STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP311-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

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

When Milwaukee Police Officers seized and searched Mr. McBride, a passenger in a vehicle parked in an alley in a "high-crime area" late at night who made a furtive movement upon officers shining a light into the vehicle, they violated his constitutionally protected right to be free from unreasonable search and seizure. U.S. Const. Amend. IV; Wis. Const. Art. I, Sec. 11; *State v. Brown,* 2020 WI 63,392 Wis. 2d 454, 945 N.W.2d 584. The fruits of this illegal seizure and search should be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Washington*, 2005 WI App 123, 284 Wis.2d 456, 700 N.W.2d 305.

ARGUMENT

I. Mr. McBride's presence in a vehicle parked in an alley in a "high-crime area" and the movement he made upon having police shine a spotlight into the vehicle fails to give rise to reasonable suspicion.

The state argues four factors support a finding of reasonable suspicion supporting Officer Rivera's seizure of Mr. McBride. (Resp. Br.13). Those factors include the location of the Nissan Pathfinder parked in a "high crime area"; that Nissan, parked in an alley, allegedly obstructed traffic; the presence of individuals in an unlit, parked car; and Mr. McBride's movement upon being illuminated by the police spotlight. (Resp.

Br. 13). But, even the State recognizes the first factor, that one's presence in a "high-crime area", alone is insufficient to give rise to reasonable suspicion. (Resp. Br. 14).

The State next asserts Milwaukee Police Officer Rivera would have been justified in stopping the Nissan because it obstructed traffic and therefore violated a City of Milwaukee ordinance. (Resp. Br. 14-15). However, Officer Rivera's testimony did not establish that the Nissan in fact blocked traffic:

> OFFICER RIVERA: [The vehicle was] parked in the alley, and it was in the alleyway so traffic would have to get around it, and I could not tell if anyone was inside of the vehicle due to it being dark out.
>
> THE COURT: What do you mean vehicles "had to get around it"? What does that mean?
>
> OFFICER RIVERA: Alleys typical in Milwaukee are very narrow, so it caught my attention because it wasn't parked off to the side, it was parked right in the alley.
>
> THE COURT: So it interfered with traffic or what?
>
> OFFICER RIVERA: It would have if like vehicles -- like, if there was a large vehicle or two-way traffic, it would interfere, yes.

(40:6-7).

On cross-examination, Officer Rivera conceded he was able to maneuver his squad car around the

parked Nissan. (40:20). Officer Rivera further admitted he took no measurements to indicate whether the Nissan in fact obstructed traffic. (40:20). The conclusion that the vehicle was parked in such a manner as to obstruct traffic is therefore unsupported by the facts in this case.

The State relies on the holding in *State v. Neal* for its assertion that Officer Rivera lawfully seized the vehicle and Mr. McBride. *Neal*, 2018 WI App 35, 382 Wis. 2d 271, 915 N.W.2d 730 (unpublished opinion) (Resp. Br. 14-15). However, in *Neal* "[t]he dashcam clearly show[ed] the vehicle parked towards the middle of the alley, blocking traffic in at least one direction." *Id*. at ¶ 11. Moreover, the fact that the vehicle obstructed traffic in *Neal* was uncontroverted. *Id*.

Unlike the court in *Neal*, the circuit court in Mr. McBride's case did not explicitly find the vehicle in fact obstructed traffic. (40:46-47). Rather, the circuit court stated, "there's an inference that the vehicle is partially blocking the alley." (40:46). Further, the dashcam video from the encounter here does not "clearly show" a vehicle obstructing traffic. (43). Moreover, Officer Rivera acknowledged that traffic, including his own squad car, could maneuver around the parked vehicle here. (43, 40:6-7, 20).

The State argues *State v. Evans* is inapplicable here. *Evans*, 2021 WI App 14 (WI App, Jan. 28, 2021) (unpublished opinion). (Resp. Br. 16). In *Evans*, law enforcement observed a man (and woman passenger)

walk from a hotel to a vehicle, drive the vehicle to an apartment complex parking lot, park for about a minute, return to the hotel parking lot, park the vehicle and remain sitting in the vehicle in the early morning hours. *Id*. at ¶¶4-5. This Court found the police in *Evans* lacked reasonable suspicion to support the seizure. *Id*. at ¶11. Mr. McBride's case similarly involves two individuals sitting in a parked car. But Mr. McBride's case presents less suspicion than presented in *Evans*. In this case, police merely happened upon the parked vehicle in which Mr. McBride was sitting, in an alley, without having made any prior observation of either the vehicle or its occupants.

The State asserts Officer Rivera observed Mr. McBride make a furtive movement in response to police illuminating the Nissan. (Resp. Br. 17). But a furtive movement in response to having a spotlight shone on the vehicle is even less suspicious than the "security check" described in *State v. Gordon*, which this Court found did not support reasonable suspicion for a seizure. *Gordon*, 2014 WI App. 44, 353 Wis.2d 468, 846 N.W.2d 48.

Under the totality of the circumstances, Officer Rivera lacked a reasonable, articulable suspicion to seize Mr. McBride and violated his Fourth Amendment rights.

II. Neither *Mimms* nor *Wilson* support the police removal and handcuffing of Mr. McBride.

The Supreme Court created a *per se* rule in *Pennsylvania v. Mimms*, allowing law enforcement to remove a driver from a vehicle during a traffic stop. *Mimms*, 434 U.S. 106 (1977). In *Maryland v. Wilson*, the Supreme Court extended the *per se* rule of *Mimms* to passengers. *Wilson*, 519 U.S. 408 (1997). This Court should reject the State's bold invitation to extend the *per se* rule applicable to traffic stops in *Mimms* and *Wilson* to non-moving encounters. (Resp. Br. 21-23).

In addition, the State relies upon *State v. Morgan* 197 Wis. 2d 200, 539 N.W.2d 887 (1995) and *State v. King*, 175 Wis. 2d 146, 499 N.W.2d 190 (Ct. App. 1993) to argue that law enforcement need not rely on the *per se* rule of *Mimms* and *Wilson* to seize and search a vehicle's occupants. (Resp. Br. 21-23). But Mr. McBride's case is distinguishable from both *Morgan* and *King*, two cases involving more suspicion of criminal activity than an arguable non-moving violation in an alley and a furtive movement upon being illuminated by a police spotlight.

The State oversimplifies the purpose of the stop in *Morgan*, claiming the officer stopped the vehicle for expired license plates. (Resp. Br. 21). The Court in *Morgan* determined police stopped Morgan after having observed him driving out of alley, make several turns in the space of a few city blocks and then enter another alley at 4 a.m. in a high-crime area. *Morgan*,

197 Wis. 2d at 204. The unusual driving pattern, in addition to the expired license plates, formed the basis for reasonable suspicion.

In *King*, law enforcement officers, aware of a suspicious vehicle involved in a shooting, observed the vehicle driven by King which matched the "type, color and license plate number" of the suspect vehicle, and conducted a stop. *King*, 175 Wis. 2d at 149. Upon approaching King, the driver, police observed he was "fidgeting and making repeated movements below the front seat." *Id*.

In both *Morgan* and *King*, police effected seizures relying upon facts far more suspicious than the purported parking violation in an alley here, where Mr. McBride was a passenger who allegedly made a furtive movement upon police shining a spotlight on the vehicle late at night in a "high crime area."

The State's reliance upon *Morgan* and *King* is misplaced, as Mr. McBride's case is clearly distinguishable. Further, this Court should reject the State's invitation to extend the *per se* rule of *Mimms* and *Wilson* to arguable, non-moving traffic ordinance matters.

III. The police search of Mr. McBride and seizure of the contents of his jacket pockets were not justified as either a lawful frisk or a search incident to arrest.

A. Officer Rivera's search of Mr. McBride's pockets was not a lawful *Terry* frisk.

The landmark U.S. Supreme Court case *Terry v. Ohio* authorizes law enforcement to conduct a pat-down search for weapons. *Terry*, 392 U.S. 1 (1968). But a *Terry* frisk must be supported by reasonable suspicion. *Id.* at 30. Moreover, *Terry v. Ohio* does not grant law enforcement *carte blanche* authority to seize items which are clearly not weapons during the course of a *Terry* frisk. *Id.*, *State v. Applewhite*, 2008 WI App 138, ¶ 6, 314 Wis. 2d 179, 758 N.W.2d 181.

The State appropriately identifies the three-factor "plain-touch" test set forth in *Applewhite*. (Resp. Br. 26). But the State incorrectly concludes all three factors have been met here. (Resp. Br. 26-27). Specifically, the State fails to establish the seized object's "incriminating character is immediately apparent" to the searching officer. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The State argues that the pill bottle inside Mr. McBride's jacket pocket, when felt by the officer, was immediately incriminating and therefore subject to seizure. (Resp. Br. 26-27). But the State fails to articulate how the officer could have known that the pill bottle he felt was either unlabeled or otherwise illegal, justifying its seizure. Because the officer could not have known the

pill bottle was unlabeled or otherwise illegal prior to removing it from Mr. McBride's pocket, its incriminating nature was not "immediately apparent" as required by *Dickerson*, and therefore its seizure was illegal.

B. Officer Rivera's search of Mr. McBride was not a search incident to arrest.

The State asserts that police had probable cause to arrest Mr. McBride for the crime of possessing a controlled substance without a prescription based on Officer Rivera's observation of the unlabeled pill bottle in the Nissan. (Resp. Br. 29). As argued in Mr. McBride's opening brief, however, the majority of courts that have addressed this issue have found that this alone does not constitute probable cause for arrest. (App. Br. 31). And, while the State argues this Court need not address the issue because "Officer Rivera's probable cause here was not based only on the pill bottle," but "based on all the surrounding circumstances, it fails to articulate what other "circumstances" give rise to probable cause to arrest. (Resp. Br. 29-30). Certainly, presence in a "high-crime area" or a "furtive movement" are not criminal activities and cannot provide police with probable cause to arrest. This Court should reject such an inference.

C. A "good faith" exception to the illegal search is without any legal basis.

Without citing any authority, the State urges this Court to extend the "good faith" exception to the

exclusionary rule based on an officer's erroneous probable cause determination. (Resp. Br. 30). The State acknowledges that the good faith exception has previously been applied where police rely on a faulty warrant, case law which is subsequently overruled, or statutes that are held unconstitutional. (Resp. Br. 31). However, the State fails to explain why the good faith exception should be extended to a fact-based, run-of-the-mill probable cause determination that police officers are required to make every day.

While the Wisconsin courts have not previously addressed whether an unlabeled pill bottle, observed in a vehicle, provides police with probable cause to arrest, (App. Br. 30), the absence of a prior determination on this factual issue by a Wisconsin appellate court does not constitute a "completely new legal principle" as the state claims, (Resp. Br. 31), and thus is not a change in the law that would warrant application of the good faith exception.

In *State v. Hess*, the Wisconsin Supreme Court detailed the chronology of the exclusionary rule and the good faith exception to it. *Hess*, 2010 WI 82, ¶ 46, 327 Wis. 2d 524, 785 N.W.2d 568, (*citing Hoyer v. State*, 180 Wis. 407, 415, 193 N.W.89 (1923)). Wisconsin adopted the good faith exception to the exclusionary rule, consistent with the evolution of this doctrine in the federal courts. *Id*. at ¶47. But "[b]oth federal and Wisconsin case law concerning the exclusionary rule and the good-faith exception start from the presumption of a warrant issued by 'a detached and neutral magistrate.'" *Id*. at ¶ 54 (quoting

United States v. Leon, 468 U.S. 897, 900 (1984) and citing *State v. Eason*, 2001 WI 98, ¶ 2, 245 Wis.2d 206, 629 N.W.2d 625).

Whether Officer Rivera possessed the requisite probable cause to seize the pill bottle from Mr. McBride's jacket pocket is a fact-based determination, not a new legal principle as the State posits. This Court should reject the State's invitation to expand the good faith exception to probable cause determinations and thus swallow the Fourth Amendment whole.

CONCLUSION

The police search and seizure of Mr. McBride violated his federal and state constitutional protections against unreasonable seizures and searches. This Court should reverse and remand to the circuit court with instructions to grant the motion to suppress, vacate Mr. McBride's convictions and grant plea withdrawal.

Dated this 26th day of August, 2021.

Respectfully submitted,

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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 2,149 words.

Dated this 26th day of August, 2021.

Signed:

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