State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

Plaintiff,

v. Case No. 2009CF001837

Willie Pierce,

Defendant.

Defendant's Motion to Suppress Evidence

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves to suppress all evidence seized as a result of the warrantless and unreasonable search of the interior of the automobile that the defendant was operating on April 13, 2009.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

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Memorandum in Support of Defendant's Motion to Suppress Evidence

Factual Background

On April 13, 2009, the defendant, Willie Pierce (hereinafter "Pierce"), was driving a car on a Milwaukee street when Milwaukee police officers conducted a traffic stop because they saw Pierce fail to signal a turn and because he was "passing multiple vehicles on the right shoulder side." Once Pierce was stopped, the officers approached the car and ordered Pierce out of the vehicle. Pierce then consented to a pat-down search of his person and so the officers directed him to the rear of his vehicle where this was accomplished. From this position, Pierce could not reach or grasp anything that was in the interior of the vehicle. The police found nothing illegal on the person of Pierce.

Here is where the stories diverge. The police claim that they politely asked Pierce for permission to search the interior of the vehicle and that he granted permission. Pierce, on the other hand, asserts that he gave consent for the officers to search his person only. He denies that he was ever asked for consent to search the vehicle nor did he ever give consent.[1]

1 Interestingly, the criminal complaint contains the following allegation of "fact", "Furthermore, in a statement to Officer Carter, the defendant admitted to the traffic infractions, admitted he gave consent to search the vehicle but then later stated that he only gave permission to the police to search himself and not the vehicle."

Contested Issues of Constitutional Fact

At the hearing on this motion the court will be required to make the following findings of constitutional fact:

1. Did Pierce knowingly, voluntarily, and intelligently give unequivocal consent to officers to search of the *interior* of the vehicle? If so, Pierce's motion to suppress must be denied. However, if the State fails to establish consent, then the court must determine the second issue.

2. If no consent was given to search the interior of the vehicle, was the warrantless search of the interior of the vehicle unreasonable?

Summary of the Argument

Pierce never knowingly, voluntarily, and intelligently granted police unequivocal permission to search the interior of the vehicle. Pierce is a young man who is inexperienced in dealing with law enforcement. The officers requested "consent" to search in terms that most people would interpret as a *command.* Pierce was never informed that he could withhold consent. At the scene, Pierce told the officers that he (Pierce) did not consent to a search of the interior of the vehicle.

Likewise, the warrantless search of the interior of the vehicle was unreasonable because, once Pierce was removed from the vehicle, there was no legitimate concern about "officer safety" sufficient to justify a search of the interior of the vehicle. Moreover, the interior of the vehicle was not likely to contain evidence of the minor traffic offenses for which Pierce was stopped.

The court must suppress all evidence seized as a result of the warrantless search of the interior of Pierce's vehicle.

Argument

I. No valid consent was granted to search the interior of the vehicle

The Fourth Amendment is not violated by a warrantless search where consent to search is freely and voluntarily given. The State bears the burden of proving by clear and positive evidence that the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. *State v. Johnson*, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993). However, whether an individual has given consent is a question of constitutional fact. *See, State v. Tomlinson*, 254 Wis. 2d 502, 648 N.W.2d 367 (2002).

In determining whether consent was voluntary, no single factor is dispositive. *State v. Hughes*, 233 Wis. 2d 280, 607 N.W.2d 621 (200). Although not being informed of the right to refuse consent often weighs against a determination of voluntariness, it is not the only factor in the analysis and does not mandate a finding of involuntariness. *Id.*, *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) (holding that "while knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.") Instead, the court must examine the totality of the circumstances. *Hughes,* 233 Wis. 2d at 280 When assessing voluntariness, courts generally focus on characteristics such as the defendant's age, intelligence, education, physical and emotional condition, and prior experience with the police. *Phillips*, 218 Wis. 2d at 202.

Here, the evidence is expected to establish that Pierce is twenty-three years old without any significant experience with law enforcement. The police never informed Pierce that he could withhold consent to search either his person or the interior of the vehicle; rather, the "request" for consent was presented by the officers in the form of a

demand. Even so, Pierce believed he was consenting only to the search of his person. He told the officers this at the scene.

Thus, the court should find a matter of constitutional fact that Pierce did not consent to a search of the interior of the vehicle.

II. The warrantless search of the interior of the vehicle was unreasonable because, once Pierce was out of the vehicle there was no legitimate concern for officer safety and the interior of the vehicle was not likely to contain evidence of the traffic offenses for which Pierce was stopped.

Until recently, the State would have had little trouble in responding to this motion. Defeating the motion would have been a simple matter of placing the officer on the witness stand and having him invoke the talismanic phrase, "for officer safety." The United States Supreme Court changed all that, though, in, *Arizona v. Gant*, 556 U.S. _____, p18 (2009), decided April 21, 2009. In *Gant,* the State, as usual, invoked the magic words, "officer safety", to justify the search of the interior of Gant's car. The Supreme Court firmly rejected this legal fiction, explaining:

> [T]he State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, *see New York v. Class,* 475 U. S. 106, 112– 113 (1986), the former interest is nevertheless important and deserving of constitutional protection, *see Knowles*, 525 U. S., at 117. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals.

Gant, pp. 11-12. Thus, the Supreme Court held that when the police make a traffic

stop, the officers may search only those areas that are within the suspect's immediate grasp, and, also, areas that will probably contain evidence of the offense for which the defendant was stopped (i.e. the traffic offense).

Regarding the "grasp area", Justice Scalia, in a concurring opinion, observed that:

> When an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car.

Gant, p. 18.

This is precisely what the officers did in this case. They removed Pierce from the vehicle and he was patted down. Once Pierce was removed from the vehicle there was no chance that he could have grabbed any weapon that may have been in the car.[2] Likewise, there is no chance that the interior of Pierce's vehicle- especially the area under the front seat- contained any evidence relevant to the alleged failure to signal a turn and passing vehicles on the right.

Conclusion

For these reasons it is respectfully requested that the court suppress all evidence seized as a result of the search of Pierce's vehicle.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

2 Lest the State be tempted to argue that Pierce could have broke free from the officer who was detaining him and run to the front seat of his car to grab a weapon, this "broad reading" of *Belton* was specifically rejected by the Supreme Court in *Gant.*

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