STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2022AP001739 CR
Circuit Court Case No. 2019CM000178

JONATHON M. MARK,

Defendant-Appellant.

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AN APPEAL FROM THE ORDER ENTERED NOVEMBER 13, 2019 DENYING THE DEFENDANT'S MOTION TO SUPPRESS: ILLEGAL SEIZURE AND FROM THE JUDGEMENT OF CONVICTION ENTERED MARCH 30, 2021, THE HONORABLE PETER L. GRIMM PRESIDING, AND FROM THE ORDER ENTERED SEPTEMBER 23, 2022, THE HONORABLE LAURA J. LAVEY PRESIDING, DENYING THE DEFENDANT'S POST-CONVICTION MOTION FOR ORDER GRANTING MOTION TO SUPPRESS: ILLEGAL SEIZURE ON GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL ALL IN FOND DU LAC COUNTY CIRCUIT COURT.

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# DEFENDANT-APPELLANT'S REPLY BRIEF

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page**



**Constitutional Provision**

## ARGUMENT

### I. The Circuit Court erred in deciding that a police officer had reasonable suspicion to seize Jonathon Mark and in denying Mr. Mark's motion to suppress evidence.

Jonathon Mark maintains that Fond du Lac City Officer Joseph Belisle did not have reasonable suspicion to seize him on February 23, 2019. He further asserts that the Honorable Peter L. Grimm erred in deciding that Officer Belisle had reasonable suspicion and in denying Mr. Mark's Motion to Suppress: Illegal Seizure.

The respondent, represented by Assistant District Attorney Wesley Kottke, disagrees and bases his argument on the testimony of Officer Belisle at the suppression hearing on November 13, 2019. Here is the testimony on which Mr. Kottke relies: Officer Belisle viewed information on the SharePoint system utilized by the Fond du Lac Police Department. SharePoint is a part of daily briefings for Fond du Lac officers and lists the people who have outstanding warrants or charges. According to Belisle, Jonathon Mark was on SharePoint on February 23, 2019 and was wanted for a probation warrant and for questioning by detectives and SharePoint included physical descriptors and a booking photo of Mr. Mark. The officer testified that, when Mr. Mark walked past the officer on February 23, 2019, the officer got a side view of Mr. Mark and a good enough look at him to cause the officer to radio for other officers. Belisle further testified that he got a front view of Mr. Mark when Mr. Mark walked past him a second time and he concluded that Mr. Mark was the wanted person on SharePoint. The officer then attempted to obtain identification from Mr. Mark and Mr. Mark refused stating that the officer did not have reasonable suspicion. Mr. Mark continued to walk away from the officer and the officer grabbed him.

However, Mr. Kottke's perspective is flawed under the well settled law on the issue of "reasonable suspicion". It is also flawed because there were additional facts in Officer Belisle's testimony which Mr. Kottke either overlooks or minimizes. Beginning with the law, a temporary seizure by law enforcement violates the Fourth Amendment if it is not based on a reasonable suspicion that the detained individual has committed, is committing or is about to commit a crime. State v. VanBeek, 2021 WI 51, ¶51, 397 Wis.2d 311, 339, 960 N.W.2d 32, 45 (2021); Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884 (1968). Reasonable suspicion is an "objective test" determined based on the totality of the circumstances. VanBeek, Id. at ¶52, 397 Wis.2d at 339, 960 N.W.2d at 45, citing State v. Guzy, 139 Wis.2d 663, 675, 407 N.W.2d 548, 555 (1987). In deciding if an officer acted reasonably, "…due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch', but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Terry, Id. 392 U.S. at 27, 88 S.Ct. at 1883. The reasonableness of the officer's action is determined using the facts available to the officer at the time of the seizure. Terry, Id. 392 U.S. at 21-22, 88 S.Ct. at 1880.

If an individual is seized in violation of the Fourth Amendment, evidence stemming from that seizure should be suppressed as the "fruit of the poisonous tree". Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 416 (1963). In Terry v. Ohio, the United States Supreme Court wrote that police conduct "…which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification that the Constitution requires…must be condemned by the judiciary and its fruits excluded from criminal trials." Terry, Id. 392 U.S. at 15, 88 S.Ct. at 1876.

The purpose of the exclusionary rule is not to allow the guilty to benefit from law enforcement error. Elkins v. United States, 364 U.S. 206, 216, 80 S.Ct. 1437, 1444 (1960). The purpose "…is to deter--to compel respect for the

constitutional guaranty in the only effective available way--by removing the incentive to disregard it." Elkins, Id. at 218, 80 S.Ct. at 1444.

Turning to the facts minimized or overlooked by the respondent, the first fact comes from the officer's testimony about the SharePoint system. Officer Belisle testified that Mr. Mark was on the SharePoint system. (R.37:5-6.) However, prior to February 23, 2019, Belisle had never met Mr. Mark and, when he interacted with Mr. Mark on that date, he called him "Mark King". (R.37:5, 16.) So, when he testified nine months later that Mr. Mark was on SharePoint it is not certain that he is referring to knowledge he had on February 23, 2019 versus knowledge he gained after Mr. Mark's seizure and arrest.

The second fact stems from Officer Belisle's testimony that SharePoint included descriptors of the wanted individual and a frontal booking photograph. (R.37:14-15.) However, the officer gave no testimony in regard to what those descriptors were or what he remembered about the appearance of the wanted person on SharePoint. He provided no testimony in regard to how Mr. Mark matched or even resembled the person on SharePoint.

The third fact relates to Mr. Kottke's argument that Officer Belisle saw the SharePoint information often enough to have a clear recollection of the wanted person. Officer Belisle testified that he "often" did "shift briefings" at the police department; that he would "often discuss individuals that have outstanding warrants" and it was "routine practice" for him to "be made aware of individuals…that may be wanted on warrants." (R.37:6.) However, when asked by the defense if he had looked at SharePoint that day (meaning February 23, 2019), the officer responded, "It was like every day. It was weeks it was on our SharePoint that we were looking for him so I could see his photo every day." (R.37:13.) So, his response was not "Yes, I saw it that day" or "I saw it every day". His response was "I *could* see [it]" meaning, under one interpretation, that it was only possible he saw it on or near February 23, 2019. His response did not confirm that he d*id* see it. The use of the verb "could" plus the fact that the

officer referred to Mr. Mark as Mark King plus the fact that the officer gave no testimony in regard to the descriptors of the wanted person all contradict the argument that Officer Belisle reviewed the SharePoint information on or near the day the officer seized Mr. Mark.

The fourth fact or set of facts pertains to Officer Belisle's testimony that he was able to see Mr. Mark's face well enough to identify him as the wanted man. Officer Belisle testified he got a side profile view of Mr. Mark when Mr. Mark first walked past him. (R.37:6.) He further testified that this caused him to radio dispatch that he believed he had sighted "Mark King". (R.37:6.) However, additional testimony by the officer undercuts the officer's representation he got a side view of Mr. Mark. The officer testified that, when he first saw Mr. Mark, the officer was talking to two other people about an unrelated police matter. (R. 37:6.) So, the officer's attention was focused on those other people. It was 10:40 at night and it was raining. (R.37:7.) So, the conditions under which Belisle observed Mr. Mark were poor. Mr. Mark was wearing a winter jacket with a hood that was "completely up around" his head. (R.37:6, 17.) So, the side of Mr. Mark's face was obscured by the hood of his jacket. Significantly, when Mr. Mark first passed Belisle, the officer was "not sure" that Mr. Mark was the wanted man. (R.37:15.)

The officer also testified that, when Mr. Mark passed the officer the second time, the officer got a frontal view of Mr. Mark. (R.37:11.) However, on cross examination, the officer testified he did not have an " actual positive ID" of Mr. Mark at the point he seized him. (R.37:19.) If Officer Belisle had recently observed Mr. Mark's photograph on SharePoint, if he had a good recollection of the appearance of the person in the photograph and if he got a good frontal view of Mr. Mark on February 23, 2019, the officer would have had an "actual positive ID".

In short, Officer Belisle had a hunch that Mr. Mark was the wanted man, but a 'hunch' did not give the officer reasonable suspicion to seize Mr. Mark.

Terry, Id. 392 U.S. at 27, 88 S.Ct. at 1883. 'Reasonable suspicion' is "…a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." Guzy, Id. at 675, 407 N.W.2d 548, 554. (Citation omitted.) Officer Belisle did not or could not articulate specific facts to ground his conclusion that Mr. Mark was the wanted man. His seizure was without reasonable suspicion and Judge Grimm's decision that the officer had reasonable suspicion and the Court's denial of the motion to suppress were in error.

Elkins further supports Mr. Marks' position. Elkins states, "Courts can protect the innocent against [unlawful police conduct] only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." Elkins, Id. at 217, 80 S.Ct. at 1444 (citation omitted; material in brackets substituted for words "such invasions" in the original). Given that Officer Belisle provided no testimony in regard to how Mr. Mark resembled the wanted man, would an innocent man have been protected from seizure by the officer? The appellant suggests that the answer is "No".[1]

## II. Trial counsel was ineffective when he did not introduce a squad video into evidence and did not call Jonathon Mark to testify at the hearing on Mr. Mark's motion to suppress evidence and trial counsel's omissions were prejudicial.

Officer Belisle's squad video camera recorded the interaction between the officer and Mr. Mark. (R.148.) Trial counsel for Mr. Mark, Attorney William Mayer, did not submit the recording into evidence at the suppression hearing. (R.37.) Also, Mr. Mayer did not call Mr. Mark to testify at the suppression

[1] An innocent man with basic knowledge of the Fourth Amendment would be especially vulnerable. The respondent, by Mr. Kottke, makes much of Mr. Mark's statement to the officer that the officer did not have reasonable suspicion to detain him. The respondent states that Mr. Mark's behavior was not that of a "normal citizen" and indicates "familiarity with the criminal justice system". (Brief of Petitioner -Respondent, p. 19.) Mr. Mark suggests that what it indicates is a familiarity with the protections of the United States Constitution which many citizens normally have.

hearing. (R.37.) Mr. Mark would have testified that he was wearing glasses on February 23, 2019. (R.149:16.) That contradicts Officer Belisle's testimony that Mr. Mark was not wearing glasses on that date. (R.37:16.) Mr. Mark asserts that Mr. Mayer's representation was ineffective when Mr. Mayer did not introduce the squad video into evidence and did not call Mr. Mark to testify that he was wearing glasses when he was seized.

Mr. Kottke, for the respondent, disagrees. He states that the video would have been "merely cumulative" to the evidence presented at the suppression hearing and that the video "merely shows…Mr. Mark walk past Officer Belisle, proceeding into the store. He then walks out of the store and Officer Belisle gets closer." (Brief of Petitioner-Respondent, p. 23.) In regard to the "glasses evidence", Mr. Kottke writes, "[i]n the vast majority of cases, the safest call is to not have the defendant testify." (Brief of Petitioner-Respondent, p. 24.) Mr. Kottke acknowledges that his opinion about calling Mr. Mark as a witness is "speculative". (Brief of Petitioner-Respondent, p. 24.)

To show that he was deprived of the effective assistance of counsel, Mr. Mark must prove: (1) that trial counsel's performance was deficient and (2) that he was prejudiced by that deficiency. State v. Dillard, 2014 WI 123, ¶85, 358 Wis.2d 543, 570, 859 N.W.2d 44, 56, citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984).

A defense attorney is deficient if his or her performance falls below the measure of "…reasonableness under prevailing professional norms." Strickland, Id. at 688, 104 S.Ct. at 2065.

To demonstrate that he was prejudiced by deficient performance, a defendant must show "…there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ." State v. Harbor, 2011 WI 28, ¶ 72, 333 Wis.2d 53, 84, 797 N.W.2d 828, 843 (2011), citing Strickland, Id. at 694, 104 S.Ct. 2052.

The squad video and the "glasses evidence" are important because they seriously undermine Officer Belisle's testimony that he got a side profile view of Mr. Mark when Mr. Mark walked past him the first time heading into Kwik Trip. They also undermine the officer's testimony that he got a full frontal view of Mr. Mark when Mr. Mark was walking away from Kwik Trip.

The video shows Mr. Mark walking toward and then entering Kwik Trip at time points 10:29:22-28. (R.148.) Meaning Officer Belisle only had seven seconds to make his first observation of Mr. Mark. For part of that time the officer can be seen on the video talking to other people. Mr. Mark not only had his hood "completely around" his head as the officer testified (R.37: 6, 17), but the video shows the hood extended beyond his head (R.148:10:29:22-28). Mr. Mark was walking with his head down and he never turned toward the officer on his way into Kwik Trip. (R.148:10:29:22-28.) It is simply not plausible that the officer was able to get a side profile view of Mr. Mark.

Officer Belisle also stated he got a full frontal view of Mr. Mark. However, given what the video shows, that is also unlikely. On the second pass in front of the officer, Mr. Mark still had his hood up and his head down. (R.148:10:32:01-39.) He passed Belisle's location only five seconds after exiting Kwik Trip meaning Belisle only had five seconds to observe Mr. Mark from the front. (R.148:10:32:01-06.) After that, Mr. Mark had his back to Belisle as he walked away. (R.148:10:32:06-15.) When Belisle made contact with him, Mr. Mark turned sideways. (R.148:10:32:15.) He did not turn to face Belisle until Belise grabbed his arm and seized him. (R.148:10:32:38.)

Officer Belisle's testimony that he got a side view of Mr. Mark followed by a frontal view of him was the basis for Judge Grimm's decision that there was reasonable suspicion. (R.37:27-28.) The squad video would have seriously undercut a finding of reasonable suspicion because the video shows that it was unlikely Belisle got either a side view on Mr. Mark's first pass or a front view on the second pass. Mr. Mark's testimony that he was wearing glasses, in contrast to

Belisle's testimony that he was not, also makes Belisle's supposed observations less credible. Mr. Mark's case for the suppression of evidence was prejudiced when the video and Mr. Mark's "glasses evidence" were not admitted at the suppression hearing and there is a reasonable probability that Judge Grimm would not have found reasonable suspicion if he viewed the squad video. By extension, trial counsel's failure to present the video and glasses evidence was not reasonable under prevailing professional norms and was deficient. Therefore, Mr. Mark has shown both prongs of ineffective assistance of counsel under Strickland and the Honorable Laura J. Lavey erred when she denied Mr. Mark's motion alleging ineffective assistance of counsel.

## CONCLUSION

Based on the above, Jonathon Mark respectfully requests that the Wisconsin Court of Appeals vacate the Judgment of Conviction in Fond du Lac County Case No. 2017-CF-178 and grant his Motion to Suppress Evidence: Illegal Seizure.

Dated at Kingston, Wisconsin this 29th day of March, 2023.

Respectfully submitted,

*Electronically signed by,*
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## CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 2950 words.

Dated this 29th day of March, 2023.

*Electronically signed by,*

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