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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP001051

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VANCE D. REED,

Defendant-Appellant.

On Notice Of Appeal From A Judgement of Conviction and an Order Entered in the Circuit Court for Outagamie County, the Honorable Mark J. McGinnis, presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

CONSTITUTIONAL PROVISIONS CITED

CASES CITED

INTRODUCTION

Vance D. Reed renews and preserves all other arguments advanced in his earlier brief. In this brief, he will concentrate on replying to a number of major issues. However, he, by no means, abandons any of the grounds for relief argued in the appellant's original brief.

ARGUMENT

I. Reed was subject to a Fourth Amendment seizure.

The State makes the baseless argument that Reed was not subject to a Fourth Amendment seizure when he consented to provide a DNA sample. This claim runs counter to the facts of this case as well as long standing Fourth Amendment law. (State's Brief at 17-24).

Officers didn't simply encounter Reed on October 6, 2016. Reed was clearly stopped. Reed was clearly detained. And at the time Reed was stopped, he was asked investigatory questions about the Brown Bear Homicide, and he was asked to submit to a buccal swab of his mouth for DNA and he was asked to consent to do so. At the same time, his brother, Desmond Hill, was placed in a squad car in order to be interviewed and obtain his DNA. Officers had their badges and service revolvers clearly visible. At the time of the stop, the only reason for the stop was that Reed and Hill may have known the Brown Bears. Officers completely lacked reasonable suspicion based on articulable facts that a crime is about to be or had been committed by Reed. (14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 76:36-40, 52-100, 100-114). The officers knowledge base before stopping Reed was bereft of some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. In short, there was no reasonable suspicion to stop him not to mention request that he provide a biological sample in the form of a DNA

buccal swab of the inside of his cheek. This is not a case about a consensual encounter involving mere questioning by the police. The police conduct here was unreasonable because Reed was detained for the sole purpose of obtaining a biological sample of his DNA.

This is not a stop and frisk problem. It is a stop and spit problem. The cases cited in the State's Brief miss the mark. The State's Brief wrongly defends the circuit court's reliance on the Wisconsin Supreme Court decision in *County of Grant v. Vogt,* 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253. On the basis of *Vogt*, the circuit court concluded that 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.) (State's Brief at 11). But *Vogt* has no application to Reed's factual situation. First, the police in *Vogt* had ample reason to be suspicious of wrong doing. 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. (State's Brief at 24). The police in Reed's case had no reason to be suspicious of Reed or his companions. In *Vogt*, the questioning by police ultimately caused the police to notice indicia of operating while intoxicated. *Id.* ¶ 8. (State's Brief at 24). Nothing prior to the encounter or during the encounter with Reed would have raised any indicia that he had violated any laws.

Under *Terry v. Ohio*, 392 U.S. 1, 30 (1968), "police officers may conduct a brief investigatory stop of a suspect if they have reasonable suspicion based on articulable facts that a crime is about to be or has been committed." *United States v. Wimbush*, 337 F.3d 947, 949 (7th Cir. 2003). "Reasonable suspicion" means "some objective manifestation that the person stopped is, or is

about to be, engaged in criminal activity." *United States v. Swift*, 220 F.3d 502, 506 (7th Cir. 2000) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981).

The Fourth Amendment applies to all seizures of a person, including seizures that involve only a brief detention short of traditional arrest. *Brown v. Texas*, 443 U.S. 47, 50 (1979). A seizure arises when the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded. *United States v. Delgado,* 466 U.S. 210, 217. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Mere police questioning does not constitute a seizure. *Id.* (citing *Florida v. Royer*, 460 U.S. 491, 497 (1993) (plurality opinion)). Rather an officer may, in compliance with the Fourth Amendment, approach an individual on the street or other public place and ask whether the individual is willing to answer questions by putting questions to the individual. *Royer*, 460 U.S. 497. *Delgado*, 466 U.S. at 216 ("interrogation relating to one's identity or request for identification by the police does, not itself, constitute a Fourth Amendment seizure.").

But in Reed's case, the stop was not about questioning as to one's identity or a request for identification. The stop was about obtaining DNA, biological information. The seizure here was about getting the DNA. And if Reed or Hill had tried to walk away from this request, no doubt they would have been unsuccessful and found themselves in custody for obstructing an officer.

The State contends 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 enforcement practices." *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). This citation to *Mendenhall* is not on point. First, the Supreme Court in *Mendenhall* was not talking about DNA samples obtained without reasonable suspicion based on articulable facts. The Court was speaking to legitimate law enforcement techniques. It is doubtful that the United States Supreme Court could have even imagined almost thirty years ago the prospect of random detentions by law enforcement to obtain biological samples of DNA unsupported by reasonable suspicion that the person providing the DNA sample had committed a crime or was committing a crime. Reed's case is a completely unique circumstance. (State's Brief at 18).

A. Reed did not forfeit his Terry Stop Argument.

The State's Brief at length tries to make a case that Reed forfeited his *Terry* stop argument. This argument is without merit when the entire record below is considered. Defense counsel at the suppression hearing made clear to the Circuit court that Reed's challenge included a challenge to the legality of the "seizure". (R. 76:9). Again, at the suppression hearing defense counsel made clear in response to questions from the Circuit court that the collection of anything would be unlawful because the seizure was unlawful. (R. 76:10). Finally, it is patently obvious from the record here that the only legitimate challenge to be brought by the defendant was that he suffered a Fourth Amendment seizure based on an unlawful *Terry* stop. There was no warrant involved. Therefore Reed was not attacking a warrant unsupported by probable cause. He was not formally arrested. Reed was not challenging an unlawful arrest unsupported by probably cause. The obvious seizure here was an unlawful *Terry* stop. What other seizure was involved? To put an even finer point on it, Reed spelled out in detail that his challenge was a challenge to the *Terry* stop in his post

suppression hearing briefing before the circuit court issued it's decision. (61:1-3).

The State claims that holding in *State v. Caban,* 210 Wis. 2d 597, 605, 563 N.W.2d 501 (1997) supports an argument that Reed has waived, or otherwise forfeited, the *Terry* issue. This is simply not the case. *Caban* is clearly distinguishable on two important points. There the defense attorney objected to issues in the trial court he later raised on appeal. Reed was consistent in his challenges. *Caban* did not raise the argument advanced on appeal before the circuit court decided the suppression motion. Reed did advance his argument before the circuit court decided the issue. The State below did not object on the basis of waiver or forfeiture in the circuit court. The circuit court understood the issue clearly before ruling on it and ruled in favor of the State and raised and relied on a case that neither party had cited in their submissions - *Vogt*. (78:1-15). By failing to seek a ruling from the circuit court as to waiver or forfeiture, the State clearly abandoned this argument and should not be able to advance this empty claim now. (State's Brief at 12-17). This Court should reject the State's waiver or forfeiture argument as unsupported by the record and by case law.

II. Because Reed was seized, the attenuation doctrine applies.

Even if consent to the taking of evidence from a defendant is determined to have been given, appellate courts review whether consent is voluntary and sufficiently attenuated from the Fourth Amendment violation. If it is not, the search and seizure of evidence is the "forbidden fruit" of the unlawful stop. *Cf. State v. Walker*, 154 Wis.2d 158, 185, 453 N.W.2d 127, 138 (1990)(determining whether a lineup and in court identification of the defendant were the forbidden fruit of the unlawful arrest). And the question in this case is "whether, granting

establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 186, 453 N.W.2d at 139 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). *Cf. id.* (citing *Brown v Illinois*, 422 U.S. 590, 604 (1975)). *State v. Bermudez,* 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998).

In Reed's case, the question of consent even if resolved against him, however, does not end the inquiry. Reed contends that the DNA buccal swab evidence seized during the search of his cheek and the subsequent DNA results linking him to the crime scene should be excluded because it was obtained as a result of the officers exploiting their unlawful stop and questioning of Reed. The question of attenuation addresses a separate constitutional value. It must be determined not only that consent was voluntarily given, but that evidence obtained was not an exploitation of the illegal stop. *Cf. Bermudez*, 221 Wis. 2d at 352. (determining whether cocaine and drug paraphernalia seized were the forbidden fruit of an illegal entry into a motel room where consent to search was found to have been given subsequent to illegal entry).

As determined in *Wong Sun*, the question is whether the connection between the illegal police activity and the later consent has 'become so attenuated as to dissipate the taint." *See Brown*, 422 U.S. at 598 (quoted source omitted). If Reed's consent to the search of the DNA buccal swab was obtained by the exploitation of prior illegal activity, than any evidence obtained during the search must be excluded despite the voluntariness of the consent. *Bermudez*, 221 Wis. 2d at 352. When applying the attentuation theory, the following must be considered: (1) the temporal proximity of the misconduct and the subsequent consent to search; (2) the presence of

intervening circumstances, and (3)the purpose and flagrancy of the official misconduct. *See State v. Anderson* 165 Wis. 2d 441, 448, 477 N.W.2d 277 (1991). *Bermudez*, 221 Wis. 2d at 353. Reed's case fails to provide sufficient indicia of attenuation, and the circuit court erred in determining that the evidence seized during the search of the DNA buccal swab of his cheek and subsequent test results is admissible. (78: 1-15).

Here, only moments passed between the stopping and questioning without reasonable suspicion about the Brown Bear homicides and the consent to the DNA buccal swab search by Reed. No intervening circumstances occurred between the unlawful stop of Reed and the DNA buccal swab search. Finally it is hard to imagine a more flagrant and unreasonable police misconduct than a warrantless stop and seizure of what amounts to biological evidence without reasonable suspicion and probable cause. (14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 76:36-40, 52-100, 100-114).

It is important to note that the State's brief fails to adequately rebut the argument and case law discussed above. In fact, the State only devotes two modest paragraphs to the argument that the attenuation doctrine does not apply. (State's Brief at 25).

III. Should the Court conclude Reed was seized, the proper remedy is to reverse the judgment of conviction and order suppression of the DNA Sample.

The State seeks an evidentiary hearing in the event that this court concludes Reed was seized. The State is not entitled to such an evidentiary hearing. The defendant is entitled to a reversal on his conviction with an order suppressing all tainted evidence. However, it is highly doubtful arguments as to obtaining evidence by

independent, lawful means or inevitable discovery by lawful means would meet with any success given the nature of the stop and seizure of DNA evidence in Reed's case.The State's reliance on the holding in *State v. Anker,* 2014 WI 107, ¶ 25, 357 Wis. 2d 565, 855 N.W. 2d 483 is not on point. The State would not have been able to show that the DNA "would have been obtained by independent, lawful means, or would have been inevitably discovered through lawful means." *Id.* ¶ 27. The State's Brief fails to spell out in detail any evidence that would be adduced at an evidentiary hearing subsequent to reversal of this conviction which would show that the DNA would have been obtained by independent, lawful means, or would have been inevitably discovered through lawful means. The State is not entitled to a hearing when they fail to spell out how this evidence would be obtained by independent, lawful means or inevitable discovery. Without a preliminary showing, the State is not entitled to such a hearing on remand. (State's Brief at 25-27).

The State's final argument runs contrary to Wisconsin Statute § 971.31 (10). By statute, there is no mandated evidentiary hearing on remand and reversal of conviction. Admittedly the holding in *State v. Semrau* 2000 WI App 54, 233 Wis. 2d 508, 608 N.W.2d 376 recognizes that an appellate court may engage in a harmless error analysis in the context of a suppression motion denial. In *Semrau*, 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. In Reed's case, it goes without saying his chances for acquittal increase dramatically if the DNA evidence is suppressed. This case does not even come close to one that would require a harmless error analysis. Without the DNA evidence, the State's case is damaged beyond repair. There is simply not enough evidence remaining to support a conclusion other than the obvious one. Reed would not

have entered his plea and would have insisted on going to trial but for the illegally obtained DNA evidence. There is no need for a evidentiary hearing on this issue after this Court determines that Reed's DNA was obtained in violation of the Fourth Amendment. (State's Brief at 27-29).

CONCLUSION

For the reasons stated above, Vance D. Reed respectfully requests that this Court reverse the judgement of conviction and reverse the circuit court's decision denying his motion to suppress DNA evidence. He further requests that the DNA evidence be suppressed.

Dated this 21st day of December, 2018.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(b) and (c) for a brief produced using the following font:

Arial: 14 characters per inch; 2 inch margin on the left and right; 1 inch margins on the top and bottom. The brief's word count is 2671 words.

Dated at Milwaukee, Wisconsin, this 21st day of December, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 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 s. 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 at Milwaukee, Wisconsin, this 21st day of December, 2018.

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