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CLERK OF WISCONSIN
SUPREME COURT

**STATE OF WISCONSIN
IN THE SUPREME COURT**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

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

JONATHON M. MARK,

Defendant-Appellant.

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.

NO-MERIT PETITION FOR REVIEW

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STATEMENT OF THE CASE

On February 23, 2019, at approximately 10:40 p.m., Jonathon Mark turned the northwest corner of a Kwik Trip in Fond du Lac, walked down the sidewalk in front of the Kwik Trip and entered that business. (R. 37:6-7; Appx. 8-9.) ("Appx." is used henceforward as an abbreviation for "Appendix".)

Joseph Belisle, a City of Fond du Lac police officer, was on the same sidewalk talking to two people in regard to an unrelated incident. (R. 37:6; Appx. 8.) Officer Belisle's police vehicle was parked so that it faced the Kwik Trip sidewalk, the video recording system in the vehicle was operating and it recorded Officer Belisle's activities on the Kwik Trip sidewalk. (R. 148.) The squad video also recorded Mr. Mark walking down the sidewalk in front of Kwik Trip, entering Kwik Trip, subsequently exiting Kwik Trip and walking on the sidewalk away from the building. (R. 148; 10:29:22.¹)

Mr. Mark passed Officer Belisle on the sidewalk as he walked toward the Kwik Trip entrance. (R. 37:7; Appx. 9.) Belisle developed the impression that Mr. Mark was an individual with an active warrant for his arrest. (R. 37:6-7; Appx. 8-9.) He seized Mr. Mark after Mr. Mark declined to identify himself and started to walk away. (R. 37:10; Appx. 12.) Mr. Mark struggled free and ran. (R.37:10; Appx. 12.) Ultimately, Mr. Mark was tackled to the ground by officers and arrested. (R.37:12; Appx. 14.)

Mr. Mark was charged with Resisting or Obstructing an Officer, in violation of Wis. Stat. §946.41(1), in Fond du Lac County Case No. 17-CM-148

¹ R.148 is the video recording from Officer Belisle's police vehicle which was entered into evidence at the post-conviction motion hearing held on September 13, 2022. (R. 149.) 10:29:22 is a time stamp from the recording. So, R. 148; 10:29:22 references the squad video at 10:29 p.m. and 22 seconds. The squad video was made a part of the record on appeal by order of the Wisconsin Court of Appeals dated April 10, 2023.

on February 27, 2019. (R.1.) Mr. Mark, by trial counsel, Attorney William Mayer, filed a Motion to Suppress: Illegal Seizure on August 1, 2019. (R. 26.) The motion asserted that Officer Belisle did not have reasonable suspicion to seize Mr. Mark and that all evidence obtained as a result of the seizure should be suppressed. (R. 1: 2-3.)

On November 13, 2019, a hearing was held on the Motion to Suppress before the Honorable Peter L. Grimm. (R. 37.) The state called Officer Belisle to testify at the hearing. (R.37:4; Appx. 6.) Belisle testified that it was raining with "icy conditions" at the time of the incident. (R. 37:7; Appx. 9.) While Belisle was speaking to the people involved in the unrelated incident, a male individual walked past him. (R. 37:8; Appx. 10.) That person was wearing a winter jacket with the hood "completely" up around his head (R. 37:6, 17; Appx. 8, 19.) Belisle testified that he saw the "side profile" of the man (R. 37:6; Appx. 8) He was not able to see the color of the man's hair. (R. 37:17; Appx. 19.)

The man continued walking past and entered Kwik Trip. (R. 37:6; Appx. 8.) Belisle did not stop him at that point. (R. 37:9; Appx. 11.) Belisle told the two people to whom he was talking to "standby" that he "...would have to speak to them in a few minutes." (R. 37:8; Appx. 10.) He then radioed for two, additional officers to come to his location. (R. 37:8; Appx. 10.) Belisle had been present at police department briefings, utilizing the Share Point system, and testified he was aware that there was an active probation warrant for an individual wanted in relation to "some sort of battery" and that the individual was known as someone who "would fight with officers". (R. 37:5-8, 13-14; Appx. 7-10, 15-16.) Belisle testified that the Share Point information included a frontal booking photograph of the man with the warrant and the information included physical descriptors of that person. (R. 37:14-15; Appx. 16-17.) Belisle testified that it was his "routine practice to be made aware of individuals or suspects in the community that may be wanted on warrants." (R.37:6; Appx. 8.) He gave no

testimony in regard to how many days, weeks or months prior to February 23, 2019, he viewed the booking photograph and physical descriptors of the wanted man. (R.37.)

Officer Belisle provided no testimony in regard to the physical descriptors, such as height or weight, of the wanted man in the Share Point system. (R. 37:4-20; Appx. 6-22.) He gave no testimony in regard to how the physical appearance of the man on the Kwik Trip sidewalk matched the booking photo or physical descriptors of the man in the Share Point system. (R. 37:4-20; Appx. 6-22.)

At the point the man first passed Belisle, Belisle wasn't sure that the man he saw was the person with the warrant. (R. 37:15; Appx. 17.) Belisle remembered the name of the wanted person as "Mark King." (R. 37:8; Appx. 10.) He later testified that, when he radioed for additional officers, he was advised that the man with the active warrant was named "Jonathon Mark". (R. 37:8-9; Appx. 10-11.) Prior to February 23, 2019, Belisle had never personally interacted with Jonathon Mark. (R. 37:5; Appx. 7.)

While Belisle was waiting for additional officers, the man walked out of Kwik Trip and Belisle testified he got a full frontal view of the man. (R. 37:11, 19; Appx. 13, 21.) Belisle then asked the man for his ID. (R. 37:10; Appx. 12.) According to Belisle, the man told Belisle that Belisle did not have reasonable suspicion to stop him. (R. 37:9-10; Appx. 11-12.) Also, according to Belisle, Belisle again asked for ID and the man again said that Belisle did not have reasonable suspicion. (R. 37:10; Appx. 12.) At some point, Belisle asked the man his name and Belisle testified the man's response was that Belisle did not have reasonable suspicion. (R. 37:10; Appx. 12.) The man started to walk away and Belisle grabbed his arm, put him in an "escort hold" and told him he had a warrant for his arrest. (R. 37:10; Appx. 12.) No evidence was produced at the hearing that Officer Belisle identified himself as a police officer, pursuant to Wis. Stat. § 968.24, before he detained Mr. Mark. (R. 37: 4-20; Appx. 6-22.)

According to Belisle, the man denied he had a warrant and "...tensed up his arm, squatted down to get a lower center of gravity, and then pulled his arm away from me and began running away along the west side of the building." (R. 37:10; Appx. 12.) Subsequently, additional officers arrived and the man was tackled to the ground and arrested. (R. 37:12; Appx. 14.)

On cross-examination, Officer Belisle testified that the person he seized was not wearing glasses. (R.37:16; Appx. 18.) He also acknowledged that Mr. Mark had not identified himself as "Jonathon Mark" at the point when the officer seized Mr. Mark. (R. 37:19; Appx. 21.) When asked if it was correct that he did not have "an actual positive ID" of Jonathon Mark at the point he "grabbed on to" Mr. Mark, Belisle responded, "Correct". (R.37:19; Appx. 21.)

Neither the state or the defense moved to enter Officer Belisle's squad video into evidence at the motion hearing and Mr. Mark did not testify at the hearing. (R.37.) Mr. Mayer argued that, when Officer Belisle grabbed Mr. Mark's arm, the officer engaged in a stop and detention of Mr. Mark and that the officer did not have the requisite reasonable suspicion, under Terry V. Ohio, to detain Mr. Mark. (R. 37:21-22; Appx. 23-24.) Counsel for the state, Deputy District Attorney Douglas Edelstein, argued that the officer was aware from Share Point that an individual was in warrant status, that the officer was familiar with the "unique physical characteristics" of that individual, that Mr. Mark was a larger individual and that the officer had reasonable suspicion to detain him. (R. 37:23-24; Appx. 25-26.)

Judge Grimm denied the motion to suppress stating that, when Mr. Mark first walked past Officer Belisle, the officer got a "good enough" look at Mr. Mark so as to prompt the officer to suspend his interaction with the two other people and to call for "back-up". (R. 37:26; Appx. 28.) Judge Grimm found that there "...was no exact testimony that Belisle knew the height or weight from his SharePoint or the briefings, so I can't make that finding of fact in today's record..." (R. 37:26; Appx. 28.) Judge Grimm stated that the evidence was

"crystal clear" that the Share Point information included a photograph and that the officer relied on that photograph when he "made the connection" to the man outside Kwik Trip and the person with the warrant. (R. 37:26-27; Appx. 28-29.) Judge Grimm said that the other "key fact" was that Officer Belisle got a full frontal view of the man when the man came out of the store and the judge described that as a "confirming visual" and said that Belisle had "more than a hunch, This is a positive visual ID." (R. 37:27; Appx. 29.) The judge noted that Mr. Mark did not stop at that point and the officer had "every right and duty to go hands on" with Mr. Mark. (R. 37:28; Appx. 30.)

Mr. Mark entered a plea of No Contest to the charge of Obstructing on March 30, 2021 and was sentenced to 225 days jail (time served) and a fine, court costs and surcharges. (Judgment of Conviction: R. 75; Appx. 35.) He filed a Notice of Intent to Seek Postconviction Relief on March 30, 2021 (R. 76.) On September 8, 2021, the Wisconsin Court of Appeals ordered an extension of the time for filing a Notice of Appeal to January 5, 2022 (R. 92) and, on November 24, 2021, undersigned counsel was appointed to represent Mr. Mark. (R. 106.) On January 4, 2022, Mr. Mark filed a Notice of Appeal. (R. 107.) On March 28, 2022, the Wisconsin Court of Appeals granted Mr. Mark's motion to withdraw the Notice of Appeal and to remand to the Circuit Court and further ordered an extension of the time limit for filing a post-conviction motion to May 2, 2022. (R. 118.)

On May 2, 2022, Mr. Mark filed a Post-Conviction Motion for Order Granting Motion to Suppress: Illegal Seizure on Ground of Ineffective Assistance of Counsel. (R. 121.) The motion asserted that trial counsel was ineffective at the suppression hearing for not introducing Belisle's squad video into evidence and for not having Mr. Mark testify that he was wearing glasses when he was at Kwik Trip on February 23, 2019. (R. 121: 1-2.) The motion further argued that the Court would not have found Belisle had reasonable

suspicion to seize Mr. Mark if the video was entered into evidence and if Mr. Mark testified he was wearing glasses. (R. 121: 1-2.)

On September 13, 2022, a hearing was held on the post-conviction motion before the Honorable Laura J. Lavey. (R. 149.) At the hearing, the DVD containing the video from Officer Belisle's squad was received into evidence and a portion of the video, at time stamp 10:28:14 through 10:32:39, was viewed by the Court. (R. 149:14-15; Appx. 49-50; R. 148.)

The squad video starts with Officer Belisle standing on the sidewalk in front of Kwik Trip approximately 10 feet from the doors into Kwik Trip. (R. 148: 10:28:14.) A vehicle is parked in front of the location where the officer is standing, but his voice can be heard on the video along with the voices of the two people to whom he was talking in regard to the unrelated incident. (R.148:10:28:14.) Also, given the officer's height, one can see the top of his head above the vehicle parked in front of his location. (R.148:10:28:14.)

Jonathon Mark is first visible on the video at time stamp 10:29:22 at the northwestern corner of Kwik Trip. (R. 148: 10:29:22.) He was wearing a heavy jacket with the hood pulled up over his head. (R. 148: 10:29:22-28.) The hood of the jacket not only "completely" surrounded Mr. Mark's face, but extended beyond his face. (R. 148: 10:29:22-28.) The video shows Mr. Mark walking west to east along the sidewalk in front of the store. (R. 148: 10:29:22-28.) He had his head down as he walked. (R. 148: 10:29:22-28.) He was facing forward as he walked, so the video shows his left side. (R.148: 10:29:22-28.) Only his hood is visible from the side; nothing can be seen of his face. (R. 148: 10:29:22-28.)

Mr. Mark passed the location of Officer Belisle at time stamp 10:29:28. (R.148:10:29:28.) He passed Officer Belisle and his back was turned to the officer before the time stamp of the video changed to time stamp 10:29:29. (R.148:10:29:28-29.) Meaning that the length of time from the point Mr. Mark turned the northwest corner of Kwik Trip and stepped onto the sidewalk

(10:29:22) to the point his back was to Officer Belisle (10:29:29) is seven seconds in length. Mr. Mark entered Kwik Trip at time point 10:29:33. (R.148:10:29:33.) Mr. Mark came out of Kwik Trip at 10:32:00. (R. 148:10:32:00.) His hood was still up and surrounding his face and he was walking with his head bent over. (R. 148:10:32:00.) By this time, Officer Belisle was standing about 12 feet from the Kwik Trip doors. (R. 148:10:32:00.) Mr. Mark walked westerly along the sidewalk and passed Officer Belisle by time point 10:32:06. The officer spoke to him at this point. Mr. Mark stopped at time point 10:32:07, but did not turn to face the officer. Instead, he stopped with his body turned sideways to the officer. (R. 148: 10:32:07.) By time point 10:32:12, Mr. Mark had his back to the officer and was walking away. At time point 10:32:14, Officer Belisle grabbed Mr. Mark and told Mr. Mark to stop. At time 10:32:26, the name 'Jonathon Mark' is heard being broadcast over the squad radio and Officer Belisle began referring to Mr. Mark as 'Jonathon'. (R. 148:10:32:26.) At 10:32:44, Mr. Mark pulled free and ran from Officer Belisle. (R. 148: 10:32:44.)

Mr. Mark testified at the motion hearing that he was wearing glasses when he interacted with Officer Belisle on February 23, 2019. (R. 149:16; Appx. 41.) Photographs of Mr. Mark's glasses were produced at the hearing, Mr. Mark verified that the photographs were images of the glasses he was wearing on the incident date and the photographs were received into evidence. (R. 149:16, 18; Appx. 51, 53.)

Mr. Mayer also testified at the hearing. (R. 149:3-12; Appx. 38-47.) He testified that the motion to suppress was "...Mr. Mark's motion..." and he "...just followed up with it." (R. 149:4; Appx. 39.) He stated that the fact that Officer Belisle only had six or eight minutes to observe Mr. Mark as he walked toward Kwik Trip was "potentially relevant", but did not change his (Mr. Mayer's) "analysis of the motion". (R. 149:7; Appx. 42.) Mr. Mayer explained that by,

his "analysis of the motion", he meant that there was "not enough to file the motion". (R.149:8; Appx. 43.) He further testified on this topic, as follows:

"Well , I guess my opinion is that if an officer has a belief that that (sic) individual may be an individual that is--that they would question further regarding a warrant--potential warrant that he felt existed for him, even 1 second would be sufficient."
(R. 149:8; Appx. 43.)

Mr. Mayer was asked at the hearing if Mr. Mark told him that he was wearing glasses on the date of the incident. (R.149:9; Appx. 44.) Mr. Mayer responded, "I imagine that information probably did come from Mr. Mark. I wouldn't have known it independently." (R.149:9; Appx. 44.)

Attorney Margaret Vinz appeared for the defense at the hearing and argued that Officer Belisle did not have reasonable suspicion to stop Mr. Mark. (R.149:19-22; Appx. 54-57.) Specifically, Ms. Vinz asserted the following points: 1) the officer gave no testimony in regard to the physical characteristics of the person with the warrant and how Mr. Mark matched those physical characteristics; 2) the officer's statement that he got a "side view" of Mr. Mark as Mr. Mark walked into Kwik Trip is not supported by the squad video because Mr. Mark's hood obscured the side of his face and 3) it was unlikely the officer got a "full frontal view" of Mr. Mark because, when the officer approached Mr. Mark as Mr. Mark was walking from Kwik Trip, Mr. Mark did not turn to face Officer Belisle and the time Belisle had to observe Mr. Mark, from the point he exited Kwik Trip to the point Belisle seized him, was very brief. (R.149:19-22; Appx. 54-57.)

Assistant District Attorney Wesley Kottke, appearing for the state, argued that there was no reason to doubt the officer's testimony that he got a side view of Mr. Mark which prompted the officer to call dispatch that he had a person "he had seen on a prior warrant" and that the officer subsequently "got...a good look of him." (R.149:22-23; Appx. 57-58.) Mr. Kottke argued that trial counsel was not ineffective for not entering the video into evidence because the video "backs up what the officer testified to" and, even if the video had been admitted into

evidence, it would not have made a difference in the outcome of the hearing on the motion to suppress. (R.149:23-24; Appx. 58-59.) Mr. Kottke also argued that the outcome of the suppression hearing would not have been different if information that Mr. Mark was wearing glasses had been entered into evidence. (R.149:24; Appx. 59.)

Judge Lavey deferred ruling on Mr. Mark's post-conviction motion until September 23, 2022 when the judge presented her oral ruling on the motion. (R. 150; Appx. 62.) Judge Lavey denied the post-conviction motion. (R.150:4-5; Appx. 65-66.) She stated that, had the evidence of the video and Mr. Mark's glasses been entered into evidence at the original suppression hearing, it would have been more likely that the court would have denied the motion to suppress and that trial counsel, as a result, was not ineffective at the suppression hearing. (R.150: 3-5; Appx. 64-66.)

On September 28, 2022, Judge Lavey executed a written order denying the Defendant's Post-Conviction Motion for Order Granting Motion to Suppress: Illegal Seizure on Ground of Ineffective Assistance of Counsel. (R. 143; Appx. 68.) On October 10, 2022, Mr. Mark filed a Notice of Appeal. (R.144.)

On December 19, 2022, Mr. Mark filed an appellant's brief which presented two issues on appeal: 1) whether the circuit court erred in deciding that Officer Belisle had reasonable suspicion to seize Mr. Mark and in denying the defendant's motion to suppress evidence and 2) whether trial counsel was ineffective at the suppression hearing when he 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 by the officer.

On May 10, 2023, the Court of Appeals issued a decision which affirmed the judgment and order of Fond du Lac County Circuit Court. (Appx. 69-79.) Specifically, the Court of Appeals upheld Judge Grimm's decision that Officer Belisle had reasonable suspicion to seize Mr. Mark on February 23, 2019 and his order denying Mr. Mark's motion to suppress evidence. The Court of Appeals

accepted Judge Grimm's credibility determination in regard to Officer Belisle and further decided that the "officer's credible testimony supports the reasonable suspicion finding." (Appx. 76.)

The Court of Appeals also affirmed the decision of Judge Lavey denying Mr. Mark's motion that trial counsel was ineffective at the suppression hearing for not entering the squad video into evidence and not calling Mr. Mark to testify that he was wearing glasses at the time he was seized by the officer. (Appx. 78-79.) The Court of Appeals concluded that the video and the "glasses evidence" would not have changed the outcome of the suppression hearing because they would not have altered the circuit court's "finding that the officer's testimony was credible" or "changed the conclusion that the officer acted reasonably". (Appx. 78.)

Undersigned counsel, after reviewing the decision of the Court of Appeals and Wis. Stat. §§ 809.62(1r) and (2)(c), now files a No-Merit Petition for Review. Counsel advised Mr. Mark of the reason for her decision and of his right to file a Petition for Review should he choose to do so.

Dated at Kingston, Wisconsin this 5th day of June, 2023.

Respectfully submitted,

Electronically signed by,

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CERTIFICATION OF FORM AND 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 3784 words.

Electronically signed by:

Margaret M. Vinz

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CERTIFICATION BY ATTORNEY

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 rulings 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 of 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 requested 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.

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