STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1051-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VANCE D. REED,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Constitutional Provisions

Statutes

Page

ISSUE PRESENTED

The State reframes Defendant-Appellant Vance D. Reed's two issues as one:

Was Reed subject to a Fourth Amendment *Terry*-stop seizure when he consented to provide a DNA sample?

The circuit court answered, "No."

This Court should answer that Reed forfeited the question. If not, this Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not seek oral argument or publication.

INTRODUCTION

After Harry and Lorraine Brown Bear were found murdered in their home, police began canvassing the area to talk with people as part of their investigation. Given the amount of biological evidence found in the Brown Bear home, police decided that, when speaking with anyone who had been inside the home, they would ask for consent to provide a DNA sample. Reed was one of those people.

Police engaged in a textbook consensual encounter with Reed. Police asked Reed and the two others with him if they were willing to talk. Reed agreed. A sergeant had a conversation with Reed in an open driveway, without threats, promises, raised voice, or any other show of force. The sergeant asked Reed if he would provide a DNA sample, and Reed agreed, without question. The sergeant gave him a consent form to sign, and Reed signed it, without question.

Reed's argument—that he was seized pursuant to an unlawful *Terry* stop when he consented to provide his DNA sample—fails for multiple reasons.

First, Reed forfeited it. He did not argue that police performed an unlawful *Terry* stop either in his suppression motion or at the suppression hearing. He only argued it in post-hearing briefing.

Second, it fails because Reed mistakenly equates an encounter with police concerning a serious crime with a seizure. There was no seizure. To accept Reed's arguments would be to eviscerate law enforcement's ability to canvass and question citizens about serious crimes.

Third, it fails because police used no show of force or authority; the fact that most people may have talked with police does not, as Reed suggests, mean a reasonable person would not have felt free to leave.

Because Reed was not seized when he consented to provide a DNA sample, the attenuation doctrine does not apply. As no Fourth Amendment violation occurred, this Court should affirm.

Lastly, if this Court holds that Reed was seized when he consented to provide his DNA sample, the proper remedy would be to remand for an evidentiary hearing to address remaining Fourth Amendment questions and, potentially, whether Reed would not have entered his plea and insisted on going to trial.

STATEMENT OF THE CASE

Procedural overview. On September 14, 2016, police discovered Harry and Lorraine Brown Bear stabbed to death in their home. (R. 14:2.) Police found Harry in a recliner; he had blood on and around him, and a large butcher knife with what appeared to be blood on it next to him. (R. 14:2–3.) Police found Lorraine Brown Bear on the floor in the hallway, with a knife in her chest and blood around her body. (R. 14:3.)

Police also found blood by the bedroom light switch, and blood stains next to boxes on the bed; in front of one of the boxes, police found an empty revolver holster. (R. 14:2.)

Given all of the biological evidence, police decided within one day that they would ask for consent to provide a DNA sample when speaking with people who had been in the Brown Bear home or had other connections to the Brown Bears. (R. 76:57–58.)

On October 6, 2016, police spoke with Reed and two of his friends; after Reed told police that he spent time at the Brown Bear home, police asked if he would be willing to provide a DNA sample. (R. 73:69–74.) Reed agreed and provided a sample. (R. 73:73.)

On October 14, 2016, the Wisconsin State Crime Lab confirmed that Reed's DNA matched the blood found on the Brown Bears's bed, near the empty holster. (R. 14:4.) The crime lab earlier confirmed that the DNA from the blood on the bed matched DNA found on the knife next to Harry Brown Bear's body. (R. 14:4.)

Police arrested Reed and, after police read him *Miranda* warnings, Reed confessed to killing the Brown Bears and taking the gun he found in the bedroom. (R. 14:4.) He told police where he put the gun, and police found it in that location. (R. 14:4.)

The State charged Reed with two counts of first-degree intentional homicide. (R. 14.)

Reed filed two suppression motions: (1) a motion to suppress his confession, on grounds that police attempted to elicit "consciousness of guilt" responses prior to reading him *Miranda* warnings (R. 33), and (2) a motion to suppress his DNA sample (R. 36).

The court held two suppression hearings. (R. 76; 77.) At the hearing on his motion to suppress his confession,

Sergeant Christopher Hammen testified that he did not ask Reed any questions about the case until after reading him *Miranda* warnings. (R. 77:5–24.) The State admitted recordings of the police transport of Reed and of the interrogation itself. (R. 49, 52; 77:29–31.) Prior to any ruling, the defense withdrew its claim of a *Miranda* violation. (R. 78:9.)

Following the next suppression hearing, the circuit court, the Honorable Mark J. McGinnis presiding, denied Reed's motion to suppress his DNA sample. (R. 78:8–12.)

Reed pled no contest to both counts; in exchange, the State agreed to cap its recommendation at eligibility for release onto supervision after 35 years of initial confinement. (R. 79.) The circuit court sentenced Reed to life in prison, with eligibility for release after 45 years of initial confinement. (R. 64; 80.)

Litigation of motion to suppress DNA evidence. In his motion to suppress his DNA sample, Reed argued that the "stop and search" was "without probable cause." (R. 36:2.)

The State filed a written response. (R. 40.) First, it argued the court should deny Reed's motion without a hearing because it was "conclusory" and insufficiently pled. (R. 40:1–2.) Second, it argued Reed voluntarily consented to provide the DNA sample. (R. 40:3.)

At the beginning of the suppression hearing, the court asked defense counsel to clarify the defense arguments; it was "trying to understand what the motion is or what the issue is." (R. 76:5.) Defense counsel explained: the "statute[s]" require probable cause to obtain DNA, and it was an "abuse of police power" to go into a community and "request[ ] that DNA just be extracted for exclusionary purposes." (R. 76:6.)

The court asked how Reed had standing to challenge police taking DNA from others; defense counsel argued that

the "overreach of the police power" included Reed. (R. 76:7, 22–23.)

Defense counsel then asserted that the collection of Reed's DNA was inappropriate because police represented they were asking for it for "exclusionary purposes, not inclusionary purposes," and that it therefore violated the "Fourth Amendment, search and seizure." (R. 76:8.)

The court noted that counsel had said a lot of "buzz words," but it was still "trying to understand." (R. 76:8–9.) The court asked whether the defense argued that "the seizure was lawful—or unlawful from the first second or it became unlawful at some point." (R. 76:9.) Counsel said that had to be "flushed out as part of the testimony." (R. 76:9.) Counsel continued: "even if that—that seizure is deemed to be lawful, that the collection of his DNA in and of itself would have been non-voluntary and illegal because probable cause hadn't been established." (R. 76:10.)

The court asked where "probable cause" was "coming from," and defense counsel stated "from the compilation of the statutes." (R. 76:11–17.) The State did not know of "any cases out there that say if officers have no probable cause it means they can't just ask the person to voluntarily consent to giving a sample." (R. 76:18.)

The court asked if the State believed a seizure occurred, and the State argued no seizure occurred. (R. 76:19.) The court indicated that issue should be addressed in testimony. (R. 76:19–20.)

The court also asked the parties to address in testimony what the remedy should be if a Fourth Amendment violation occurred, including exceptions to the exclusionary rule. (R. 76:24–25.) The State responded that it wished to first get through the testimony concerning whether any violation occurred, because addressing any exceptions to exclusion would require it "go through the

other 500 pages of discovery." (R. 76:25.) Defense counsel did not "have an objection to the State's position in regards to additional testimony if necessary." (R. 76:25.)

The State called three officers to testify: Sergeants Nathan Borman, Travis Linskens, and Christopher Hammen. Sergeant Borman testified that police discovered the Brown Bears murdered in their home on September 14, 2016, and the police collected blood samples and knives from the home. (R. 76:32.)

Sergeant Borman explained that by the next day, police started asking people for DNA samples. (R. 76:35–37.) Police used consent forms. (R. 42; 76:35.) The officers were "encouraged if at all possible to obtain consent DNA samples," and he estimated they obtained around 25 samples. (R. 76:42–43.)

Sergeant Travis Linskens explained that the investigation started with police talking to neighbors; police then developed a list of people who "would have known the Brown Bears, been at their residence or had contacts with them." (R. 76:55.) Police did not believe the Brown Bears had any adult children in the area, so they had to rely on people in the community to investigate. (R. 76:55–58.)

On October 6, 2016, Sergeants Linskens and Hammen set out to make contact with Reed and his brother, Desmond Hill—people they learned lived in the area and potentially had contact with the Brown Bears. (R. 76:59–60, 105.) Police did not have any reason to believe either had a "beef or issues with the Brown Bears" at that point; they were making "general contacts." (R. 76:59.)

Linskens and Hammen went to Reed's home; Reed's mother said he and Hill were with their friend, Merlin Metoxen. (R. 76:60–61, 105.) Police knew where Merlin lived and traveled to his home. (R. 76:61.) No one answered, they

left, spoke to someone else, and then drove back past Merlin's home. (R. 76:61–62, 105–06.)

Police saw Jonathan Melchert—who they knew to be a friend of Reed and Hill's—walking out of Merlin's house. (R. 76:62, 106.) Sergeant Hammen asked if Merlin was home; he said yes, and Hammen asked if he would ask Merlin to come outside to talk with them. (R. 76:106–07.) Merlin came outside, and Sergeant Hammen talked to him; Merlin at first said he had not seen Reed or Hill, but he then said they were inside. (R. 76:63–64, 107–08.)

Merlin asked Sergeant Hammen if he should go inside to get them, and Hammen asked him to do so. (R. 76:64, 107–08.) Three young men—Reed, Hill, and Peter Penaass—came out. (R. 76:64, 108–09.)

Sergeant Hammen identified himself and Linskens as police; they wore shirts and ties with badges and side arms; Hammen confirmed his side arm was visible. (R. 76:65, 116.)

The State admitted into evidence both an audio recording and transcript of the sergeants' initial interactions with the three, and Sergeant Linskens's conversation with Reed. (R. 44–45; 76:75–76.)[1]

Sergeant Hammen explained that he was not there to "jack them around," that they were not there to talk about being "truant" or "smoking dope." (R. 45:3–4.) He requested that they take their hands out of their pockets. (R. 45:3.) He asked: "So anybody, everybody willing to talk to me?" (R. 45:3–4.) They agreed. (R. 76:109.)

Police separated the young men per standard practice. (R. 76:110.) Sergeant Linskens talked with Reed in the open

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[1] The recording is not electronically filed but is in the appellate record. (R. 44.)

driveway; Sergeant Hammen talked with Hill in the front seats of his unmarked patrol car. (R. 76:65–66, 79, 109–10.) Hammen did not lock the doors and told Hill he could leave. (R. 76:110.) Peter sat on the back porch. (R. 76:67.)

Sergeant Linskens testified that Reed appeared to understand him, never asked to stop talking, never said he wanted to leave, and never tried to walk away. (R. 76:67.) Linskens never told him he had to stay and talk. (R. 76:68.)

Linskens asked Reed if he knew what he wanted to discuss, and Reed said he assumed the Brown Bear homicide. (R. 45:5; 76:68.) Reed told Linskens that "Harry was his guy," that he would "go over there from time to time, drink beer with him, ask him for cigarettes, things like that." (R. 45:5–6; 76:68.) Reed said he would help Harry Brown Bear around the house, and he gave Sergeant Linskens the name of others who did the same. (R. 45:8–9; 76:69.) Reed estimated he was last at the Brown Bear house one-and-one-half months earlier. (R. 45:5; 76:69.) Linskens asked Reed if he knew anything about what happened, and Reed said no. (R. 45:5–14.)

Sergeant Hammen finished speaking with Hill, and he told Linskens that Hill consented to provide his DNA. (R. 76:70.) Hammen then went to speak with Penaass. (R. 76:112.)

Linskens asked Reed if he would consent to provide a DNA sample:

> Okay, so guys what we're doing basically you know we're talking to everybody around here, you guys have heard us around here and you've heard this spiel from ah Sgt. Hammen, but everybody that's been over there at the residence, had contact with Harry that knew Harry, we're asking for DNA swabs so that for elimination if you've been over there and things like that, okay? *Are you cool with that?*

(R. 45:15 (emphasis added); *see also* 76:71.)

Reed agreed to give a sample. (R. 76:71.) Sergeant Linskens said Reed never appeared confused. (R. 76:71.) He gave Reed an opportunity to go through the consent form:

> This is just basically what I asked you for it's just the written purpose of it, okay? So the consent is to do a buccal swab which is just a quick swab of your cheek, okay? If you just print your name here, date of birth, your address here, and then I'll write my name here 'cause *this is you giving permission to take it and then ah once you're good with that then ah just sign it on the bottom there, okay?* Okay, all right. All right, Vance, I'll just do yours real quick since I got your sheet right here, okay?

(R. 45:15–16 (emphasis added); *see also* 76:71–73.)

Linskens asked Reed to fill out his personal information. (R. 76:72.) This all occurred out "in [that] open driveway area"; they used the hood of Sergeant Hammen's car to fill out the form. (R. 76:73.) The State admitted into evidence Reed's signed consent form. (R. 43; 76:71–72, 76.)

Linskens never told Reed he had to give a sample; Linskens acknowledged that he did not phrase the question as "you may or may not consent," but assumed that "asking somebody" for consent would be that person's "opportunity." (R. 76:73, 91–92.) Linskens never raised his voice, and he never made any threats or promises related to giving the sample; Reed did not ask any questions about giving the sample. (R. 76:73–74, 89, 113.)

After collecting the samples, Hammen and Linskens talked with the young men about sports and then left. (R. 76:74, 113.)

After the suppression hearing, the parties submitted additional briefing. The defense argued that police

conducted a "*Terry* stop"[2] of Reed without reasonable suspicion. (R. 61.) The defense also argued that the State failed to prove that inevitable discovery would apply, and that Reed's statements to police were therefore "fruits of the poisonous tree." (R. 61:2–3.)

The State noted the defense had now made a new argument by asserting that police engaged in an unlawful *Terry* stop. (R. 57:1.) It explained that without any notice of this argument, it had not asked questions of the officers that may be relevant to the *Terry* analysis. (R. 57:1.) It explained that if the court wished to address the *Terry* argument, it may wish to seek additional testimony; alternatively, it argued the court could conclude this was not a *Terry* stop under the existing testimony. (R. 57:2.)

The State also argued that police could lawfully ask Reed for his consent to provide a DNA sample, without any reasonable suspicion or probable cause to believe he was involved in the crime. (R. 57:2–3.)

The State further noted that Reed for the first time argued the statements were fruits of the poisonous tree. (R. 57:5.) The State asserted that if the court wished to have additional testimony to address the applicability of inevitable discovery, it would present such testimony. (R. 57:5–6.)

The court denied Reed's motion to suppress his DNA sample. (R. 78:8–11.) The court noted that the issue was "different than what it was at the time of the motion hearings and prior to the motion hearing." (R. 78:9.)

The court found that the undisputed facts established police were outside of a house; Reed and two others came

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[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

outside. (R. 78:10.) The officers spoke to them initially as a group, and then Sergeant Linskens spoke with Reed while Hammen took Hill to the unmarked squad. (R. 78:10–11.) It found the officers were "outside the home, weapons were not drawn. There were no threats. There was no coercion. There were no tricks." (R. 78:11.)

The court discussed the Wisconsin Supreme Court's decision in *County of Grant v. Vogt*, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253, and concluded Reed's police encounter was not a *Terry* stop: "It does not constitute a Fourth Amendment seizure, and at the time of the stop there was no facts or conduct by law enforcement that a reasonable person would feel like they were not free to leave." (R. 78:10–11.)

Reed appeals.

STANDARDS OF REVIEW

This Court considers independently whether a party forfeited an argument. *State v. Kaczmarski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702.

The question of whether police have seized an individual, thereby implicating the Fourth Amendment, involves a two-part standard of review. *Vogt*, 356 Wis. 2d 343, ¶ 17. This Court upholds the circuit court's fact-findings unless clearly erroneous but applies those facts to the constitutional principles de novo. *Id.*

ARGUMENT

Reed was not subject to a Fourth Amendment seizure when he consented to provide a DNA sample.

A. Reed forfeited his *Terry*-stop argument by not raising it in his suppression motion or at the suppression hearing.

1. Legal principles

Wisconsin Stat. § 971.30(2)(c) provides that all motions—including pretrial motions—shall "[s]tate with particularity the grounds for the motion and the order or relief sought." Wis. Stat. § 971.30(2)(c); *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433. Our statutes include this requirement to ensure "notice to the nonmoving party and to the court of the specific issues being challenged by the movant." *State v. Caban*, 210 Wis. 2d 597, 605, 563 N.W.2d 501 (1997).

This rule applies to Fourth Amendment challenges. *Caban*, 210 Wis. 2d at 606; *see also State v. Radder*, 2018 WI App 36, ¶¶ 12–13, 382 Wis. 2d 749, 915 N.W.2d 180. To determine whether a defendant preserved a particular Fourth Amendment challenge, reviewing courts examine both the suppression motion and the suppression hearing. *Caban*, 210 Wis. 2d at 606.

Similarly, Wisconsin's "waiver rule," which encompasses both waiver and forfeiture principles, holds that issues "not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727. This rule is an "essential principle of the orderly administration of justice," as it provides the parties and courts with notice and a fair

opportunity to address the claim, encourages attorney diligence, and prevents "sandbagging." *Id.* ¶ 12.

2. Reed did not argue that police conducted an unlawful *Terry* stop until after the suppression hearing.

Reed forfeited the argument he raises on appeal. He now asserts that the police conducted an unlawful *Terry* stop without reasonable suspicion. (Reed's Br. 8–11.) His motion to suppress his DNA sample, however, did not become a *Terry*-stop challenge until *after* the suppression hearing.

First, Reed's suppression motion made no mention of an unlawful *Terry* stop, or—for that matter—any unlawful seizure of Reed. (R. 36.) The word "seized" only appeared in the context of boiler-plate language that the "evidence was seized" in violation of his rights. (R. 36:1.) Instead, Reed's motion argued the police took his DNA sample "without probable cause." (R. 36:2.) If he wished to raise a *Terry*-stop challenge as well, there is no reason why he could not have done so in the motion. His motion failed to preserve his appellate challenge. *Caban*, 210 Wis. 2d at 606.

Second, Reed did not make his *Terry*-stop argument at or during the suppression hearing. The court immediately expressed confusion about Reed's arguments, and it offered defense counsel repeated attempts to clarify. (R. 76:5 ("I'm trying to understand what the motion is or what the issue is . . . ."); 76:8 ("Let me just try to understand everything you're saying . . . .").)

Despite ample opportunities, Reed did not argue that police seized him without reasonable suspicion to believe he had been involved in criminal activity. Instead, defense counsel focused on his claim that police abused their power by asking people, including Reed, to provide DNA samples; further, that even if police had consent, the "statute[s]" still required probable cause for police to ask. (R. 76:5–21.)

To be fair, defense counsel did suggest at the suppression hearing—in response to the court's prompting—that part of the challenge may include a challenge to the legality of the "seizure":

> THE COURT: And then unlawfully detained and that led to the voluntariness of the consent not being lawful. And then the last thing you said was a violation of the Fourth Amendment search and seizure.
>
> [DEFENSE COUNSEL]: Right. Which would be the overriding violation.
>
> THE COURT: So I'm trying to understand then, just go back to my initial question, so, number one, you're saying that there was an unlawful seizure when he stopped and questioned or –
>
> [DEFENSE COUNSEL]: That's correct.
>
> THE COURT: Okay. And is the argument on your side that the seizure was lawful—or unlawful from the first second or it became unlawful at some point in time?
>
> [DEFENSE COUNSEL]: That's what has to be flushed out as part of the testimony.

(R. 76:9.)

The court asked defense counsel if he asserted that "the collection of anything would be unlawful because the seizure was unlawful," and defense counsel answered, in part, "That's correct." (R. 76:10.)

Nevertheless, these vague references to an "unlawful seizure"—mostly enunciated by the court in an effort to clarify the defense position—did not preserve Reed's appellate argument that police lacked the reasonable suspicion necessary to perform a *Terry* stop. Neither the words "reasonable suspicion" nor *"Terry*" appear anywhere in the suppression hearing transcript. (*See generally* R. 76.)

Further, the broader context of defense counsel's arguments reflects that his "seizure" argument concerned his overarching claim that police could not lawfully canvass citizens and request DNA samples. (*See* R. 76:5–21.) For example: "[I]f the State or the government is just going into a community and requesting that DNA just be extracted for exclusionary purposes of any party that they have contact with, I believe that's an abuse of police power." (R. 76:6.)

Moreover, Reed's "seizure" discussion began with counsel stating "it would be a violation of the Fourth Amendment, search and seizure." (R. 76:8.) Following that sweeping assertion with a claim that the "seizure" was unlawful did not provide "with particularity the grounds for the motion." Wis. Stat. § 971.30(2)(c); *Caban*, 210 Wis. 2d at 606.

If that were sufficiently particular to preserve an argument, a defendant simply quoting the text of the Fourth Amendment itself—which protects the individual against "unreasonable searches and seizures"—would be enough to preserve any "search" or "seizure" argument. *See* U.S. Const. amend IV. Our statutes and forfeiture case law tell us otherwise. Wis. Stat. § 971.30(2)(c); *Caban*, 210 Wis. 2d at 606.

Consider the facts of *Caban*: there, the Wisconsin Supreme Court addressed whether the defendant forfeited his argument that police lacked probable cause to search his car. *Caban*, 210 Wis. 2d at 600. His suppression motion asserted a "broad Fourth Amendment challenge to the automobile search," but did not include "a request to suppress the evidence on the ground that there was no probable cause for the search of his vehicle." *Id.* at 602–03.

At the suppression hearing, defense counsel did not pursue and at times objected to questions relevant to probable cause to search; instead, defense counsel argued

that police had neither a warrant nor exigency to search his car. *Caban*, 210 Wis. 2d at 603, 607. After the circuit court found probable cause for his arrest and denied his motion, the defendant then, on appeal, argued that police lacked probable cause to search the car. *Id.*

This Court concluded that the defendant "waived his right to appeal that issue." *Caban*, 210 Wis. 2d at 608. His arguments that police unlawfully searched his car were not sufficient to preserve the *particular* "search" argument (i.e. that the search was unlawful due to a lack of probable cause). *Id.* at 607–09.

The same should be true here. Using—as the circuit court described defense counsel's argument—Fourth Amendment "buzz words" such as "seizure" (*see* R. 76:8), did not put the State or court on fair notice, before the hearing, that Reed would later argue police were conducting a *Terry* stop without the requisite reasonable suspicion.

Indeed, both the State and circuit court identified this as a new argument when Reed raised it in his post-suppression briefing. (R. 57:1 ("without any prior notice that the interaction with the defendant would be challenged in this fashion, the State did not elicit questioning from the officers that may be relevant if the Court believes it is appropriate to engage in a *Terry* analysis"); 78:9 (court noting the issue was "different than what it was" "prior to" and "at the time of the motion hearing[ ]).)

Thus, though defense counsel here did not, like the defense attorney in *Caban*, affirmatively object to questions relevant to the issue raised on appeal, *see Caban*, 210 Wis. 2d at 603, and though Reed raised the argument before the circuit court decided the suppression motion, the result should be the same. Reed did not state his argument with particularity either before or during the suppression hearing; in failing to do so, he did not give the State notice of

his particular argument. Wis. Stat. § 971.30(2)(c); *Caban*, 210 Wis. 2d at 605.

His appeal rests on his claim that police lacked reasonable suspicion to perform a *Terry* stop. He forfeited this argument; this Court need not go further.

B. Reed was not seized when he consented to provide a DNA sample.

1. Legal principles

Both the United States and Wisconsin Constitutions protect against unreasonable searches and seizures. U.S. Const. amend IV; Wis. Const. art I, § 11. Wisconsin courts have historically interpreted our state constitutional protection as identical to the Fourth Amendment protection. *Vogt*, 356 Wis. 2d 343, ¶ 18.

These constitutional protections are not implicated until law enforcement "seizes" an individual. *Vogt*, 356 Wis. 2d 253, ¶ 19. There are two kinds of Fourth Amendment seizures: *Terry* stops and arrests. *Id.* ¶¶ 27–28. To conduct a lawful *Terry* stop, police must have reasonable suspicion of criminal activity—"specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." *Id.* ¶ 27 (citation omitted).

"While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984); *see also U.S. v. Mendenhall*, 446 U.S. 544, 555 (1980) (plurality opinion) (seizure analysis is not affected by the

fact defendant was not "expressly told by the agents that she was free to decline to cooperate with their inquiry").[3]

Moreover, "a person's consent is no less valid simply because an individual is particularly susceptible to social or ethical pressures." *Vogt*, 356 Wis. 2d 343, ¶ 31.

In *Mendenhall*, the Supreme Court explained that "characterizing every street encounter between a citizen and police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." 446 U.S. at 554 (plurality opinion). The Court recognized the need for police questioning as a "tool in the effective enforcement of the criminal laws." *Id.*

A seizure instead occurs "only when, by means of physical force or a show of authority, [an individual's] freedom of movement is restrained." *Mendenhall*, 446 U.S. at 553 (plurality opinion); *Vogt*, 356 Wis. 2d 343, ¶ 20.

Thus, as both the United States and Wisconsin Supreme Courts hold, a Fourth Amendment seizure has not occurred "unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave." *Vogt*, 356 Wis. 2d 343, ¶ 24 (quoting *Delgado*, 466 U.S. at 216).

This is an objective test; importantly, it considers whether, under the totality of the circumstances, "an *innocent* reasonable person, rather than the specific

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[3] Justice Stewart's lead opinion in *Mendenhall*, setting forth the standard to evaluate whether a seizure occurred, was joined only by Justice Rehnquist at the time; both the U.S. and Wisconsin Supreme Courts have since adopted the *Mendenhall* standard. *I.N.S. v. Delgado*, 466 U.S. 210, 215–17 (1984); *County of Grant v. Vogt*, 2014 WI 76, ¶¶ 20–26, 356 Wis. 2d 343, 850 N.W.2d 253.

defendant, would feel free to leave under the circumstances." *Vogt*, 356 Wis. 2d 343, ¶ 30 (emphasis added). Factors that may suggest a seizure include physical touching by officers, the "threatening presence of several officers," an officer displaying his weapon, or the "use of language or tone of voice indicating that compliance . . . might be compelled." *Id.* ¶ 23 (citation omitted).

Wisconsin statutes provide for situations where the State may, without a warrant, take DNA samples from persons arrested or on supervision for particular crimes; none of those statutes are at issue here. Wis. Stat. § 165.76. Outside of those provisions, to take an individual's DNA sample, law enforcement must have a warrant—unless they have an exception to the warrant requirement, such as consent. *State v. Ward*, 2011 WI App 151, ¶ 10, 337 Wis. 2d 655, 807 N.W.2d 23.

"A search authorized by consent is wholly valid unless that consent is given while an individual is being illegally seized." *State v. Luebeck*, 2006 WI App 87, ¶ 7, 292 Wis. 2d 748, 715 N.W.2d 639.

2. Police engaged in a consensual encounter with Reed, from which a reasonable person would have felt free to leave.

a. If this Court concludes Reed was not seized when he consented to provide his DNA sample, Reed's appeal fails.

The dispositive question is whether Reed was seized when he consented to give police his DNA sample. He was not.

Importantly, Reed makes no argument that his consent was not voluntarily given. (Reed's Br. 11.) In citing case law, he at times suggests that voluntariness is a

question to be determined. (*See, e.g.*, Reed's Br. 12 ("It must be determined not only that consent was voluntarily given, but that evidence obtained was not an exploitation of the illegal stop.").) He then, however, acknowledges that he failed to develop any voluntariness challenge below, and he does not develop any argument on appeal. (Reed's Br. 11 ("Reed did not seem to meaningfully dispute that consent to the buccal swab was given voluntarily subsequent to the stop.").) Voluntariness is not at issue. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (this Court need not address undeveloped arguments).

Reed also does not renew—and has therefore abandoned—his pre-trial argument that, even with his consent, police still needed probable cause to ask for his DNA sample. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned").

Thus, we are left with one question: was Reed seized when he consented to give a DNA sample?

b. Reed was not seized.

The answer to the dispositive question is no, Reed was not seized. At every step of the way, police communicated that this was a consensual encounter—that the choices rested with Reed:

When Reed, Hill, and Penaass came outside, Sergeant Hammen asked if the young men were *willing* to talk: "So anybody, everybody willing to talk to me?" (R. 45:3–4.)

When Sergeant Linskens asked for a DNA sample, he asked Reed if he was *willing* to provide a DNA sample: "Are you cool with that?" (R. 45:15; 76:71.)

When Sergeant Linskens discussed the consent form with Reed, he explained that signing it meant Reed was

willing to provide a DNA sample: ". . . this is you giving permission to take it and then ah once you're good with that then ah just sign it on the bottom there, okay?" (R. 45:15–16; 76:71–73.)

The circumstances surrounding these questions also demonstrate a consensual encounter: police spoke to Reed in an "open driveway." (R. 76:66, 72–73.) Sergeant Linskens never told Reed he had to stay and talk, never raised his voice, never told Reed he had to give a DNA sample, and never made any threats or promises related to him giving a sample. (R. 76:68, 73–74, 89.)

Police in no way restricted Reed's freedom of movement—not through a "show of force," not through a "show of authority," not at all. *Mendenhall*, 466 U.S. at 553 (plurality opinion); *Vogt*, 356 Wis. 2d 343, ¶ 20.

Reed's arguments rest on a fundamental misunderstanding of the limitations of consensual police encounters. Reed correctly cites the Supreme Court's decision in *Delgado* as holding that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." (Reed's Br. 10); *Delgado*, 466 U.S. at 216.

But Reed then incorrectly flips that holding to argue that police may *only* question people about "identity" or "identification," absent reasonable suspicion. (*See, e.g.*, Reed's Br. 10, 14 ("This case was most certainly not about interrogation related to Reed's identity or request for identification.").)

The conversation did not have to be limited to Reed's name or identification to be a consensual encounter, as opposed to a Fourth Amendment seizure. On the contrary, in *Delgado*, the Supreme Court made clear that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation." 466 U.S. at 216.

If Reed were correct, a police officer asking a person standing in a street after a shooting—"Did you see what happened?"—would constitute a Fourth Amendment seizure, because the question does not concern the identity or identification of the person to whom it was asked. This "would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices," such as the important "tool" of police questioning. *Mendenhall*, 466 U.S. at 554 (plurality opinion).

Reed asserts that his "freedom of movement was restrained by the questioning about the homicides." (Reed's Br. 9–10.) Stated differently, he argues that a reasonable person would not have felt free to leave because police were asking questions about a homicide. Reed is wrong for multiple reasons.

First, he overlooks that reasonable suspicion asks how an "*innocent* reasonable person" would feel. *Vogt*, 356 Wis. 2d 343, ¶ 30 (emphasis added). An innocent person would not feel "so intimidat[ed]" as to feel forced to remain, simply because the officer asked questions about a serious crime. *See Vogt*, 356 Wis. 2d 343, ¶ 24 (citation omitted).

But second, even if an innocent person would feel that way, it still would not transform the questioning into a seizure. The fact that "most citizens will respond to a police request" does not make a consensual encounter a seizure. *Delgado*, 466 U.S. at 216.

Third, again, accepting Reed's argument would eviscerate law enforcement's ability to canvass and ask questions of potential witnesses—particularly in serious cases, "while not enhancing any interest secured by the Fourth Amendment." *Mendenhall*, 466 U.S. at 554 (plurality opinion).

Reed asserts that because he "was not informed he was at liberty to refuse" to provide a sample, he was seized.

(Reed's Br. 15.) The Supreme Court, however, has explicitly held that the fact that most people will respond to a police request, "without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado*, 466 U.S. at 216. Consensual encounters and requests from police are different, for example, than laws *requiring* a person to provide a DNA sample upon arrest. *See Maryland v. King*, 569 U.S. 435 (2013) (deeming reasonable a state law requiring buccal swab DNA samples upon arrest for a serious offense); (*see also* Reed's Br. 15–16.)

Reed's speculation that if he walked away, he "might have faced arrest for obstructing an officer," finds no support in the record and offers nothing to the analysis. (Reed's Br. 15); *Vogt*, 356 Wis. 2d 343, ¶ 49 (rejecting consideration of speculation as to what might have occurred if defendant had tried to leave).

The fact that Reed was 19 years old also does not change the seizure equation. *Compare* (Reed's Br. 15 (noting he "was only 19 at the time of the encounter")) *with Vogt*, 356 Wis. 2d 343, ¶ 31 ("a person's consent is no less valid simply because an individual is particularly susceptible to social or ethical pressures").

Beyond that, Reed only otherwise points to the facts that the officers had "badges and service revolvers clearly visible," and Sergeant Hammen talked with Reed's brother in the squad car. (Reed's Br. 9–10.) It does not appear Sergeant Linskens ever testified about his service weapon one way or the other; Sergeant Hammen testified his weapon was visible. (R. 76:116.) Both testified that their badges were visible. (R. 76:65, 116.) Neither the police's attire, nor the fact that Hammen talked with Reed's brother in the *front* seats of his unmarked squad car, (R. 76:65–66, 79, 109–10), rendered the police interaction with Reed a Fourth Amendment seizure.

As did the circuit court, compare the facts of *Vogt* to this case: there, an officer in his marked squad car saw a car turn into the parking lot of a closed park at roughly 1 a.m.; the officer found this to be suspicious. *Vogt*, 356 Wis. 2d 253, ¶ 4. The officer pulled behind the defendant's car in a way that would have made it more difficult, though not impossible, for the defendant to leave; he then got out of the car and walked up to the defendant's window. *Id.* ¶¶ 6–7, 40–42. The officer was in "full uniform and had a pistol in his side holster." *Id.* ¶ 7. The officer "rapped" on the window and motioned for the defendant, one of two people in the car, to roll the window down. *Id.* The officer asked him what he was doing, and ultimately noticed indicia of operating while intoxicated. *Id.* ¶ 8.

The Wisconsin Supreme Court concluded that the defendant was *not* seized: "[a]lthough it may have been Vogt's social instinct to open his window in response to Deputy Small's knock, a reasonable person in Vogt's situation would have felt free to leave." *Vogt*, 356 Wis. 2d 343, ¶ 53. The Court noted, among other things, that the officer did not brandish his weapon, did not "speak in a way that would suggest" the defendant had to roll down the window, and did not touch the defendant. *Id.*

Like in *Vogt*, here the police did not brandish weapons and did not speak to Reed in a way suggestive of a command; further, there is nothing in the record to indicate police ever touched Reed prior to taking his sample.

The police action here was, if anything, less intimidating than the facts of *Vogt*. Unlike the officer in *Vogt*, who directed the defendant to roll down the window of the car, police did not direct Reed to talk to him or provide a sample. The interaction occurred in an open driveway as part of a police canvass to talk with multiple people. The police did not use any show of force or authority when talking with Reed to restrain his movement. *See Vogt*, 356

Wis. 2d 343, ¶ 20. Reed was therefore not seized when he consented to provide his DNA, and the circuit court properly denied his suppression motion.

c. Because Reed was not seized, the attenuation doctrine is inapplicable.

If a Fourth Amendment violation occurs, and a defendant offers subsequent voluntary consent, the State may argue attenuation: that a "sufficient break in the causal chain" existed "between the illegality and the seizure of evidence." *State v. Phillips*, 218 Wis. 2d 180, 204–05, 577 N.W.2d 794 (1998).

Here, no Fourth Amendment violation occurred because Reed was not seized when he consented to provide his DNA sample. *See* Section B.2.b, *supra*. Reed's attenuation arguments rest on the incorrect premise that he was ever seized under the Fourth Amendment. (*See* Reed's Br. 11–13.) Without any seizure (and thus no constitutional violation), this Court need not consider whether Reed's consent was somehow attenuated from that seizure.

C. Should this Court nevertheless conclude Reed was seized, the proper remedy is to remand for an evidentiary hearing.

1. An evidentiary hearing would be necessary to address remaining Fourth Amendment questions.

a. Legal principles

"Requesting permission to search a person who has been lawfully seized does not invalidate the person's consent." *State v. Floyd*, 2017 WI 78, ¶ 32, 377 Wis. 2d 394, 898 N.W.2d 560.

Additionally, "[t]ainted evidence" may be admissible through the independent source and inevitable discovery doctrines, if the State can show the evidence either was also obtained by independent, lawful means, or would have been inevitably discovered through lawful means. *State v. Anker*, 2014 WI 107, ¶ 25, 357 Wis. 2d 565, 855 N.W.2d 483. *Id.* ¶ 27. The applicability of such exceptions involves fact-findings. *Id.* ¶ 26. Thus, where this Court disagrees with a circuit court's conclusion about the legality of police action, this Court has remanded the matter to the circuit court for an evidentiary hearing to determine whether exceptions apply. *See, e.g.*, *id.* ¶ 27.

b. Because the circuit court concluded Reed was not seized, it did not need to address additional Fourth Amendment questions.

As no seizure occurred, Reed is due no relief. If, however, this Court holds that Reed was seized when he consented to provide a DNA sample, it should remand for an evidentiary hearing to address remaining Fourth Amendment questions.

Because Reed did not argue that police engaged in an unlawful *Terry* stop without reasonable suspicion until after the suppression hearing, the State, as it explained in its post-suppression hearing response, did not "elicit questioning from the officers that may be relevant" to the "*Terry* analysis." (R. 57:1.) Though, as the State noted in that response, the existing record did not reflect police had reasonable suspicion at the time (R. 57:2), the record remains incomplete on the question of the legality of any seizure.

The circuit court had no need to take the State up on its suggestion to present additional testimony—it did not

need to assess the legality of any seizure, the interplay between the seizure's legality and Reed's consent, or what that meant for the admission of the DNA sample and any other evidence—because it (correctly) concluded no seizure occurred. (*See* R. 57:2; 78:10–11.) If this Court concludes otherwise, additional testimony would be necessary.

Moreover, at the suppression hearing, defense counsel did not object to the State's suggestion of first addressing testimony as to whether any constitutional violation occurred before hearing additional testimony on the applicability of exceptions to the exclusionary rule. (R. 76:24–25.) Because the circuit court found no Fourth Amendment violation occurred, it had no need for further testimony on whether any exceptions to the exclusionary rule apply. Remand would also be necessary to address whether any exceptions to the exclusionary rule apply. *See, e.g.*, *Anker*, 357 Wis. 2d 565, ¶ 27.

2. An evidentiary hearing would also be potentially necessary to assess whether, if the evidence had been excluded, Reed would not have pled no contest.

a. Legal principles

Wisconsin Stat. § 971.31(10) provides that a defendant may appeal a denial of a suppression motion notwithstanding the fact that he entered a guilty plea or no-contest plea. A defendant, however, "is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996) (citation omitted).

In *State v. Semrau*, 2000 WI App 54, 233 Wis. 2d 508, 608 N.W.2d 376, this court held that harmless-error analysis applies to the erroneous denial of suppression in a case

where the defendant subsequently enters a plea in lieu of trial. *Id.* ¶ 22. The question is whether a reasonable probability exists that, but for the circuit court's failure to suppress the evidence, the defendant would have refused to plead and insisted on going to trial. *Id.* ¶ 2; *but see State v. Rockette*, 2005 WI App 205, ¶ 26, 287 Wis. 2d 257, 704 N.W.2d 382 (declining to apply *Semrau* harmless error to facts and applying a different harmless error analysis).

b. If the evidence would have been suppressed, the next question would be whether Reed would have insisted on going to trial.

If this Court concludes Reed was seized, a hearing would further be necessary because, if (on remand) the circuit court were to determine that the DNA sample was unlawfully obtained and no exceptions applied, the circuit court would also need to consider whether Reed would not have entered his plea and would have instead insisted on going to trial. *See Semrau*, 233 Wis. 2d 508, ¶ 2.

The DNA evidence, albeit very strong evidence, was not the only evidence against Reed: among other things, he confessed. (R. 14:4; 26:3; 27:1.) If his confession remained admissible, that would also be strong evidence against him. *See, e.g. State v. Anderson*, 165 Wis. 2d 441, 447–52, 477 N.W.2d 277 (1991) (applying attenuation doctrine to defendant's statement where police engaged in illegal searches and defendant gave subsequent statement after police read him *Miranda* warnings).

Moreover, facing the possibility of life without eligibility for release onto supervision, he accepted a plea agreement whereby the State promised to recommend he receive a release eligibility date, and he did receive a release eligibility date. (R. 14:1; 64; 79; 80); Wis. Stat. §§ 940.01(1)(a) (first-degree intentional homicide is a Class A

felony), 939.50(3)(a) (penalty for Class A felony is life in prison), 973.014(1g) (a court may sentence someone to life in prison without the possibility of release onto supervision). Thus, if—and only if—this Court concludes Reed was seized, remand would also be warranted to, if necessary, assess whether Reed would have insisted on going to trial.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 21st day of November, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,912 words.

Dated this 21st day of November, 2018.

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HANNAH S. JURSS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of November, 2018.

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