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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2022AP000540-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY L. CUNDY,

Defendant-Appellant.

Appeal of a Judgment of Conviction entered in
Dodge County Circuit Court,
the Hon. Martin J. De Vries, Presiding

REPLY BRIEF

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I. Officer Wheeler seized Cundy at his home without a warrant and evidence derived from the illegal arrest must be suppressed.

A. The Fourth Amendment's warrant requirement applies to all searches and seizures at a person's home, not just "arrests."

The State does not dispute that Cundy was "seized" for Fourth Amendment purposes when he attempted to end his conversation with Officer Wheeler at his front door. State Br. at 16. The State's argument instead rests on the faulty premise that a warrant is required only when the seizure at a person's home amounts to an "arrest." State Br. at 16-17. According to the State, because "Cundy's seizure was merely a temporary, investigative detention … Wheeler needed only reasonable suspicion." *Id.*[1]

This is an extraordinary argument. If it were true that a warrant is not needed to make an investigatory detention at a person's home, then police, armed with no more than "reasonable suspicion," could simply walk into a person's home and start questioning them. After all, that would not be an "arrest."

This of course is not the law. The Supreme Court has not limited the warrant requirement to "arrests" at a person's home. Instead, the Court has more broadly stated that "[i]t is a basic principle of Fourth

[1] The State was apparently referencing *Terry v. Ohio*, 392 U.S. 1 (1968), the seminal case allowing temporary seizures for investigative purposes based on reasonable suspicion alone.

Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (quotation marks and footnote omitted).[2] Accordingly, the Court has repeatedly held that warrantless searches and seizures at a person's home violate the person's Fourth Amendment rights, even when the police do not physically enter the four-walls of the home.

In one strikingly similar case, police officers on the defendant's front porch threatened to arrest him if he did not accompany them to the police station to be fingerprinted. *Hayes v. Florida*, 470 U.S. 811, 812 (1985). The defendant obliged, and eventually moved to suppress the results of the fingerprinting as the result of a warrantless seizure at his home, unsupported by probable cause. *Id.* at 812-813. The state court denied the motion, holding that the officers only needed reasonable suspicion by "analogizing to the stop-and-frisk rule of [*Terry*]." *Id.* at 813.

The Supreme Court rejected this application of *Terry*, for the simple reason that the Fourth Amendment provides heightened protections for searches and seizures at a person's home that they do not enjoy while out in the public. *Hayes*, 470 U.S. at 815-818. The Court acknowledged that "the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act[.]" *Id.* at 817. However, the Court was quick to say that "[o]f course, neither reasonable suspicion nor probable cause would

[2] While "the warrant requirement is subject to certain exceptions," *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006), the State has not argued that any apply here.

suffice to permit the officers to make a warrantless entry into a person's house for the purpose of obtaining fingerprint identification." *Id*. The Court held that the Fourth Amendment is violated "when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Id*. at 816. Notably, numerous federal courts have rejected the notion that *Terry* stops may be performed at a person's home absent a warrant. *Moore v. Pederson*, 806 F.3d 1036 (11th Cir.2015); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir.2008); *United States v. Reeves*, 524 F.3d 1161 (10th Cir.2008).

The Supreme Court's insistence on a warrant for any type of search and seizure at a person's home, where one would not be needed otherwise, is well-illustrated in *Florida v. Jardines*, 569 U.S. 1, 6 (2013). There the Court held that a warrant is needed to conduct a canine "drug sniff" at a person's front door. The Court observed that the Fourth Amendment explicitly protects "houses," and that "when it comes to the Fourth Amendment, the home is first among equals." *Id*. Moreover, the Court observed that the curtilage, *i.e.*, the area "immediately surrounding and associated with the home… [is] part of the home itself for Fourth Amendment purposes." *Id*. Performing a police investigation on a person's front porch goes well beyond the "implied license" to approach a home and knock on the door to speak with the occupants, and thus constitutes an unlicensed, unconsented to "physical intrusion" of the defendant's home for which a warrant is required. *Id*. at 7-10. And while *Jardines* does involve a "search," it would make little sense to

require a warrant to perform a dog sniff on a person's front porch, but not to remove a person from their home as part of an investigation.

The State's reliance on *State v. Quartana*, 213 Wis. 2d 440, 443, 570 N.W.2d 618, 620 (Ct. App. 1997), is understandable, but ultimately misplaced. The only issue in *Quartana* was whether the seizure was an "arrest" that required probable cause. The court simply did not reach the issue raised here: whether a warrant is required to perform a *Terry* stop at a person's home.

Quartana apparently did not argue that a warrant was required for any seizure at his home. According to the court, "Quartana argue[d] that th[e] police action violates § 968.24," Wisconsin's codification of *Terry*, because it amounted to an arrest unsupported by probable cause. 213 Wis. 2d at 442. The Court then stated it would address "the analysis to be conducted when a person under a *Terry* investigation is removed from one place to another[.]" *Id*. Perhaps Quartana simply overlooked the warrant argument. Or, Quartana may have concluded, based on facts that did not make it into the court's opinion, that the warrant requirement did not apply. For instance, the opinion notes in passing that the residence was shared with his parents. *Id*. at 444. Perhaps one of his parents consented to the officers entering the home.

Regardless of the whys and wherefores, the *Quartana* decision only addresses whether that detention was an "arrest," and simply does not address whether a warrant is required for a *Terry* stop at a person's home. There is no language in *Quartana* that

would prevent this court from holding that Cundy's seizure at his home violated his Fourth Amendment rights because it was made without a warrant. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 256 (1997). Even if *Quartana* can be stretched to reach this holding, it is clearly in conflict with subsequent Supreme Court precedent, such as *Jardines*, and can be disregarded by this court. *State v. Jennings*, 2002 WI 44, ¶ 18, 252 Wis. 2d 228, 237, 647 N.W.2d 142, 147.

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Certainly, if Wheeler had come across Cundy walking down the street or otherwise out in public, *Terry* would have allowed Wheeler to stop Cundy, ask him some questions, and even transport him somewhere in the vicinity to continue the investigation. But he didn't. Wheeler went to Cundy's home, continued to question Cundy despite Cundy's effort to end their conversation, and then ordered Cundy out of his house so he could be transported for the show-up identification. So, just as the seizure in *Hayes* and the search in *Jardines* required a warrant simply because they were conducted at the defendant's home, so too did the seizure at Cundy's home require a warrant.

B. The State does not dispute that Officer Wheeler lacked probable cause to arrest Cundy for a crime.

The State does not argue that Officer Wheeler had probable cause to arrest Cundy, and does not seek application of that exception to the exclusionary rule. Cundy Br. at 17-18, *citing New York v. Harris*, 495 U.S. 14, 21 (1990). Having not addressed this issue,

the State has conceded it. *State v. Anker*, 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 573–74, 855 N.W.2d 483, 487.

The State does argue in a footnote that the exclusionary rule should not be applied because there is "no evidence of misconduct from Wheeler." State Br. at 20, n. 4 (*citing State v. Burch*, 2021 WI 68, ¶ 17, 398 Wis. 2d 1, 961 N.W 2d 314, *cert. denied Burch v. Wisconsin*, 142 S. Ct. 811 (2022)). This argument should be rejected for two reasons. First, the Court of Appeals simply "do[es] not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." *State v. Santana-Lopez*, 2000 WI App 122, ¶ 6 n. 4, 237 Wis. 2d 332, 339, 613 N.W.2d 918, 922 (cleaned up).

Second, the language cited from *Burch* was at most a recognition of the general purpose of the exclusionary rule, when the court was considering whether to apply the rule to a rather unique situation involving the defendant's digital data. There is no suggestion in *Burch* that the exclusionary rule has been rewritten to require the defendant to show police "misconduct" in all cases. Instead, under the well-established and still standing precedent, Cundy was entitled to the suppression of all evidence derived from his illegal seizure at his home, unless the State could show that any particular piece of derivative evidence was so attenuated from the illegal arrest that the "taint" of the illegality had dissipated. *Brown v. Illinois*, 422 U.S. 590, 592 (1975).

C. The burden is on the government to show that evidence derived from Cundy's illegal arrest – including his statements, the identification, and the blood draw warrant – should not be excluded.

The State adds at the very end of its brief, almost as an afterthought, a request that this case be remanded to the circuit court "to give the parties the opportunity to give the parties the opportunity to address the scope of the evidence that should be suppressed (if any), whether an exception to the exclusionary rule applies, and the effect on each charge in the case." State Br. at 31. The Court should decline this invitation.

First, the State does not explain why this Court cannot address these questions now. Perhaps a remand would be appropriate if specific fact-finding was needed, but the State neither asks for an evidentiary hearing nor identifies what facts would need to be proven.

Second, any such hearing could have been had as part of the suppression hearing if the State had made any arguments based on an exception to the exclusionary rule or the lack of connection between the police conduct and the evidence Cundy sought to be suppressed. The State instead put all its eggs in one basket, and argued only that Cundy's Fourth Amendment rights were not violated. This Court has refused to order remand when "the State prevented a complete fact-finding on an issue that could have been resolved at the trial court," and should do so here as well. *State v. Nichelson*, 220 Wis. 2d 214, 230, 582 N.W.2d 460, 467 (Ct. App. 1998)

II. Cundy's statements after he was ordered out of his house and taken by squad car to be identified by a witness were the result of a custodial interrogation without the requisite *Miranda* warnings.

The courts agree that a person is in *Miranda* custody when "a reasonable person would have considered himself restrained to a degree associated with formal arrest," and that answering that question requires consideration of numerous factors. *State v. Dobbs*, 2020 WI 64, ¶ 61, 392 Wis. 2d 505, 945 N.W.2d 609; *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). However, the courts sometimes group the factors differently, and Cundy addressed the relevant factors as laid out in *Dobbs*, while the State has focused on the test as laid out in *State v. Halverson*, 2021 WI 7, ¶ 17, 395 Wis. 2d 385, 395, 953 N.W.2d 847, 852. Cundy will likewise address the test articulated in *Halverson*, though the factors are substantially similar.

In *Halverson*, the court stated that the first step of the inquiry is to "ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." 2021 WI 7, ¶ 17 (cleaned up). Cundy was ordered out of his home to participate in a show up identification, taken to the show-up in the back of a police car, and then when he was returned to his house, Officer Wheeler said "step out here and we'll go back over to the other side over here and we'll chat a little more about this." (R. 42 at 37:40). Officer Wheeler and a colleague then questioned Cundy about his activities than evening.

At what point was Cundy "at liberty to terminate the interrogation and leave"? *Halverson*,

2021 WI 7, ¶ 17. The State does not say. Certainly, not before or during the show-up: according to the State, Cundy was properly detained under *Terry*, and thus decidedly not "free to leave." When the police officers returned to Cundy's home, and began questioning him, there is no suggestion that Cundy's participation was optional. Officer Wheeler – after ordering him out of his home – tells Cundy "step out here and we'll go back over to the other side over here and we'll chat a little more about this." (R. 42 at 37:40). A reasonable person would interpret this as a command that must be obeyed, not an invitation that could be declined, especially in light of all of Officer Wheeler's prior commands. Accordingly, the first step of the test under *Halverson* is met.

Under *Halverson,* "the second step in the custody analysis [is] 'whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'" 2021 WI 7, ¶ 17, *quoting Howes v. Fields*, 565 U.S. 499, 509 (2012). Importantly, *Howes* explains that it is the "shock" of the "sharp and ominous change" of being arrested and taken to a police station – of being "cut off from … normal life and companions and abruptly transported from the street into a police-dominated atmosphere" – that will "give rise to coercive pressures" to answer the interrogator's questions and not remain silent. 565 U.S. at 511-512 (citations and quotation marks omitted).

Here, Officer Wheeler denied Cundy's attempt to end their initial conversation, ordered Cundy out of his home, took him by police car to be identified by a witness, transported him back to his home by police car, and then ordered him to stand by the side of the

road so he and another officer can ask him questions, all after 10 p.m. at night. Certainly, this would be a "shock" to anyone, and would create "coercive pressures" to cooperate with the government and answer its questions.

Indeed, Cundy did answer the officers' questions, when before he attempted to end their conversation. For instance, Cundy admitted that he was at a bar called "Sidelines" earlier in the day (R. 42 at 39:45), a point the prosecutor emphasized in his closing argument. (R. 182:216). Likewise, when asked to take field sobriety tests, Cundy refused and said "there's no reason" (R. 42 at 42:19-33), which the State used to argue demonstrated his consciousness of guilt. (R. 182:220). These statements were not duplicative of any statements Cundy made prior to being in custody, and the State has not shown that their introduction at trial were harmless. Accordingly, Cundy is entitled to a new trial.

Finally, the State has not addressed, and thus concedes, Cundy's argument that further fact-finding is necessary to determine whether evidence derived from the *Miranda* violation – such as the results of the blood draw warrant – because the statements were involuntary or the *Miranda* violations were deliberate. Cundy Br. at 27.

III. Cundy's identification by Williams was unduly suggestive, as Officer Wheeler told Williams that Cundy was probably intoxicated, promised to bring Williams the person whom Officer Wheeler was involved, and then showed Cundy to Williams while Cundy was in the back of Officer Wheeler's squad car.

The State argues that Officer Wheeler's statements to Williams were largely irrelevant, because Williams had already given dispatch the registration information and "[i]t seems straightforward, then, that Williams believed that the person whose name matched the registration was responsible for the hit-and-run." State Br. at 28.

But this is precisely the problem: there can be multiple drivers of a car besides the registered owner. Indeed, that is why Officer Wheeler was investigating the matter further, and trying to have Williams identify Cundy as the driver. So, Officer Wheeler's statements about Cundy probably being drunk (R. 49:61) suggested to Williams that Cundy – the person he was going to bring to Williams to identify – was not only the registered owner, but the person responsible for the hit-and-run.

Finally, the state has not shown that Williams's identification is nonetheless reliable. The State relies on Williams's description of the driver to dispatch allegedly matching Cundy, without acknowledging how incredibly generic the description was: "a male in his possible 40s with a collared shirt and salt and pepper hair." (R. 49:16-17). Counsel would venture that most men in their 40s are blessed with at least some salt in their hair, and that many own collared

shirts as well. The description did not really narrow the population down. Moreover, there was no description of any facial hair on the driver, the color of the driver's shirt, and so on.

Indeed, the lack of any real detail in Williams's description is likely because he only got a fleeting glance, from a distance, at night. The State simply has not established that Williams's identification was "reliable." *State v. Roberson*, 2019 WI 102, ¶ 27, 389 Wis. 2d 190, 202, 935 N.W.2d 813, 818–19.

CONCLUSION

For the reasons stated above and in his opening brief, Cundy is entitled to a new trial.

Dated this 31st day of January, 2023.

Respectfully submitted,

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CERTIFICATIONS

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 3,000 words.

Dated this 31st day of January, 2023.

Electronically signed by Thomas B. Aquino
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