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COURT OF APPEALS**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP708-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CATTI J. MEISENHELDER,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction Entered in  
the Calumet County Circuit Court, the Honorable  
Jeffrey S. Froehlich, Presiding.

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REPLY BRIEF OF  
DEFENDANT-APPELLANT

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## ARGUMENT

**I. This was not a valid search incident to arrest because under all the circumstances there was not a reasonable possibility that Ms. Meisenhelder could access a weapon or destructible evidence.**

A search incident to arrest may be permissible when “under all the circumstances, there remains a reasonable possibility” that the arrested person could access a weapon or destructible evidence. *United States v. Shakir*, 616 F.3d 315, 321 (3d Cir. 2010). The state’s argument depends wholly upon there being a reasonable possibility, under all the circumstances, that Ms. Meisenhelder could access the vial inside her purse when the officer searched it. (State’s Brief at 11).

The state limits its analysis to the location of the bag and fails to address “all the circumstances” and reasonableness. A closer look at the cases cited in the state’s brief exposes this flaw in its argument. (State’s Brief at 11-12). First, Ms. Meisenhelder was not holding her purse; it had been placed on a chair. (49:10).<sup>1</sup> The state relies on *United States v. Hill*, 818 F.3d 289 (7<sup>th</sup> Cir. 2016), but the defendant in *Hill* was holding the bag when he was detained and it was this fact that led the court to conclude he was “plainly exercising immediate control” over the bag. *Id.* at 295.

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<sup>1</sup> In Defendant-Appellant’s Brief-in-Chief, testimony from the June 25, 2020, motion hearing was incorrectly cited as record cite 48. The state in its brief correctly cited the hearing as item 49.

For the same reason, the state's reliance on *United States v. Rutley*, 482 F.App'x 175, 177 (7<sup>th</sup> Cir. 2012) is unpersuasive.<sup>2</sup> (State's Brief at 11). The defendant in *Rutley* was carrying the bag at the time of his arrest, with the court noting that officers are permitted to search a bag "carried by" the person arrested. *Id.*

Likewise, in *United States v. McLaughlin*, 739 F. App'x 270 (5<sup>th</sup> Cir. 2018), police arrested the defendant pursuant to an arrest warrant for robbery and he was a suspect in multiple bank robberies, including two that had occurred that day. The defendant had fled from police days earlier and a firearm had been recovered during the pursuit. At the time of his arrest, the defendant carried an envelope large enough to conceal a gun under his arm. *Id.* at 276. *See also United States v. Ouedraogo*, 824 F.App'x 714 (11<sup>th</sup> Cir. 2020)(defendant was holding the purse when arrested).

The other federal cases the state relies on contain factual distinctions that bear no resemblance to the facts in Ms. Meisenhelder's case. These cases tilt the "reasonable possibility" analysis in favor of the search, while the circumstances in Ms. Meisenhelder's case diminish the "reasonable probability." For example, in *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010), the court relied on the totality of the circumstances surrounding the arrest "this is

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<sup>2</sup> *Rutley* was before the court in the form of a No-Merit Appeal.

especially true when we consider that Shakir was subject to an arrest warrant for armed bank robbery, and that he was arrested in a public area near some 20 innocent bystanders as well as at least one suspected confederate who was guarded only by unarmed hotel security officers. *Under these circumstances*, the police were entitled to search Shakir's bag incident to arresting him." (*emphasis added*) *Id.* at 321.

The defendant in *United States v. Ferebee*, 957 F.3d 406 (4<sup>th</sup> Cir. 2020), was visiting a friend who was on probation and subject to warrantless searches. The officers found the defendant smoking marijuana on a couch with a backpack at his feet. The defendant said the backpack was not his. The court held that the defendant had no standing to challenge the search of the backpack because his denial of ownership constituted abandonment. *Id.* at 414. Although this determination resolved the issue, the court went on to discuss the search incident to arrest, noting that though handcuffed, the defendant was able to wad up and throw away his marijuana joint without detection from the officers thus showing himself to be fully capable of tampering with evidence despite his handcuffed state. *Id.* at 419. *See also United States v. Perdoma*, 621 F.3d 745 (8<sup>th</sup> Cir. 2010) (court found the defendant had already run from officers once, officers did not know how strong he was); *United States v. Cook*, 808 F.3d 1195 (9<sup>th</sup> Cir. 2015)(officers observed the drug transaction, multiple weapons were found with the defendant's co-conspirator, a large crowd had

gathered and agents reasonably feared that bystanders might intervene).

Ms. Meisenhelder was arrested at a Walmart after taking eyeliner and mouthwash without paying. (49:13; 20). Four officers were with Ms. Meisenhelder in the Walmart's loss prevention office when the search took place. (49:7). Ms. Meisenhelder was not holding her purse, there is no indication that innocent bystanders were at risk or co-conspirators present, Ms. Meisenhelder had not tampered with evidence while being held in the room, the theft did not involve weapons and the record doesn't reflect that the officers were concerned about Ms. Meisenhelder's strength. (49). Under all the circumstances, there simply was not a reasonable possibility that Ms. Meisenhelder could access a weapon or destructible evidence. The search incident to arrest was not valid.

The state in its brief does not directly address Ms. Meisenhelder's argument that police lacked probable cause to open the vial. An issue not argued is deemed conceded. *Charolais Breeding Ranches Ltd v. FPC Sec. Corp.*, 90 Wis.2d 97, 108-109, 279 N.W.2d 493 (Ct. App. 1979).

## CONCLUSION

For these reasons, as well as those set forth in the brief-in-chief, Ms. Meisenhelder respectfully requests that this court reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence obtained as a result of the unlawful search.

Dated this 21st day of October 2021.

Respectfully submitted,

*Electronically signed by*

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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 956 words.

Dated this 21st day of October, 2021.

Signed:

*Electronically signed by*

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