IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC 85564**
	)	
MARVIN L. GOFF,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEVENTH JUDICIAL CIRCUIT, DIVISION IV
THE HONORABLE LARRY D. HARMAN, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Marvin Goff, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Mr. Goff incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

ARGUMENT

I.

The State is estopped from arguing that the issue of the trial court's ruling on Mr. Goff's motion to suppress was not preserved, because the State did not make that argument in the trial court, in its brief and oral argument in the Court of Appeals, or in its rehearing motion and transfer application.

Further, the State cannot shift its burden of proof to Mr. Goff to show that there was no possibility that there is any evidence that could ever be conceived that might justify this warrantless seizure. In addition, the fellow officer rule, which allows one officer or police agency to request assistance from others without broadcasting every detail known to them, does not validate detentions where no request for assistance and no information amounting to reasonable suspicion is communicated to the detaining officer. Finally, the State's argument that it did not have to show "an articulable suspicion that [Mr. Goff was] armed and dangerous" does not comply with United States Supreme Court precedent.

Raising New Issue -- Estoppel

One searches in vane through the transcript, the State's Court of Appeals brief, and its rehearing and transfer motions for the argument that the State now raises in this Court.

The State's -- apparent -- initial theory as to how the stop of Mr. Goff was justified was that there was a warrant "for a person that came back to the address that

the car was registered to." (Hr.Tr. 5). Mr. Goff showed the fallacy of this theory in his brief in the Court of Appeals, so the State changed its approach. It argued that there was reasonable suspicion for the stop due to Mr. Goff's and Patrick Trent's actions at Wal-Mart and Hy-Vee. (Respondent's Court of Appeals brief, at 17). That was the State's argument in its brief and in oral argument. And the Court of Appeals rejected that argument, holding that the information known to the detaining officer was not sufficient to justify the detention. Slip Opinion at 7-8.

In the State's application for transfer to this Court, it again argued that there was reasonable suspicion for the stop, and that the "fellow officer" rule operated to allow the court to consider information known to Officer Boydston, whether or not she communicated with the detaining officer (Trans.App. 1, 5-8). Mr. Goff disposed of this argument in his opening brief in this Court, showing that the only evidence of the men's activities on which Easley could rely was what he observed himself -- Boydston's observations were never broadcast to the other officers, nor did she broadcast a request to stop the men or the car. Because of that, Easley could not claim to have been acting on a fellow officer's information.

Because the State's arguments in the circuit court and in the Court of Appeals were exposed as groundless, it has now changed its approach once more. Now the argument is procedural; it claims this issue was not preserved for appeal (Resp.Sub. Br. 14). But raising this new argument violates Rule 83.08, which prohibits altering "the basis of any claim that was raised in the court of appeals brief. . . ." Rule 83.08(b). The State should therefore be estopped from arguing a lack of preservation.

Preservation

At any rate, this issue was preserved. Mr. Goff alleged in his motion to suppress that there was no probable cause for his "arrest *or detention*," and that the "search was made without a valid warrant and *without lawful authority*." (L.F. 4) (emphasis added). Even though they do not use the phrase "reasonable suspicion," these claims raise the issue of the validity of the stop. Then at trial, Mr. Goff objected when the State offered the "key" that was seized from Mr. Goff's pocket, and received a continuing objection to all evidence seized (Tr. 115-16). Unlike the State, Mr. Goff has not changed his theory; he alleged an unauthorized search and seizure in his motion, and he has argued this on appeal.

Factual Misstatements

During its argument, the State makes several incorrect statements as to the facts. The first is that, when Officer Boydston saw the car at Wal-Mart, "[t]wo men were outside the car, standing by the vending machines." The State attributes this to pages 87 and 102 of the transcript. (Resp.Br. 15). But it is not true that either officer said that Officer Boydston saw this. She said only that she saw one man getting in the car; the other was at the entrance doors (Tr. 87). She did not say either man was standing by the vending machines.[1]

The transcript reference on which the State relies is page 102. There, Officer Easley said, "Officer Boydston had stated on the radio that there was a vehicle and

[1] This was also a change in her testimony from the suppression hearing, where she

two subjects by the vending machines." (Tr. 102). So, while it is true that Boydston saw a *car* by the machines, it is not true that either Boydston or Easley testified that Boydston broadcast that the *men* were *standing* by the machines. There is no support for the State's assertion.

The next questionable statement is that when Boydston got back to where she had been a "moment" before, the car was gone. (Resp.Sub.Br. 16). This is again a compilation of the two officers' testimony, and it paints an erroneous picture of what Officer Boydston saw and what Officer Easley heard. *Boydston* did not say the car was gone a moment later; she said she turned around, and when she got back, the car was gone (Tr. 90). This clearly took more than a "moment."

In fact, it took long enough for Boydston to drive to the other end of the Wal-Mart lot, and for the dispatcher to run the plates and the address where the car was registered, then advise Boydston that "something [sic] living at that address known to operate that car had several outstanding warrants." (Tr. 90). It was Easley who used the word "moment" when he testified to information coming from Boydston, but the State incorrectly repeats what he said. He testified that he heard Boydston's conversation on the radio about the car and the warrants (Tr. 102). *Then*, it was "a moment later" that Boydston advised that the car was gone (Tr. 102).

Granted, this is a small piece of evidence, and because it involves the events at Wal-Mart, it is one that adds nothing to the question of whether there was reasonable

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testified that the first man was already in the car when she drove by (Hr.Tr. 4-5).

suspicion for Easley's seizure and detention, but saying that the car was gone a "moment" later implies, contrary to the evidence, that the car left immediately when the officer drove by. And that leaves the false impression of evasion, of which there was no evidence.

Similarly incorrect is the State's assertion that Easley parked where Trent could not see him. (Resp.Sub.Br. 16). Easley did say that he parked where he *thought* Trent might not be able to see him (Tr. 107-08), but he also testified that he was parked southeast of a car that was facing south (Hr.Tr. 22). Therefore, they were generally facing each other, so it would appear that Trent could see the officer as well as the officer could see him, especially where Easley testified at the suppression hearing that he did not know whether anyone in the car could see him (Hr.Tr. 22).

The next problem with the State's version of the facts is its claim that Easley thought an object in Mr. Goff's pocket was a weapon. (Resp.Sub.Br. 17). The phrase, "thought was a weapon" was actually in the question, which Easley answered, "Yes." (Hr.Tr. 23). But the State leaves out his clarification in answer to the very next question, "What was that?" -- he said, "The object in the front right pocket. I didn't know what it was." (Hr.Tr. 23). Easley never said he thought Mr. Goff had a weapon; he said he did not know.

Another misstatement is the claim that, "In the front passenger compartment was a notebook with a list of codes correlating to the codes on the keys." (Resp.Sub. Br. 18). The State attributes this to pages 126-27 of the transcript. But at those pages, the officer actually testified that he did not investigate the numbers at all; "It just

seemed like it [sic] had some significance to the keys. There were so many of them some of the codes possibly went to the sets of keys that are here present." (Tr. 126-27). He did not even look at all of the numbers -- "I think, if I recall it just looked like they were codes and that they possibly looked like some of the numbers that were on the keys." (Tr. 127). That was as far as he took his investigation (Tr. 127).

As a final misstatement, there is the claim that Mr. Goff consented to the search of the car. (Resp.Sub.Br. 18). To its credit, the State does indicate in a footnote how the officer changed his testimony when pressed on this issue. But to say simply that Mr. Goff gave consent is not a fair statement of what is contained in the suppression hearing transcript:

> Q. Did Mr. Trent ever agree to, verbally give you consent to search the car?
>
> A. I'm not sure.
>
> Q. What about Goff?
>
> A. I believe so.
>
> Q. Is that contained in your report?
>
> A. No.
>
> Q. It's not in your report?
>
> A. I don't believe so.
>
> Q. Don't you believe that would have been an important fact to contain [sic] to write in your report if he had given you consent?

A. Well, the vehicle was being towed anyway, and usually it's inventoried before it's towed away. Plus, the driver was under arrest. So I have the right to check the compartment.

Q. But it's your best recollection that Mr. Goff gave you consent to search the interior of the car?

A. Possibly, but I don't recall.

Q. So it's possible he didn't give you consent?

A. It's possible.

(Hr.Tr. 25-26). So the answer was, "Possibly yes-possibly no." Such evidence could not sustain the State's burden to justify the warrantless search. ***State v. Franklin***, 841 S.W.2d 639, 644 (Mo. banc 1992). The State has overstated the facts in support of its position on a factor that is largely irrelevant, because consent would not have saved this search from the taint of the invalid stop anyway. ***State v. Miller***, 894 S.W.2d 649, 655-56 (Mo. banc 1995).

The Burden of Proof

The State's primary defense of this stop was to claim that it was Mr. Goff's burden to show that the dispatcher lacked reasonable suspicion. (Resp.Sub.Br. 28). It cites no authority for its argument that, even if this were to be treated as plain error, the burden of proof shifts from the State to the defendant to prove that there was no

reasonable suspicion.[2] It is the State that has available to it the evidence of the reasons for the officers' actions. It is not up to a defendant to negate every possible source of information underlying a vehicle stop. Such a burden would be impossible to sustain. No matter how many witnesses a defendant questioned, the State could always produce another at trial with information to justify the stop. Once Mr. Goff alleged an invalid search and seizure, it was the State's burden to justify its warrantless search. ***Franklin***, 841 S.W.2d at 644. And it failed to carry that burden.

Fellow Officer Rule

When it finally addresses the merits, the State first concedes that it was not entitled to rely on the "warrant" for some unknown person who may have had connections with Mr. Goff's car. (Resp.Sub.Br. 30). But then it incorrectly applies the fellow officer rule. It cites ***Whiteley v. Warden***, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), and ***United States v. Hensley***, 469 U.S. 221, 105 S. Ct. 675, 83 L.Ed.2d 604 (1985), but then does not understand that in both cases there was a specific request for assistance from one officer or agency to another. ***Whiteley***, 401 U.S. at 563-64, 91 S.Ct. at 1034; ***Hensley***, 469 U.S. at 223, 105 S. Ct. at 677.

This is not the case here. Officer Boydston made no request to the other officers to stop Mr. Goff for any conduct she observed at Wal-Mart. All she did was

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[2] Contrary to the State's assertion (Resp.Sub.Br. 31), ***State v. Galazin***, 58 S.W.3d 500, 505 (Mo. banc 2001), does not say this. It holds only that a motion to suppress must be filed before trial and that an objection to "foundation" is not an adequate substitute.

discuss with the dispatcher the issue of the unproved and ambiguous warrant, a conversation Easley overheard. That is why the Western District was correct that Officer Easley's observations were all that could be considered. Slip Op. at 8. He had no other information on which to base his stop, except for the "warrant," which the State concedes was insufficient.

Had Boydston put out a call that she had observed a possible crime at Wal-Mart, even if she gave no details, the reasonableness of the stop would have been judged on her observations, assuming she testified to those observations in court. But she did nothing of the kind. She merely called in a license number and Easley overheard the reference to a warrant; there was no request to stop the car or any information about any alleged suspicious behavior.

Thus the State's predictions of doom for the "Amber alert" system (Resp.Sub. Br. 27-28), are unfounded. Aside from the fact that there is not necessarily any allegation of criminal activity in such cases, any officer with probable cause will put that fact in the bulletin, as was done in ***Hensley***. Similarly, the NCIC lists warrants for arrest, and detaining officers can rely on that information, assuming the State properly proves the information underlying the warrant. ***Miller***.

Mr. Goff does not, and has never, argued that an officer is required to detail the evidence in a bulletin or request to detain. But the officer cannot keep silent about the request to detain an individual. He cannot broadcast by telepathy a request to stop a

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Mr. Goff did file a pre-trial motion to suppress.

person, as the State argues. And he cannot learn after the fact that an officer has detained a person for no reason, then contact them about a wanted bulletin.

Whatever was in Boydston's head about Wal-Mart stayed in her head when Easley, relying solely on the "warrant" and his own observations, stopped Mr. Goff without reasonable suspicion and subjected him to an invalid search.

Reasonable Suspicion

Because the State undertakes no analysis of the issue of whether there was reasonable suspicion for the stop, except by including Officer Boydston's uncommunicated observations in the analysis (Resp.Sub. Br. 31-34), there is no need for Mr. Goff to respond to its irrelevant argument on that issue. The question is reasonable suspicion based only on Easley's observations, and Mr. Goff disposed of that issue in his opening brief.

Pat-Down Search

The State finally argues that, contrary to the rule of ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), it was not required to show that Easley had "an articulable suspicion that an individual is armed and dangerous." ***Michigan v. Long***, 463 U.S. 1032, 1034, 103 S.Ct. 3469, 3473, 77 L.Ed.2d 1201 (1983); *citing* ***Terry***, 392 U.S. at 24, 88 S.Ct. at 1881 (internal citations omitted) (Resp.Sub.Br. 34-36). The State claims that any pat-down was justified despite any evidence of such suspicion because the court should just assume that the circumstances would have

supported such a belief. (Resp.Sub.Br. 34-35). It adds that Easley did not pat down Mr. Goff until after he arrested Trent. (Resp.Sub.Br. 36).

It would be a new rule of law, contrary to ***Terry***, if this Court were to hold that an officer need not articulate any suspicion whatsoever, as long as the State can later scrutinize a transcript for snippets of information that sound suspicious. That is all the State has done here. But Easley never mentioned any suspicion, and the State cannot invent it at this late date.

Although the prosecutor asked if the pat-down was "for officer's safety reasons" (Tr. 111), the officer articulated no basis for any concern for his safety.[3] Nor did he articulate any suspicions that Mr. Goff was armed and dangerous. Thus he was not entitled to conduct a pat-down search. Because all of the evidence seized flowed from the invalid stop and that search, it was therefore inadmissible. This Court must reverse Mr. Goff's conviction and discharge him therefrom.

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[3] This was an issue Mr. Goff specifically argued in the suppression hearing (Hr.Tr. 28). Had it wished, the State at that point could have recalled the officer to testify to his suspicions, if he had any.

II.

The State's argument about all of the evidence found in Mr. Goff's car is irrelevant where the State did not prove the *corpus delicti* of the crime -- that there was in fact a loss suffered by the alleged victim.

The State really has no conception of Mr. Goff's argument. Its detailing of all the evidence of attempted stealing (Resp.Sub.Br. 38-43), is completely irrelevant to the issue before this Court: did the State prove that there was a loss? If there was no loss, there was no theft. Mr. Goff showed in his opening brief that the State did not prove that the alleged victim suffered a loss, which was the reason he argued the State failed to prove the *corpus delicti* of the offense of stealing.[4]

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[4] The State's attempt to disparage Mr. Goff's argument by labeling his reference to *corpus delicti* "spurious" (Resp.Sub.Br. 43), shows its lack of understanding of the issue. Mr. Goff did not invoke the *corpus delicti* rule to argue that his statements could not be admitted. He simply pointed out that in every criminal case the State must prove that a crime was in fact committed -- it must prove the *corpus delicti*, literally, the "body of the crime." Black's Law Dictionary, Pocket Edition, 1996. Mr. Goff recognizes that the *corpus delicti* rule is distinguishable from an issue as to the sufficiency of the evidence. But the ideas overlap. "The *corpus delicti* cannot be presumed and must be proved by legal evidence sufficient to show that the crime charged has been committed by someone." ***State v. Edwards***, 116 S.W.3d 511, 544 (Mo. banc 2003).

Further, Mr. Goff's argument was not a "challenge" to Binseil's testimony (Resp.Sub. Br. 43), nor does he ask this Court not to believe his testimony (Resp.Sub. Br. 42). As in Point I, the State invents arguments that Mr. Goff did not make. Mr. Goff understands that this Court will not decide issues of credibility. But he argued simply that the manager's testimony, taken as true, did not establish that any money that was supposed to be in the vending machine was missing, despite the fact that he used the phrase, the "'7-Up' [machine] had money gone out of it." (Tr. 148). The totality of his testimony was to the contrary.

As Mr. Goff explained in detail in his opening brief, Mr. Binseil's explanation that there was still paper money in the machine (Tr. 149), coupled with his description of the store's system for removing the money (Tr. 146-47, 150-51, 154), showed that the jury, like Mr. Binseil, could only speculate whether any money was supposed to be in the machine that was not there. The State can speculate *ad infinitum* about the coins, keys, and tools in Mr. Goff's car, but if it did not show that any money was missing from the vending machine, it did not prove Mr. Goff's guilt.

III.

Mr. Goff's question about his demeanor at the scene of the arrest can in no way be construed to have elicited the officer's deliberate and improper comment that Mr. Goff "understood the drill, he'd been through it before," nor did Mr. Goff argue, as the State claims, that every such comment by a State's witness must be treated as having been made in response to questions asked by the prosecutor.

It is patently absurd for the State to claim that Mr. Goff elicited the officer's improper "response." (Resp.Sub.Br. 48). A question about Mr. Goff's demeanor in no way elicited a statement that he "understood the drill, he'd been through it before." (Tr. 135). And the State flatly misstates Mr. Goff argument to claim that he said that "any 'trained police officer' who is called in the state's case-in-chief should be treated as though the prosecution asked all the questions of the officer." (Resp.Sub.Br. 48). In fact, no such claim appears in Mr. Goff's brief. All he said was:

> Reviewing these factors [from ***State v. Smith***, 934 S.W.2d 318, 320-21 (Mo.App. W.D. 1996)] in this case reveals: 1) Although the officer volunteered the response, it is important to note that he was not only a State's witness, but a trained police officer, with at least seven years experience (Tr. 100), who should be held to a higher standard, and should know that this was inadmissible evidence. Because of the close

> relationship between police officers and prosecutors, this factor should weigh in Mr. Goff's favor.

(App.Sub.Br. 46). Mr. Goff stands by that argument -- his actual argument. The officer should have known better, *regardless* of who asked the question, than to volunteer such an uncalled-for remark.

Just as far-fetched is the State's claim that a reversal here would lead to defendants deliberately asking questions of State's witnesses designed to elicit information about prior convictions. (Resp.Sub.Br. 48). The trial court understood that Mr. Goff did not elicit the information; otherwise it would not have admonished the jury to disregard it (Tr. 138-39). Further, such abuses can easily be controlled by the trial court if a defendant actually elicits what would be inadmissible evidence. But that did not happen here. This was a volunteered remark, and Mr. Goff is entitled to a reversal of his conviction for the officer's injection of inadmissible and prejudicial evidence.

CONCLUSION

For the reasons set forth in Point I herein and in his opening brief, appellant Marvin Goff respectfully requests that this Court reverse his conviction and remand for a new trial, at which the State may not present evidence seized from Mr. Goff or his car. For the reasons set forth in Point II herein and in his opening brief, Mr. Goff respectfully requests that this Court reverse his conviction and sentence and discharge him therefrom. For the reasons set forth in Point III herein and in his opening brief, Mr. Goff respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,118 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, updated in December, 2003. According to that program, these disks are virus-free.

On the _____ day of December, 2003, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, MO 65109.

_____
Kent Denzel