STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP1754

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JEFFREY D. KOSMOSKY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR CALUMET COUNTY, BRANCH I, THE HONORABLE JEFFREY S. FROEHLICH PRESIDING, TRIAL COURT CASE NO. 20-CT-363

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE'S RELIANCE ON *PENNSYLVANIA v. MIMMS*, 434 U.S. 106 (1977), IS MISPLACED.

The State begins its argument by asserting that a bright-line rule exists which always permits a law enforcement officer to have a driver step out of his or her vehicle, and therefore, Mr. Kosmosky has no basis upon which to complain that the scope of his detention was unconstitutionally enlarged. State's Response Brief at p.5.[1] The State relies upon *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), for this proposition. The State's reliance on *Mimms* is, however, misplaced because it fails to mention the ***context*** in which the *Mimms* Court reached its conclusion.

More particularly, the defendant in *Mimms* was detained for having an expired license plate. *Id*. at 107. After being stopped, one of the law enforcement officers involved asked Mimms to step out of his vehicle and produce his operator's license. *Id*. After alighting from his vehicle, an officer observed that Mimms had a large bulge under his jacket which the officer thought might be a weapon. *Id*. Based upon this observation, Mimms was frisked and a .38-caliber revolver was discovered tucked into his waistband. *Id*. Mimms was immediately arrested and charged with carrying a concealed weapon. *Id*.

Subsequently, Mimms moved to suppress evidence of the weapon on the ground that the officer's order for him to step out of his vehicle was an unconstitutional seizure under the Fourth Amendment. *Id*. The trial court denied his motion and Mimms' case was tried whereupon he was found guilty. *Id*. Mimms appealed and the Pennsylvania Supreme Court reversed his conviction on the ground that "the officer could not point to 'objective observable facts to support a suspicion that criminal activity was afoot . . . .'" *Id*. at 107-08. The Supreme Court disagreed, finding that an officer could order a person out of a vehicle for *officer safety*. *Id*. at 110-11. Nowhere within the four corners of the *Mimms* opinion does the Court state that an individual may permissibly be ordered out of a vehicle for ***both*** officer safety and to ***further investigate*** other violations for which no reasonable suspicion exists—that is the entire premise of the holding in *State v.*

[1]The State begins numbering the pages of its brief with the notation that its actual page two is page "i," and then continues sequentially therefrom using lower case Roman numbers until it reaches its actual page four where it begins with an Arabic "1." The State left its cover page unnumbered. The State's numbering format is contrary to § 809.19(8)(bm) which requires "**sequential [Arabic] numbering starting at '1' on the cover**." Wis. Stat. § 809.19(8)(bm) (2021-22). Given this discrepancy, Mr. Kosmosky will refer to specific pages of the State's brief not by the erroneous page numbering it employed, but rather, by the page's actual cardinal position if the cover of its brief had been treated as page one (1) as it should have been.

Betow, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), and if it was not, then *Betow* could be discarded as mere judicial flotsam.

Unnoticed by the State, there is a distinction with a difference between the circumstances of *Mimms* and the facts of Mr. Kosmosky's case, and it is this: the order for Mimms to alight from his vehicle was ***nothing which would have actually enlarged the scope of his detention*** had he not been carrying a concealed weapon. At the moment they ordered Mimms out of the vehicle, law enforcement officers were not enlarging the scope of his brief detention for having an expired plate to include an investigation for a weapons violation—something which they had no reasonable suspicion to suspect at the time. This is highly significant because assuming, *arguendo*, that Mimms did not have a weapon, his encounter with law enforcement officers would have been the "brief interaction[] with law enforcement officers, . . ." the Constitution intended and he would have been free to be about his business. *State v. Floyd*, 2017 WI 78, ¶ 21, 377 Wis. 2d 394, 898 N.W.2d 560, citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). This is consistent with the constitutional notion that "the principal function of the investigative stop is to ***quickly*** resolve" whether the officer's suspicion is founded or unfounded. *State v. Anderson*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). Any action on the part of law enforcement officers which causes an undue delay in the processing of an individual for Fourth Amendment purposes violates the *Floyd* notion that roadside contacts with law enforcement officers "are meant to be brief interactions . . . ." *Floyd*, 2017 WI 78, ¶ 21.

In this case, Mr. Kosmosky was detained for speeding, however, the deputy's action in asking him to step out of his vehicle was not premised upon a concern for his safety, but rather, was done for the purpose of determining whether Mr. Kosmosky was impaired—something which would have enlarged the scope of his detention ***beyond*** the brief interaction it would have been had the deputy simply wanted to issue a speeding citation to Mr. Kosmosky while he stood outside of his vehicle.

II. THE FACTS KNOWN TO THE DEPUTY DO NOT SUPPORT A CONCLUSION THAT MR. KOSMOSKY WAS OPERATING UNDER THE INFLUENCE.

Not all facts are "created equally" when it comes to assessing whether a reasonable suspicion exists to believe that a violation of the law is afoot. For example, the State, as expected, makes much of the fact that Mr. Kosmosky was smoking a cigarette upon the deputy's approach to his vehicle. As Mr. Kosmosky pointed out in his initial brief, this is an activity in which nearly one-in-five people in Wisconsin still engage, no matter how "inconsistent with societal norms" the deputy might feel it is. R49 at 5:3-7; State's Response Brief at p.7. Casting such a

wide net over a common, albeit "unappealing," behavior is both dangerous and offensive.

More specifically, it is "dangerous" because it borders on a "profiling-like" presumption which assumes that an entire cross-section of society is guilty of some wrongdoing based solely upon a particular characteristic of their personality. Put another way, if it is patently wrong to suspect that every person who dons a dastār might have an affiliation with a terrorist organization, then why is it not also wrong to believe that a cigarette smoker must be concealing an odor of intoxicants? Just like Deputy Fuller claimed to have the experience that drivers light cigarettes to "mask the odor" of intoxicants, common observations are that individuals engaged in extremist behavior wear head-coverings of a certain kind. Nevertheless, this fact does not support the default conclusion that the person is a fanatic because their head happens to be covered—it is an expression of their religious beliefs. Frankly, some individuals addicted to nicotine would consider smoking as their "religion," but this does not mean the person is hiding anything. For this reason, the conclusion that the deputy drew regarding Mr. Kosmosky's smoking borders on the dangers inherent in profiling.

Beyond the foregoing, the deputy's observation is "offensive" because his *opinion* about smoking being "inconsistent with societal norms" implies that his particular moral code is something by which he expects others to live. First, it is difficult to accept that something which one-in-five people do cannot be considered "normal" behavior as there is no "number" one can place on what is a "norm." Mr. Kosmosky concedes that smoking may be *unappealing* behavior, but that is a far cry from being outside a "norm." For example, many people consider chewing gum to be unappealing, but no one would argue it is against the "norm." Similarly, there is a cross-section of society that displays "Old Glory" in their front yard, but those individuals who elect not to have a flag in their front yard would be wrong to assume that these individuals are reactionary fanatics who exist outside of the societal "norm." The second problem with the deputy's comment about smoking being outside the "societal norm" is that his *opinion* lacks any foundation in the record. More specifically, the State asked no questions of the deputy regarding what a "societal norm" is defined as, what basis the deputy has to believe that smoking is not considered to be part of that "norm," how the deputy came about his sociologic knowledge of what "norms" are or should be, *etc*. The deputy's *opinion* is just that, namely an "opinion" that has little to no value in the reasonable suspicion calculus. It is about as helpful as if the deputy offered his opinion that "purple is a better color than red."

The State also mentions Mr. Kosmosky's speeding violation as a significant factor in the assessment of whether independent grounds existed to enlarge the scope of his detention. State's Response Brief at p.6. Mr. Kosmosky concedes that

this is a relevant factor to consider in a reasonable suspicion framework, however, as he noted above, not all facts are "created equally." The precise conduct of which the deputy complains in this case is exactly the same as that observed in *Betow*, yet the *Betow* court did not conclude that it was significant enough to be accorded the weight necessary—along with Betow's nervousness, his "implausible" explanation of where he was headed, and the mushroom sewn on his wallet—to believe that Betow might be impaired. *Betow*, 226 Wis. 2d at 503-04.

Apart from the foregoing, the State also proffers that there is much to be gleaned from Mr. Kosmosky's "slow speech," his "difficulty locating his insurance card," and his "bloodshot" eyes. State's Response Brief at p.7. Once more, not all facts are "created equally," or perhaps in this instance, "*weighted* equally." As Mr. Kosmosky noted in his initial brief, Deputy Fuller also conceded that:

> Mr. Kosmosky "responded to [the deputy's squad] lights in a timely" and "prompt[]" manner. R24 at 20:7-11.
>
> There was "nothing unusual about the manner in which [Mr. Kosmosky] . . . parked on the side of the road." R24 at 20:14-16.
>
> Mr. Kosmosky "did [not] have any difficulty producing his driver's license . . . ." R24 at 20:20-22.
>
> Mr. Kosmosky "already had [his license] out" when Deputy Fuller approached his vehicle. R24 at 21:3-4.
>
> Mr. Kosmosky exhibited no confusion or problems with his mentation. R24 at 21:10-15.
>
> "[P]rior to having Mr. Kosmosky exit the vehicle to perform field sobriety tests," the deputy never "noticed an odor of alcohol coming from [Mr. Kosmosky] or the vehicle." R24 at 21:16-23.
>
> **Similarly, "prior to having Mr. Kosmosky exit the vehicle," Deputy Fuller did not observe "any problems with [Mr. Kosmosky's] physical mannerisms or movements while he was inside the truck."** R24 at 24:19 to 25:1 (emphasis added).

Nevertheless, despite the foregoing admissions on the part of the deputy, the State refuses to consider these facts as a part of what the deputy knew *in totality*. This is important because the *weight* to be afforded Deputy Fuller's observations as identified by the State is considerably diminished when considered in context as part of the *whole*.

Moreover, in clear contravention to *State v. Ford*, 211 Wis. 2d 741, 750, 565 N.W.2d 286 (Ct. App. 1997), the State relies on observations made ***subsequent*** to the point at which Mr. Kosmosky's detention was enlarged in order to justify the enlargement of the scope of that very detention. State's Response Brief at p.7

(noting that the deputy detected a "small odor of intoxicant" coming from Mr. Kosmosky "after [he] exited the vehicle"). This is otherwise known as "bootstrapping." Bootstrapping is a notion which has been ardently, strictly, and unequivocally **rejected** by both the Wisconsin Supreme Court and Court of Appeals as an appropriate approach to the examination of whether law enforcement actions are constitutionally justifiable. Fourth Amendment problems cannot be retroactively cured by considering incriminating evidence which was discovered *after* the point at which the constitutional defect is alleged. *Ford*, 211 Wis. 2d at 750 ("[t]he fact that the officer's suspicion was confirmed by evidence found during [an] unauthorized search cannot be used after the fact to bootstrap that suspicion into probable cause for an arrest"); *see also, State v. Swanson*, 164 Wis. 2d 437, 450-51, 475 N.W.2d 148 (1991). Thus, that portion of the State's argument premised on discoveries made by the deputy *after* Mr. Kosmosky was directed to exit his vehicle should be rejected without the slightest apology.

CONCLUSION

Based upon the totality of all of the information known to the deputy in the instant matter, Mr. Kosmosky proffers that the deputy lacked sufficient grounds upon which to expand the scope of his initial detention in violation of the Fourth Amendment, and therefore, this Court should reverse the decision of the court below.

Dated this 29th day of January, 2023.

Respectfully submitted:
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Electronically signed by:
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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,432 words.

I also hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 29th day of January, 2023.

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