STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2005AP000876-CR
(Ozaukee County Case No. 04-CM-89)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANNA ANNINA,

Defendant-Appellant.

Appeal From The Judgment of Conviction and the Final Order Entered In The Circuit Court For Ozaukee County, The Honorable Joseph D. McCormack, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

BECAUSE THE CONCEDED FACTS ESTABLISH THAT ANNINA DID NOT COMMIT THE CRIME OF RESISTING AN OFFICER, SHE IS ENTITLED TO WITHDRAWAL OF HER PLEA AND DISMISSAL OF THAT CHARGE

The state fails to rebut, and therefore concedes, a number of points established in Annina's opening brief. *E.g.*, *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 279 N.W.2d 493, 499 (Ct. App. 1979) (that not disputed is deemed conceded).

First, the state concedes that the warrant was constitutionally invalid and that the officers accordingly did not act with lawful authority in forcing their way into Annina's home. Annina's Brief at 5-6. Second, the state concedes that, because the officers did not have

lawful authority to enter Annina's home, they likewise did not have lawful authority to arrest her for resisting or obstructing their entry. *Id.* at 6. Third, the state concedes that, if the officers did not have lawful authority to arrest Annina, then she could not be guilty of resisting her arrest. *Id.* at 6-7. And fourth, the state concedes that, if the agreed facts demonstrate that Annina was not guilty of resisting, then she must be allowed to withdraw her plea to that charge and it must be dismissed. *Id.* at 9-10.

The state's concessions would appear to mandate reversal in this matter. It attempts to avoid this result, however, by throwing in a new twist, asserting that Annina was arrested, not for resisting or obstructing the illegal search of her home, but for disorderly conduct. State's Brief at 2. According to the state, Annina was not immediately arrested upon entry by the officers. Rather, they merely "secure[d]" her and "later . . . remove[d] her from the inside of the residence," and "ultimately" arrested her. State's Brief at 2-3. According to the state, the fact that it was the officers' own conduct in unlawfully invading Annna's home which directly and immediately caused her emotional response is irrelevant. State's Brief at 5-11.

The state's assertion fails for a number of reasons. First, under any reasonable standard, Annina was arrested the instant the officers shoved their way into her home and slapped handcuffs on her, and before the allegedly disorderly conduct relied upon by the state.

An arrest occurs when, given the totality of circumstances and degree of restraint, a reasonable person in the defendant's position would have considered him or herself to be in custody. *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148, 152 (1991).[1] *See also Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003):

> A suspect is under custodial arrest when "a reasonable person in the suspect's position would have understood

[1] The Supreme Court abrogated different language from *Swanson* in *State v. Sykes*, 2005 WI 48, ¶27, 279 Wis.2d 742, 695 N.W.2d 277.

> the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *United States v. Ienco*, 182 F.3d 517, 523 (7th Cir.1999).

A reasonable person in Annina's position would have understood that she was under arrest the instant the police burst into her home and immediately handcuffed her. While the state insists that Annina was not arrested until sometime later, State's Brief at 2-3, it does not identify any circumstance which would lead a reasonable person to know that the initial detention was something less than a full-blown arrest. Nor does it identify any significant change in restraint or circumstances which would indicate a transformation from "detention" to full-blown arrest. The objective standard for assessing when one is under arrest is intended to avoid exactly the type of subjective evaluations relied upon by the state. *See Swanson*, 475 N.W.2d at 152.

It is true that the police lawfully may detain the occupant of a residence during the execution of a valid search warrant, and may even use handcuffs for protection of the searching officers without that detention automatically becoming an "arrest." *See State v. Vorburger*, 2002 WI 105, ¶¶46-69, 255 Wis.2d 537, 648 N.W.2d 829. The *Vorburger* Court was careful to note, however, that the validity of such actions turn on the validity of the search warrant.

> The critical factor in this case--the factor that distinguishes it from *Swanson*--is the presence of a valid search warrant for contraband. The search warrant is central to this case and to our analysis because it injects an objective justification, based upon the determination of a detached magistrate, into the totality of the circumstances.

Id. ¶69. The officers here had no such valid warrant.

Second, the state's theory that the police lawfully may arrest for *any* new crime witnessed while conducting an illegal search, State's Brief at 3-11, is just wrong. While it is true that evidence of crimes

committed in response to an illegal search or arrest sometimes will not be suppressed as fruits of the police misconduct, *see, e.g.*, *United States v. Waupekenay*, 973 F.2d 1533 (10th Cir. 1992); *United States v. Bailey*, 691 F.2d 1009 (11th Cir. 1082), the state's broad-brush statement of the rule ignores both the legitimate rationale for that result and, consequently, its limitations.

While the state chooses to focus on whether there was a "new" crime committed in response to the police illegality (here, "disorderly conduct"), the policies underlying the exclusionary rule require a different focus. It is not enough to say that the "new crime" was an independent act of free will. Nor is it accurate to say that, "[i]n cases where a person subjected to an illegal search reacts by committing a criminal offense, such as endangering the safety of the officers conducting the search, courts have uniformly held that the evidence of this new crime is admissible." State's Brief at 5-6, citing 5 LaFave, Search and Seizure §11.4(j) at 339-41 (3d ed. 1996).

Rather, as Professor LaFave explains in debunking the broad "new-crime/exercise-of-free-will" theory relied upon by the state, the focus must be on whether the purposes of the exclusionary rule are sufficiently furthered in a particular situation to justify its costs:

> It is particularly useful to keep in mind in this context that the fruit of the poisonous tree doctrine, which has not been applied to all fruits in a "but for" sense, serves to keep the exclusionary rule within reasonable bounds. "The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its costs. By thus focusing upon "the purpose of the exclusionary rule and the policies it serves," it may be seen that the result reached in the bribery cases is sound. *The critical fact is that there has been no exploitation of the prior illegality and that admission of the evidence of bribery "thwarts the purpose of the rule of exclusion to such an insubstantial degree that the public interest in apprehending criminals*

countervails."

LaFave, *Search & Seizure* §11.4(j) at 376-77 (4th Ed. 2004) (emphasis added; footnotes omitted) ("LaFave"). LaFave contrasted incriminating admissions and attempts to dispose of incriminating evidence, noting that they "are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases. " *Id.* at 377.

The same underlying principles, and not the "free and independent action" theory, also legitimately explain admission of evidence of threats or assaults on police officers making illegal arrests or searches. "[H]ere, as in the bribery cases, the better basis of distinction is that no exploitation of the prior illegality is involved and that the rationale of the exclusionary rule does not justify its extension to this extreme." *Id.* §11.4(j) at 378 (footnote omitted). Courts are understandably wary of applying the exclusionary rule to immunize actual or threatened violence against the police, especially where denying exclusion under those circumstances would do little to encourage future unlawful police conduct. *Id.*; *see Bailey*, 691 F.2d at 1017.

The two-part standard proposed by Professor LaFave provides a rational approach to assessing whether a given response by the victim of an illegal arrest or search is in fact the fruit of the police illegality or is instead "sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *see United States v. Ceccolini*, 435 U.S. 268, 274 (1978) (causal connections determined by looking at fundamental tenets of exclusionary rule). *See also Castle v. State*, 999 P.2d 169, 177 (Alaska App. 2000) ("When a defendant commits a crime in response to an illegal search or seizure, the policy of the exclusionary rule–society's interest in deterring police misconduct–must govern any decision whether to admit or suppress evidence of the defendant's crime"); *State v. Alexander*, 595 A.2d 282 (Vt. 1991) (adopting LaFave's approach); *State v. Wisneski*, 459 A.2d 129, 133 (Del. Supr. 1983) (same).

Assessing the circumstances of this case in light of the underly-

ing policies of the exclusionary rule demonstrates two fatal defects in the state's broad-brush approach. First, unlike in situations involving bribery or violence against police officers, application of the state's approach here permits state exploitation of the unlawful police conduct.

Just as incriminating admissions and attempts to dispose of incriminating evidence are "common and predictable consequences of illegal arrests and searches," LaFave, §11.4(j) at 377, so was Annina's emotional response to the police unlawfully and forcibly invading her home and immediately forcing her into handcuffs. Such a response is fully understandable and predictable given the police actions. *See, e.g.*, *Chapman v. Keltner*, 241 F.3d 842, 846-47 (7th Cir. 2001) (defendant's sobbing and shaking deemed "natural responses to being placed under arrest"); *Vorburger*, ¶17 (woman "cried and appeared upset" when seized by police). *See also People v. Felton*, 78 N.Y.2d 1063, 581 N.E.2d 1344 (1991) ("defendant's actions in striking the officer was 'immediate, spontaneous, and proportionate to the officer's attempt to lay hands on him when he refused to stop' and thus, was not sufficient to attenuate the unlawful stop so as to render the arrest and seizure of the contraband lawful").

As with incriminating admissions and attempts to dispose of incriminating evidence, therefore, to permit the state to evade the direct and predictable consequences of police illegality in this manner "would encourage such Fourth Amendment violations in future cases." LaFave, §11.4(j) at 377. Unscrupulous officers could view themselves free to invade the homes of suspects without a valid warrant, knowing that the homeowners' natural and likely reactions could provide bases for arrest and consequent search of the surrounding area without having to go through the inconvenience and uncertainty of obtaining a warrant.

In *State v. Alexander*, 595 A.2d 282 (Vt. 1991), the Vermont Supreme Court held that, if a roadblock is illegal, a defendant's failure to comply with an order to stop at that roadblock cannot be treated as a "distinct" and untainted crime. Otherwise, "the goal of the exclusionary rule . . . will not be served." *Id.* at 285. "Police could be

less fastidious in establishing roadblocks or could even make random stops of drivers on less than probable cause, and when drivers failed, for whatever reason, to stop, any evidence gathered at the illegal stop could not be suppressed." *Id.*

The court in *Wisneski*, 459 A.2d at 133, similarly held that exclusion was appropriate where "[t]he evidence sought to be excluded was the police officer's testimony of the defendants' immediate response to his forcible entry into their home" and "there was no violent or premeditated assault." The court observed that, "[b]y excluding the officer's testimony, deterrence of police misconduct will be furthered without impeding reasonable police efforts against crime." *Id.*

In *Castle v. State*, 999 P.2d 169 (Alask App. 2000), Castle was a passenger in a car stopped for a defective headlight. While the officer was arresting the driver for driving with a revoked license, Castle disobeyed the officer's order to remain in the car and instead walked away. When the officer subsequently located Castle and attempted to stop him, Castle ran down the middle of the street. The officer ultimately caught up to him, however, and placed him in handcuffs. A search revealed several small plastic bags with cocaine residue. *Id.*

On Castle's appeal from denial of his motion to suppress, the state argued, *inter alia*, that the officer lawfully seized Castle for violating a municipal ordinance by running down the middle of the road. The Court, rejected this argument, however, holding that exclusion is appropriate where "the defendant's crime is a predictable result of the police illegality." 999 P.2d at 176. The *Castle* Court emphasized that

> [o]ne of the major aims of the exclusionary rule is to deter the police from engaging in the unlawful detention or restraint of our citizens. Society's interest in deterring unlawful arrests and investigative stops would be ill-served if the police could unlawfully seize (or try to seize) someone, only to later justify themselves by proving that the victim of this unlawful seizure ran into the street, or crossed against a red light or jaywalked, or

> trespassed by running across municipal park land when it was closed, or littered by throwing contraband to the ground. In such instances, "[the] defensive action of the victim can fairly be characterized as having been brought about by exploitation [of the illegal conduct]." This being so, courts should apply the exclusionary rule to deter the police from future similar misconduct.

Id. at 177.

Second, while the rationale of the exclusionary rule does not justify its extension to the extreme of granting "'victims of illegal searches a license to assault and murder the officers involved,'" LaFave, §11.4(j) at 378, quoting *State v. Miller*, 194 S.E.2d 353 (N.C. 1973), Professor LaFave points out that this "reasoning does not logically carry over to nonviolent responses" such as Annina's here. LaFave, §11.4(j) at 378 n.479.

It is one thing to say that the desired end of deterring constitutional violations by the police is insufficient to justify immunizing violent conduct toward those same officers. It is quite another to say that there exists some overriding societal interest in punishing a woman's nonviolent, emotional response to her illegal seizure and the invasion of her home which similarly nullifies the goal of deterring police misconduct. *See People v. Brown*, 802 N.E.2d 356, 359-60 (Ill. App. 2003):

> Although providing false information with the intent to avoid arrest would be criminal behavior [citation omitted], Brown was simply responding to the officer's questioning in conjunction with an illegal seizure. Refusing to provide identification does not raise the same policy concerns as assaulting a law enforcement officer, and thus Brown's statements may be suppressed as the fruit of the unconstitutional seizure.

See also Castle, 999 P.2d at 177 (court distinguishes between assault on officer conducting illegal search or seizure and lesser offenses); *Alexander*, 595 A.2d at 285 (distinguishing *Bailey* and other

cases involving violence against police officers on grounds offense of refusing to stop at illegal roadblock is not "sufficiently serious"); *Wisneski*, 459 A.2d at 133 (exclusion appropriate in part because "there was no violent or premeditated assault").

Finally, the state's argument must fail because it is established law in Wisconsin that "a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him. . . ." *Lane v. Collins*, 29 Wis.2d 66, 138 N.W.2d 264, 267 (1965) (footnote omitted). There is no legitimate purpose in labeling as a criminal one whose "disorderly" conduct resulted directly from illegal actions of state agents. Yet, that is exactly what the state seeks here.

The officers forcibly invaded Annina's home without a valid warrant and immediately placed her in handcuffs, despite the absence of any legal basis to do so. They then proceeded to conduct an illegal search of her home. Given these circumstances, it is no surprise that she became emotional. It would be an unusual person who would not.

Even when the evidence is viewed in the light most favorable to the state, any breach of the peace or disorderly conduct was directly provoked by the officers' inflammatory conduct. *See also State v. Hobson*, 218 Wis.2d 350, 577 N.W.2d 825, 828, ¶10 & fn.7 (1998) (disorderly conduct charge, based on defendant yelling and swearing at police who were unlawfully attempting to arrest her son, dismissed by circuit court for lack of probable cause; state did not challenge finding on appeal).

For all of these reasons, therefore, the state's attempt to avoid the necessary consequences of the officers' unlawful entry and seizure of Annina must be rejected. The facts show that she was arrested, not for disorderly conduct sometime after the unlawful entry, but immediately upon the officer's illegal entry and for resisting that entry. Any arrest for her subsequent "disorderly conduct" was unlawful in any event as such an arrest is a direct exploitation of the illegal entry, seizure of Annina, and search of her home. That arrest likewise cannot

stand because the offense is too insubstantial to justify foregoing the deterrent rationale of the exclusionary rule. And finally, Wisconsin law bars a police officer from provoking an individual into a breach of the peace.

Annina's conviction therefore cannot be based on any assertion that she resisted a valid arrest for disorderly conduct. Because the state properly has conceded that the conviction cannot be based on her resisting or obstructing the entry into or search of her home, or for resisting her arrest for such obstruction, she cannot stand convicted of that charge. She accordingly must be allowed to withdraw her plea to the charge of resisting arrest and that charge must be dismissed.

CONCLUSION

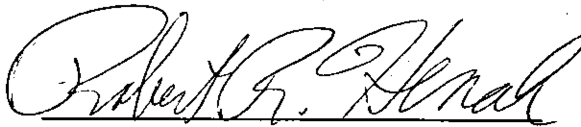
For these reasons, Anna Annina respectfully asks that the Court vacate the judgment of conviction and order dismissal of the charge of resisting an officer.

Dated at Milwaukee, Wisconsin, July 28, 2005.

Respectfully submitted,

ANNA ANNINA,
Defendant-Appellant

HENAK LAW OFFICE, S.C.



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Annina CA Reply.wpd

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,982 words.

Robert R. Henak

Reply cert.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 28th day of July, 2005, I caused 10 copies of the Reply Brief of Defendant-Appellant Anna Annina to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Robert R. Henak

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