40:34-50, 46:2-22).

The State argued the police possessed reasonable suspicion to seize and search Mr. McBride, based upon his presence in a vehicle parked in an alley in a high-crime area and his movement upon a police spotlight being directed inside the vehicle. (40:35-36; 46:3-6). Mr. McBride argued Officer Rivera lacked reasonable suspicion to seize and search him pursuant to *Terry v. Ohio,* 392 U.S. 1 (1968). (40:38-40, 46:6-10).

In an oral ruling, the circuit court, the Honorable J.D. Watts, denied the motion to suppress, finding the police had reasonable suspicion to seize and search Mr. McBride pursuant to *Terry*, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and Wis. Stat. § 968.25. (40:40-50, 46:11-23).

Following the court's denial of his suppression motion, Mr. McBride pleaded guilty to all three counts; in exchange, the State agreed to dismiss and read-in

[1] All references to the body camera video received as evidence at the suppression hearing will be to the file titled "TRAFFIC_STOP 2" which is the only file on the DVD that was submitted by the court. (40:14-15, 43, 12). Counsel will indicate where specific events happen on the video by citing to the time counter at the bottom of the screen which begins at 0:00:00 and reports elapsed time in the video in the format hours:minutes:seconds.

the second and subsequent offense enhancers on all counts. (46:25).

On September 30, 2019, the court sentenced Mr. McBride to a term totaling 6 years imprisonment (3 years confinement and 3 years extended supervision). (42:30; 17).

Mr. McBride timely filed a notice of intent to pursue postconviction relief. (19:1). He appeals the circuit court's denial of his suppression motion pursuant to Wis. Stat. § 971.31(10).

STATEMENT OF FACTS

At the suppression hearing, Officer Rivera testified that while on routine patrol on October 27, 2018, at approximately 11:15pm, he and his partner, Officer Eric Kradecki, drove through an alley near 416 East Locust Street in Milwaukee. (40:5-6). The officers approached a Nissan Pathfinder that had no headlights on, parked in the alley. (40:6; 43 at 0:00:20).

Officer Rivera testified the way the Nissan was parked could have obstructed traffic, resulting in being ticketed and towed. (40:7, 40:20). On cross-examination, however, Officer Rivera acknowledged he was able to maneuver around the Nissan and did not take measurements to indicate that it in fact obstructed traffic. (40:20).

Immediately upon seeing the Nissan, Officer Rivera shone the police spotlight on it and observed

two occupants inside - the driver and a front seat passenger. (40:6-7; 43 at 0:00:22). Officer Rivera acknowledged the spotlight was bright and that it was possible one may be blinded by it. (40:30)

Officer Rivera testified that upon shining the spotlight into the Nissan, he saw the passenger "bend down towards his waist area and begin to reach around in the vehicle." (40:7-8). Officer Rivera's body camera footage, which was played at the suppression hearing, reflected it was difficult to see whether Mr. McBride made a furtive movement. (43 at 0:00:22 - 0:00:29; 40:41).

Officer Rivera acknowledged that police had no reports of a "ShotSpotter" call or other suspicious activity in the area, nor were they provided any information regarding Mr. McBride or the vehicle he was in specifically. (40:19-20). According to Officer Rivera, Mr. McBride's movement prompted him to believe that "something illegal was going on." (40:20).

The officers got out of their squad car and immediately ordered the Nissan's occupants to put their hands up. (40:9; 43 at 0:00:28-0:00:34). Officer Kradecki made contact with the driver, while Officer Rivera approached the passenger, Mr. McBride. (43 at 0:00:33-0:00:41; 40:10). Officer Rivera shouted and repeated "hands up!" as he approached Mr. McBride. (43 at 0:00:28-0:00:34; 40:10). While Officer Kradecki spoke with the driver, Officer Rivera opened the passenger side door. (43 at 0:00:37-0:00:40; 40:11). About 25 seconds passed between the time the officers

observed the parked vehicle and when they ordered the occupants to put their hands up. (43 at 0:00:15-0:00:40; 40:23).

Mr. McBride complied with the command to keep his hands up and Officer Rivera handcuffed him while asking what he was reaching for and what he was doing there. (43 at 0:00:28-0:00:55; 40:11, 22-24). Mr. McBride denied reaching for anything and responded that "this is my house right here." (43 at 0:00:53-0:00:58; 40:31). Indeed, the Nissan was parked behind the house where Mr. McBride lived. (40:30).

After handcuffing Mr. McBride, Officer Rivera pulled him out of the Nissan. (43 at 0:00:57-0:01:02; 40:11). As he did so, Officer Rivera noticed an orange pill bottle without a label on the floor of the front passenger area, in plain view. (40:11-12, 25). Officer Rivera testified that, based on his training and experience, the presence of the unlabeled pill bottle indicated Mr. McBride was unlawfully possessing a controlled substance. (40:12).

Upon removing Mr. McBride from the Nissan, Officer Rivera searched him and found another unlabeled pill bottle in his right front jacket packet. (40:12; 46:21; 43 at 0:00:1:10). He subsequently found a baggie containing suspected heroin, later confirmed to contain a combination of heroin and fentanyl. (1:2).

On cross-examination, Officer Rivera testified he did not believe the pill bottle was a weapon. (40:25).

In denying the suppression motion, the circuit court noted Officer Rivera had been a police officer for almost 12 years and patrolled this particular area. (40:41). The court found Officer Rivera credible and gave weight to his testimony that he observed Mr. McBride make a furtive movement, despite the lack of corroboration from the body camera recording. (40:42). According to the circuit court, a furtive movement may indicate "consciousness of guilt and action to secrete evidence." (40:49).

Accepting the officer's testimony of his knowledge of the area as "high-crime," the court acknowledged this factor alone would be insufficient to provide reasonable suspicion. (40:46).

However, the court found that the combination of Mr. McBride's furtive movement and his presence in a "high-crime area" created reasonable suspicion justifying the seizure. Additionally, the court found suspicious the presence of two occupants sitting in an improperly parked vehicle without headlights illuminated in an alley. (40:46-47).

Finally, the court found the presence of pill bottles on the floorboard of the car unusual and related to Officer Rivera's inference of suspicious activity. (40:49).

Considering the above factors - the presence of a vehicle allegedly improperly parked in an alley, occupied by two individuals and without headlights on, in a high-crime area, where the passenger made a furtive movement upon a police spotlight being shone

into the vehicle and the observation of a pill bottle on the floorboard - the court found Officer Rivera possessed reasonable suspicion under *Terry* to justify Mr. McBride's seizure and the subsequent frisk of his person, for officer safety. (40:46, 49-50). The circuit court further found Officer Rivera lawfully seized the pill bottle from Mr. McBride's jacket. (46:21).

ARGUMENT

I. Police did not have reasonable suspicion to seize Mr. McBride based upon his movement in response to police shining a spotlight into vehicle in which he was a passenger, parked in an alleyway behind his house, in a "high-crime area."

A. General legal principles and standard of review.

The Fourth Amendment to the U.S. Constitution and Article 1, Section 11 of the Wisconsin Constitution protects the rights of citizens to be free from unreasonable searches and seizures. The U.S. Supreme Court and the Wisconsin Supreme Court recognize the protection from warrantless searches and seizures is not absolute. *See e.g. State v. Brown*, 2020 WI 63, ¶ 10, 392 Wis. 2d 454, 945 N.W.2d 584. One exception is for "short investigative stops if law enforcement has 'a particularized and objective basis' to suspect a person of criminal activity." *Id*. (citing *Navarette v. California*, 572 U.S. 393 (2014); *see also* Wis. Stat. § 968.24 (codifying investigative stops).

Federal and state caselaw clearly grant law enforcement officers leave to "stop and frisk" individuals suspected of criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Young*, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729. However, a lawful, investigative seizure must be supported by reasonable suspicion. *Id*. at 20-22.

To determine whether police lawfully initiated an investigatory stop, this court must "examine the facts leading up to the stop" to decide whether those facts, "viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion." *Young*, 2006 WI 98, ¶ 58 (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). As our Supreme Court noted in *Young*:

> Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient.

Id. at ¶ 21 (citing *Terry*, 392 U.S. at 27) (internal citation omitted).

The State bears the burden of proving the constitutionality of the seizure. *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634.

The appropriate remedy for an unconstitutional seizure is to suppress the evidence it produced. *State v. Washington*, 2005 WI App 123, ¶ 10, 284 Wis. 2d

456, 700 N.W.2d 305; *Wong Sun v. United States*, 371 U.S. 471, 484-85, 487-88 (1963).

Whether one's constitutionally-protected right against unreasonable searches and seizures was violated is a mixed question of law and fact, to which this court must apply a two-step standard of review. *Brown*, 2020 WI 63, at ¶8. The circuit court's findings of fact will be accepted unless clearly erroneous, but the application of those facts to constitutional principles shall be reviewed independently. *Id*.

When a defendant enters a guilty plea following the circuit court's denial of his suppression motion and a reviewing court determines that the circuit court erred, the defendant should be allowed to withdraw his guilty plea, unless the State can prove that there was no reasonable probability that the court's error contributed to the plea. *State v. Semrau*, 2000 WI App 54 ¶ 26, Wis. 2d 508, 608 N.W.2d 376.

Here, had the circuit court granted McBride's suppression motion, the evidence against Mr. McBride would have excluded and he would not have pleaded guilty.

B. The seizure of a vehicle parked in an alley, in a "high-crime area," in which a passenger makes a movement in response to police shining a spotlight, was unsupported by reasonable suspicion to believe a crime had been committed.

The State conceded and the circuit court agreed this case is controlled by *United States v. Mendenhall,* 446 U.S. 544 (1980). (40:34, 38). That is, "a seizure occurs when, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Young*, 2006 WI 98, ¶ 28 (citing *Mendenhall*, 446 U.S. at 554). Further, the State conceded, and the circuit court agreed Mr. McBride was seized when Officer Rivera commanded him to "show his hands." (40:34-35).

The circuit court found four factors which established "reasonable suspicion under the totality of the circumstances" to justify the police seizure of Mr. McBride. Those factors were: (1) it was a high-crime area; (2) Mr. McBride made a "furtive movement"; (3) the fact that the car was parked in an alleyway in such a manner that it could have obstructed traffic; and (4) the officer's inferences, based on his training and experience, regarding the pill bottle on the floorboard or between the door and passenger seat.

None of these factors, either individually or in combination, establish reasonable suspicion under the totality of the circumstances.

First, as the circuit court acknowledged, the mere presence of Mr. McBride in an area characterized by Officer Rivera as a "high-crime area" fails to rise to the level of reasonable suspicion. *State v. Gordon*, 2014 WI App 44, ¶ 15, 353 Wis. 2d 468, 846 N.W.2d 48; *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

In *Gordon*, this court held the police seizure of an individual walking at night in an area denoted as "high-crime" who patted the outside of his pocket in a "security adjustment" upon seeing police was not justified by reasonable suspicion. *Id.* at ¶14, 9. This court emphasized those who live in "high-crime areas" are entitled to the same constitutional protections as everyone else. *Id.* at ¶15.

Second, while the circuit court found the "furtive movement" described by Officer Rivera to be a factor, such a movement not dissimilar to the "security adjustment" in *Gordon*. Similar to *Gordon*, where the factors considered for reasonable suspicion included (1) presence in a "high-crime area", (2) recognition of police presence and (3) the movement (in *Gordon*, the patting the outside of his pants pocket, and here, the bending towards his waist and reaching around), there needed to be something "more." *Id.* at ¶14.

Third, the circuit court credited Officer Rivera's testimony that the Mr. McBride's was a passenger in an improperly parked car in an alley. The circuit court found this behavior unusual. But, such behavior, even in a "high-crime area" does not create reasonable suspicion of criminal activity.

This court has previously found sitting in an idling car in a parking lot is not enough to establish reasonable suspicion. *State v. Evans*, 2021 WI App 14, ¶ 40 (Wi. App., Jan. 28, 2021, unpublished opinion)[2]. (App. 8). In *Evans*, police noticed two individuals in a vehicle leave a hotel parking lot, drive to an apartment complex, park for a few minutes, return to the hotel parking lot and remain sitting in the idling vehicle. *Id*. at ¶2, 4. (App. 3). Officers parked two squad cars "in a pincer-like fashion" around the car, shined headlights and overhead spotlights on the vehicle, approached the vehicle and upon smelling marijuana asked the driver, Evans, out of the vehicle. *Id*. at ¶2, 6-9. (App. 3-4). This court found the seizure of Evans unsupported by reasonable suspicion under the totality of the circumstances, noting "none of these facts constitute the 'more' referenced by *Gordon* and *Anderson*." *Id*. at ¶45. (App. 10).

Here, an allegedly improperly parked car does not amount to that something more to amount to reasonable suspicion.

Finally, the circuit court credited a fourth factor, an "inferential" factor, drawing on the inferences an officer makes upon spotting an individual under the circumstances – here, sitting in an improperly parked car in an alleyway late at night, in a high-crime area making a furtive movement, corroborated by the pill

[2] Pursuant to Wis. Stat. § 809.23(3)(b), an unpublished opinion issued after July 1, 2009, may be cited for its persuasive value, though it is not binding precedent.

bottle on the floorboard. This overlooks Officer Rivera's testimony, admitting that his contact with Mr. McBride was not based on an improperly parked vehicle. Instead, the police contact was prompted by Mr. McBride's movement when Officer Rivera illuminated the vehicle and its occupants with the spotlight.

While an officer may rely upon training and experience to inform his observations, the court is not required to "accept all of his suspicions as reasonable" or that the officer's "perceptions are justified by the objective facts." *State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997) (quoting *United States v. Buenaventura-Ariza*, 615 F.2d 29, 36 (2nd Cir. 1980). It is a factor for the court to consider but may not be dispositive. *Id.*

Moreover, the pill bottle on the floor was not observed by Officer Rivera until after his seizure of Mr. McBride. Because the presence of the pill bottle was not known to Officer Rivera at the time of the seizure, it cannot provide a basis for reasonable suspicion to justify the seizure.

Here, the police acted unreasonably when they subjected Mr. McBride to an unlawful seizure. This court should reverse the circuit court and order the evidence obtained as a result of the illegal seizure be suppressed.

II. Officer Rivera's handcuffing and removal of Mr. McBride from the vehicle was not supported by reasonable suspicion and exceeded the scope of a *Terry* stop.

Even if the initial stop and seizure of Mr. McBride was constitutional, the pills and heroin discovered in his jacket pocket should still be suppressed because the police exceeded the scope of a *Terry* stop, rendering the search illegal.

The State argued that *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), granted Officer Rivera the authority to remove Mr. McBride from the vehicle. *Mimms* created a per se rule, allowing law enforcement to remove a driver from a vehicle during a traffic stop. In *Maryland v. Wilson*, 519 U.S. 408 (1997), the court extended this rule to passengers in traffic stops.

In *Mimms*, the U.S. Supreme Court found that the reasonableness of removing an individual from a vehicle depends upon the balance of the incremental intrusion upon the person and legitimate concerns for officer safety. It specifically noted "the hazard of accidental injury" to officers conducting traffic stops on the shoulder of a roadway, and also noted that a significant number of police officer homicides occurred during traffic stops. *Mimms*, 434 U.S. at 109-111.

In both *Mimms* and *Wilson*, the Court's concern was the hazards and danger to police investigating a traffic violation on a roadway. Here, the police encounter with Mr. McBride did not occur during a

roadside stop, but when an officer shined a spotlight into a parked vehicle in an alley, which caused Mr. McBride's movement. The seizure of Mr. McBride was not a "*de minimis*" additional intrusion occurring during a roadside traffic stop. *Wilson*, 519 U.S. at 412. To the contrary, rather than a traffic stop, Mr. McBride's seizure was the whole point of the police encounter.

Officer Rivera did not ask Mr. McBride to lower the window, or step out of the vehicle, nor did he ask him his name. Rather, upon approaching the Nissan, Officer Rivera opened the door, handcuffed and pulled Mr. McBride out. While doing so, he asked Mr. McBride whether he had any weapons and what he was doing there.

Because the handcuffing and removal of Mr. McBride exceeded the scope of a *Terry* stop, the seizure and the subsequent evidence obtained should be suppressed. *Washington*, 2005 WI App 123, *Wong Sun*, 371 U.S. 471.

III. The unlawful search of Mr. McBride was unjustified as either a lawful frisk or a search incident to arrest.

A. The police search of Mr. McBride exceeded the scope of a *Terry* frisk.

1. Legal principles surrounding a *Terry* frisk.

The circuit court found the search of Mr. McBride was a lawful *Terry* frisk and that the scope of the frisk was reasonable. (46:18).

Here, even if the police seizure and removal of Mr. McBride from the vehicle was justified, the subsequent police search of his person and seizure of the pill bottle and the baggie from his pocket were not justified as a *Terry* frisk.

A *Terry* frisk is permissible:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Terry, 392 U.S. 1, 30.

A *Terry* patdown frisk for weapons is thus authorized only when police have "specific and articulable facts" which reasonably warrant a limited search of the person's outer clothing to determine whether the person is armed. *State v. Applewhite*, 2008 WI App 138, ¶ 6, 314 Wis. 2d 179, 758 N.W.2d 181. "A frisk for weapons must be based on 'reasonable suspicion – less than probable cause, but more than a hunch – that someone is armed." *Id*. (citing *State v. Buchanan*, 178 Wis. 2d 441, 448, 504 N.W.2d 440 (Ct. App. 1993)).

Because the purpose of a *Terry* frisk is for police safety, the frisk itself must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29; *cf. Sibron v. New York*, 392 U.S. 40, 63-65 (1968) (finding a police search and seizure of heroin from defendant's pocket was not justified as a *Terry* frisk for weapons).

2. The police lacked reasonable, articulable suspicion to frisk Mr. McBride.

A *Terry* stop of an individual by the police does not automatically entitle police to frisk the individual. *See Arizona v. Johnson*, 555 U.S. 323 (2009). Two conditions must be met: (1) the investigatory stop must be lawful and (2) the police must reasonably suspect the person stopped is armed and dangerous. *Id*. at 326-327.

Here, the circuit court relied upon the same factors to justify the police seizure as well as the search of his person. That is: (1) it was a high-crime area; (2) Mr. McBride made a "furtive movement"; (3) the fact that the car was parked in an alleyway in such a manner that it could have obstructed traffic; and (4) the officer's inferences, based on his training and experience, that Mr. McBride was hiding something and the presence of the unlabeled pill bottle on the floorboard or between the door and passenger seat of the Nissan. (46:13-16).

If one's presence in a "high-crime area" cannot justify a police seizure of such an individual, this factor cannot justify a police search of their person, either. *See Gordon*, 2014 WI App 44, ¶ 15. Similarly, sitting in a parked car also fails to establish reasonable suspicion to justify a search. *See State v. Evans*, 2021 WI App 14.

The circuit court found Mr. McBride's furtive movement provided reasonable suspicion, justifying the police frisk of his person. But a furtive movement, even with one's presence in a "high-crime area," isn't enough to provide reasonable suspicion justifying a frisk.

In *State v. Johnson*, 2007 WI 32, 729 N.W.2d 182, 299 Wis. 2d 675, the Wisconsin Supreme Court found a "furtive" or reaching movement alone failed to establish reasonable suspicion. In *Johnson*, police officers recognized Johnson's vehicle, having stopped it earlier the same day for an emissions violation. *Id*.

at ¶2. Upon stopping the car for failing to signal a turn, officers observed Johnson, the driver, made a reaching motion, in which a portion of his head and shoulders disappeared from the officers' view. *Id*. at ¶3. The police believed Johnson had attempted to conceal contraband or a weapon. *Id*. Johnson was asked to step out of the car and subjected to a pat-down, which produced a baggie of several grams of cocaine, seized from his pocket. *Id*. at ¶5-8. The Court found the "search was not justified by specific, articulable facts supporting a reasonable suspicion that Johnson posed a threat to the officers' safety or that of others." *Id*. at ¶48.

The Court in *Johnson* discussed a number of Fourth Amendment cases, including *State v. Kyles*, 2004 WI 15, 269 Wis.2d 1, 675 N.W.2d 449, which found unconstitutional the search of a passenger in a traffic stop at night in a high-crime area, who appeared nervous and kept putting his hands in and out of his coat pocket. In *Kyles,* the Court concluded the passenger's nervousness and movements, as well as his presence in a high-crime area, fell short of reasonable suspicion. *Kyles*, 2004 WI 15.

Here, as in *Johnson* and *Kyles*, Mr. McBride's movement inside an allegedly improperly parked vehicle, in an alleyway, in a "high-crime area," late at night, fails to establish reasonable suspicion that he posed a threat to police.

The circuit court credited Officer Rivera's testimony that the presence of an unlabeled pill bottle

prompted him to believe Mr. McBride unlawfully possessed a controlled substance. Without more information, though, this factor can be no more than a mere hunch -an impermissible ground for a *Terry* frisk.

3. The police exceeded the scope of a *Terry* frisk by seizing a pill bottle from Mr. McBride's pocket.

Even if the police lawfully seized and frisked Mr. McBride, the police exceeded the scope of a *Terry* frisk upon removing a pill bottle from Mr. McBride's jacket pocket. Officer Rivera acknowledged what he felt in Mr. McBride's pocket was not a weapon. To the contrary, he believed what he felt was a pill bottle.

The Wisconsin Supreme Court acknowledged the "plain touch" exception to the warrant requirement, as an extension of the "plain view" doctrine, and requires three factors. *Applewhite*, 2008 WI App. 138, ¶ 14. Under the "plain touch" doctrine, police may remove objects, other than a weapon, during a pat-down search, but only "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993), *Applewhite*, 2008 WI App 138, ¶ 14.

Here, an analysis of all three factors is unnecessary, as the "incriminating character is immediately apparent" factor cannot be met. While Officer Rivera testified he saw an unlabeled pill bottle

on the floor of the vehicle, and that he subsequently found a pill bottle in Mr. McBride's jacket while searching him, pill bottles themselves, even unlabeled ones, are not apparently incriminating. Further, the contents of a pill bottle cannot be immediately ascertained without closer inspection, and certainly not by the feel of the bottle itself. Moreover, until Officer Rivera actually removed the pill bottle from Mr. McBride's pocket, he could not have known whether it was unlabeled (and potentially suspicious) or lawfully prescribed to and possessed by Mr. McBride.

B. The search of Mr. McBride was not a search incident to arrest.

The circuit court found that Officer Rivera lawfully seized and removed Mr. McBride from the vehicle and lawfully frisked Mr. McBride. Upon seeing an unlabeled pill bottle in the Nissan and discovering a second pill bottle in Mr. McBride's jacket, the circuit court found that there was probable cause to arrest him. (46:20-22). To the extent that the circuit court referenced a search incident to arrest, the search of Mr. McBride cannot be justified as such under these circumstances.

A search incident to arrest is a lawful exception to the warrant requirement. *Chimel v. California*, 395 U.S. 752, 755 (1969) (citing *Weeks v. United States*, 232 U.S. 383 (1914)); *State v. Randall*, 2019 WI 80, ¶22, 387 Wis.2d 744, 930 N.W.2d 223; Wis. Stat. § 968.11. But the presence of an unlabeled pill bottle in the

passenger area of a vehicle where Mr. McBride was seated and second one in his jacket pocket, containing an unknown quantity or type of pills, without more, can hardly amount to probable cause for an arrest.

A Colorado Court of Appeals case surveyed various states' analyses of whether discovery of a pill bottle warrants a finding of probable cause for a search or seizure. *People v. Alemayehu*, 2021 COA 69 ¶ 45, __P.3d.__ (Colo. App. Div. I, May 20, 2021, unpublished opinion).[3] (App. 31). While one state (Ohio) found probable cause, six others (Louisiana, Tennessee, Kansas, Illinois, Indiana and Pennsylvania) "reject the idea that an unlabeled pill bottle, in and of itself, constitutes probable cause for a search or seizure." *Id*. at ¶ 47. (App. 31-32).

In *Alemayehu*, sheriff's deputies were responding to a collision in a parking lot and speaking with the driver outside of his vehicle when they noticed two prescription pill bottles, one without a label, inside a pocket at the bottom of the driver's side door. *Id*. at ¶2-3, 5, 26. (App. 27-28). Colorado joined the majority of states in concluding that:

> [T]he mere observation of an unlabeled prescription pill bottle did not provide the deputies with probable cause to associate it with criminal activity. Consequently, unless there

[3] Wis. Stat. § 809.23(3)(b); *see also State v. Swope*, 2008 WI App 175, ¶26, n.5, 315 Wis.2d 120, 762 N.W.2d 725,; *State v. Stenzel*, 2004 WI App 181, ¶18, n.6, 276 Wis.2d 224, 688 N.W.2d 20.

> were other unusual circumstances which would have elevated the deputies' suspicion to probable cause, the deputies would have lacked the authority to seize the item for further inspection under the plain view exception.

Id. at ¶49. (App. 32).

This court should also join the majority and find the presence of an unlabeled pill bottle fails to give rise to probable cause for a seizure and a search of Mr. McBride.

Officer Rivera lacked probable cause to arrest Mr. McBride for the unlawful possession of a prescription drug based simply upon the unlabeled pill bottle in the vehicle and therefore lacked the authority to search him incident to arrest. Moreover, as argued above, Officer Rivera also lacked justification to seize the pill bottle from Mr. McBride's jacket pocket as part of a *Terry* frisk.

CONCLUSION

For the reasons stated above, Donte McBride respectfully asks this Court to reverse the circuit court's denial of his suppression motion with directions to grant suppression of all evidence obtained during the unlawful encounter and to allow Mr. McBride to withdraw his guilty plea.

Dated this 12th day of July, 2021.

Respectfully submitted,

Electronically signed by Jill M. Skwor
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 5,100 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 one or more initials or other appropriate pseudonym or designation 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 12th day of July, 2021.

Signed:
Electronically signed by Jill M. Skwor
JILL M. SKWOR
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