

RECEIVED

STATE OF WISCONSIN

04-15-2015

IN SUPREME COURT

**CLERK OF SUPREME COURT
OF WISCONSIN**

No. 2014AP515-FT

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DANIEL S. IVERSON,

Defendant-Respondent.

ON A PETITION FOR REVIEW OF A DECISION
AFFIRMING AN ORDER GRANTING A MOTION TO
SUPPRESS AND DISMISSING THE CASE ENTERED IN
THE LA CROSSE COUNTY CIRCUIT COURT, THE
HONORABLE RAMONA A. GONZALEZ, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-
PETITIONER

BRAD D. SCHIMEL
Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Appellant-
Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

TABLE OF CONTENTS

	Page
ISSUES PRESENTED FOR REVIEW	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	2
STATEMENT OF THE FACTS AND THE PROCEDURAL HISTORY OF THE CASE.....	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
Trooper Larsen lawfully stopped Iverson's Jeep to investigate the forfeiture offense of littering after Larsen observed that someone had discarded a cigarette butt from Iverson's Jeep.	7
A. Applicable constitutional provisions.....	7
B. Applicable statutes.	8
C. Standard of review.....	9
D. An officer has the authority to stop an automobile and seize its occupants when the officer has probable cause to believe that an occupant has committed a non- traffic forfeiture offense.....	10

	Page
1. General legal principles governing the reasonableness of traffic stops.....	10
2. Officers may conduct traffic stops based on probable cause to believe that a non-criminal forfeiture violation has occurred.	11
3. An officer's authority to seize a person without a warrant extends to non-traffic forfeiture violations.	12
4. A state trooper has the authority to investigate littering violations, including the authority to stop an automobile on a highway and arrest violators.....	13
5. Trooper Larsen had probable cause to believe that an occupant in Iverson's Jeep had littered.	15
E. Alternatively, Trooper Larsen acted lawfully and on reasonable suspicion when he stopped Iverson's Jeep based upon his observation of a littering violation.	16

	Page
1. Officers may conduct traffic stops based upon reasonable suspicion that a non-traffic forfeiture violation has occurred.	17
2. Trooper Larsen had reasonable suspicion that Iverson or someone in his car committed the non-traffic forfeiture offense of littering.	20
CONCLUSION.....	21

CASES CITED

City of Milwaukee v. Nelson, 149 Wis. 2d 434, 439 N.W.2d 562 (1989)	6, 12, 13, 14
County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541 (1999)	18
Johnson v. State, 75 Wis. 2d 344, 249 N.W.2d 593 (1977)	11
Miesen v. D.O.T., 226 Wis. 2d 298, 594 N.W.2d 821 (Ct. App. 1999).....	16
State v. Arias, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748.....	9

	Page
State v. Batt, 2010 WI App 155, 330 Wis. 2d 159, 793 N.W.2d 104	19
State v. Baudhuin, 141 Wis. 2d 642, 416 N.W.2d 60 (1987)	11, 12
State v. Brereton, 2013 WI 17, 345 Wis. 2d 563, 826 N.W.2d 369	9
State v. Brown, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66	10
State v. Colstad, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394	19
State v. Felix, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775	7
State v. Griffin, 183 Wis. 2d 327, 515 N.W.2d 535 (Ct. App. 1994)	18
State v. Krier, 165 Wis. 2d 673, 478 N.W.2d 63 (Ct. App. 1991)	17, 18
State v. Matasek, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811	9

	Page
State v. Newer, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923	19
State v. Popke, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569	10, passim
State v. Post, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634	18
State v. Smith, 131 Wis. 2d 220, 388 N.W.2d 601 (1986)	4
State v. Tomaszewski, 2010 WI App 51, 324 Wis. 2d 433, 782 N.W.2d 725	19
United States v. Morrison, 449 U.S. 361 (1981)	4
Whren v. United States, 517 U.S. 806 (1996)	11

STATUTES CITED

Wis. Stat. § 16.84(2)	13
Wis. Stat. § 23.57	13
Wis. Stat. § 29.921	13
Wis. Stat. § 36.11(2)(a)	13
Wis. Stat. § 73.031	13

	Page
Wis. Stat. § 110.01	14
Wis. Stat. § 110.07	8, 14
Wis. Stat. § 110.07(1)(a)	8, 9, 14
Wis. Stat. § 110.07(1)(a)1.	14, 15, 19
Wis. Stat. § 110.07(1)(a)3.	6, 15, 16, 19
Wis. Stat. § 110.07(1)(b)	15
Wis. Stat. § 110.07(2m).....	13
Wis. Ch. 125	13
Wis. Stat. § 125.14	13
Wis. Ch. 139	13
Wis. Ch. 194	5
Wis. Stat. § 287.01(10)).....	14
Wis. Stat. § 287.81	2, passim
Wis. Stat. § 287.81(b).....	16
Wis. Stat. § 287.81(2).....	6, 9, 14, 15, 20
Wis. Stat. § 287.81(2)(a)	14, 16
Wis. Stat. § 287.81(2)(b)	14, 15
Wis. Stat. § 289.01	15
Wis. Stat. § 289.01(28).....	14

	Page
Wis. Stat. § 289.01(33)	14
Wis. Stat. § 340.01(22)	14
Wis. Ch. 341	5
Wis. Ch. 342	5
Wis. Ch. 343	5
Wis. Ch. 344	5
Wis. Ch. 345	5
Wis. Stat. § 345.20(1)(b)	5
Wis. Stat. § 345.22	11, 13
Wis. Ch. 346	5
Wis. Ch. 347	5
Wis. Ch. 348	5
Wis. Ch. 349	5
Wis. Ch. 351	8
Wis. Stat. § 345.28(1)	5
Wis. Stat. § 800.02(6)	12, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV	7, 9, 10, 12
Wis. Const. art. I, § 11	7

OTHER AUTHORITY

Marty Aherns, National Fire Protection Association, <i>Brush, Grass and Forest Fires</i> (November 2013)	15
--	----

STATE OF WISCONSIN
IN SUPREME COURT

No. 2014AP515-FT

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DANIEL S. IVERSON,

Defendant-Respondent.

ON A PETITION FOR REVIEW OF A DECISION
AFFIRMING AN ORDER GRANTING A MOTION TO
SUPPRESS AND DISMISSING THE CASE ENTERED IN
THE LA CROSSE COUNTY CIRCUIT COURT, THE
HONORABLE RAMONA A. GONZALEZ, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-
PETITIONER

ISSUES PRESENTED FOR REVIEW

Trooper Michael Larsen saw that someone had thrown a cigarette butt from Daniel Iverson's moving Jeep—an apparent violation of the statutory prohibition against littering, and stopped the Jeep based on his observations. May an officer's observations of a non-traffic forfeiture offense form the basis for a stop of its vehicle and seizure of its occupants?

The circuit court granted Iverson’s motion to suppress evidence resulting from the investigatory stop. It concluded that the officer had relied upon a littering offense under Wis. Stat. § 287.81¹ as a pretext to investigate whether the driver was intoxicated. *State v. Iverson*, No. 2014AP515-FT, slip op. ¶ 4 (Wis. Ct. App. Oct. 9, 2014) (Pet-Ap. 103).

The court of appeals affirmed the circuit court on different grounds. *Id.* ¶ 1 (Pet-Ap. 101-02). It phrased the issue as follows: “[W]hether an articulable suspicion or probable cause of violation of a forfeiture that is not a violation of a traffic regulation is sufficient justification for a warrantless seizure of a citizen.” *Id.* ¶ 11 (Pet-Ap. 104). The court of appeals held “that a ‘mere forfeiture’ standing alone does not justify an investigatory stop” *Id.* ¶ 12 (quoted source omitted) (Pet-Ap. 105).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting the State’s petition for review, this Court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE FACTS AND THE PROCEDURAL HISTORY OF THE CASE

On September 18, 2013, at 1:00 a.m., Wisconsin State Patrol Trooper Michael Larsen was on patrol and driving northbound on Rose Street in the City of La Crosse. Larsen observed a Jeep in the right hand lane directly in front of him (12:4, 8; Pet-Ap. 114, 118). As the Jeep approached an intersection, Larsen saw the Jeep drift toward the centerline and then drift in its lane (12:4, 9; Pet-Ap. 114, 119). At that time of night, the traffic control signal at that intersection is

¹ Unless otherwise indicated, all references to the Wisconsin Statutes refer to the 2011-12 edition.

a flashing yellow light. The Jeep stopped at the intersection and then continued north on Rose Street (12:5; Pet-Ap. 115). As the Jeep approached a flashing yellow light at another intersection, the Jeep came to a complete stop before continuing through the intersection. Larsen stated that no traffic was present at either intersection that would have caused the driver to stop (12:4-5; Pet-Ap. 114-15).

As the Jeep proceeded north on Rose Street, Trooper Larsen observed a cigarette butt being thrown from the passenger side, prompting Larsen to stop the Jeep (12:6; Pet-Ap. 116). Until that point, Larsen did not believe that he had sufficient reasonable suspicion necessary to initiate a traffic stop (12:11; Pet-Ap. 121).

Trooper Larsen made contact with the driver, Daniel S. Iverson. Larsen advised Iverson that he had stopped Iverson because a cigarette butt had been thrown from his car. Iverson replied that he was unaware that anyone had discarded the cigarette. Alex Paulson, the backseat passenger, stated, “[T]hat was me” (12:7; Pet-Ap. 117).

During the traffic stop, Trooper Larsen apparently developed probable cause to arrest Iverson and cite him for operating a motor vehicle while under the influence of an intoxicant (OWI) as a first offense, and operating a motor vehicle with a prohibited alcohol concentration (PAC) as a first offense (1:1-2).²

Circuit Court Proceedings

Iverson moved to suppress evidence and to dismiss his cases (7). The State argued that Trooper Larsen had

² The two citations were issued as separate cases, but the cases were consolidated in the circuit court and remain consolidated on appeal (1; 7; 9; 10).

probable cause to stop the Jeep and cite Iverson or the other occupant for littering (8:1-2; 12:13-14; Pet-Ap. 122-23).

Following the suppression hearing, the circuit court granted Iverson's motion to suppress evidence. The circuit court explained:

[H]e wasn't stopping him to cite him for the litter. He was stopping him to see if he was a drunk driver. That's really the real reason for the stop. The real reason for the stop is not the litter. The litter is the excuse, and if that cigarette butt comes out of the driver's side, I'm with you, Trooper; I'm there; but not out of the passenger side. Motion to suppress is granted.

(12:14-15; Pet-Ap. 124-25). The circuit court entered an order granting Iverson's motion to suppress evidence and to dismiss his cases (9; Pet-Ap. 139).³

The Court of Appeals' Decision

The State appealed (10). It argued that Trooper Larsen acted reasonably when he stopped the Jeep because he had probable cause or reasonable suspicion to believe that Iverson or his passenger had littered, contrary to Wis. Stat. § 287.81 (Plaintiff-Appellant's Court of Appeals Brief at 8-10). The State also asserted that the circuit court erred when it considered Trooper Larsen's subjective motivation when it stopped the Jeep (Plaintiff-Appellant's Court of Appeals Brief at 11-12).

The court of appeals requested supplemental briefing. It directed the parties to address the following question: "[W]hether the articulable suspicion that is used to justify

³ The remedy for an illegal arrest is suppression of the evidence seized thereafter, not dismissal of the case as the circuit court ordered. *See United States v. Morrison*, 449 U.S. 361, 365-66 (1981); and *State v. Smith*, 131 Wis. 2d 220, 240, 388 N.W.2d 601 (1986).

an investigatory stop may be based upon a violation of a non-traffic forfeiture?” (Pet-Ap. 110).

The court of appeals ultimately affirmed the circuit court. In its decision, the court of appeals framed the issue as follows:

The dispositive question before me in this case is whether an articulable suspicion or probable cause of violation of a forfeiture that is not a violation of a traffic regulation is sufficient justification for a warrantless seizure of a citizen.

Iverson, slip op. ¶ 11 (Pet-Ap. 104).⁴ The court concluded that an officer may not conduct an investigatory stop of a vehicle based upon the officer’s observations of a non-traffic forfeiture law offense. *Id.* ¶ 12 (Pet-Ap. 105).

*State’s Motion for Reconsideration before the
Court of Appeals*

The State moved for reconsideration on two grounds (Pet-Ap. 132-37). First, the State asserted that the court of appeals’ decision in *Iverson* was inconsistent with its decision in *State v. Jeramy Qualls*, No. 2014AP141-CR (Wis. Ct. App. Oct. 8, 2014) (petition for review denied Jan. 13, 2015) (Pet-Ap. 127-31, 133-34). The day before the court of appeals decided *Iverson*, it issued its decision in *Qualls*. In

⁴ The court of appeals distinguished between forfeitures that constituted traffic violations and other forfeitures. *State v. Iverson*, No. 2014AP515-FT, slip op. ¶ 11 (Wis. Ct. App. Oct. 9, 2014) (Pet-Ap. 104). In this brief, the State will use the phrase “non-traffic forfeiture offense” to refer to those forfeiture offenses that fall outside the definition of a “traffic regulation” as defined under Wis. Stat. § 345.20(1)(b). That section defines a “traffic regulation” as “a provision of chs. 194 or 341 to 349 for which the penalty for violation is a forfeiture or an ordinance enacted in accordance with s. 349.06. Except as otherwise specifically provided, ‘traffic regulation’ does not include a nonmoving traffic violation as defined in s. 345.28(1).”

Qualls, an officer stopped an automobile after an occupant discarded a cigarette butt. The court of appeals held that the officer had probable cause to stop *Qualls*' vehicle based on a reasonable belief that someone in the automobile had littered. *Qualls*, slip op. ¶ 6 (Pet-Ap. 129).

Second, the State argued that the court of appeals' holding contradicted this Court's decision in *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 439 N.W.2d 562 (1989) (Pet-Ap. 135). In *Nelson*, this Court held that an officer may arrest a person without a warrant for a non-criminal ordinance violation as long as (1) the violation occurs in the officer's presence, unless other factors exist; and (2) a statute authorizes the officer to do so. *Id.* at 457-58. As is pertinent in this case, Wis. Stat. § 110.07(1)(a)3. authorizes state troopers to stop vehicles to investigate littering violations and to arrest for those violations. See Wis. Stat. § 287.81(2).

The court of appeals subsequently denied the State's motion for reconsideration (Pet-Ap. 107). The State appeals.

SUMMARY OF THE ARGUMENT

The court of appeals erred when it affirmed the circuit court's decision to suppress the evidence.

A law enforcement officer may lawfully seize a person without a warrant for a civil non-traffic forfeiture offense if (1) the violation occurs in the officer's presence, and (2) the statute authorizes the officer to do so. Wisconsin Stat. § 287.81(2) provides that a person who litters from a vehicle or along a state highway is subject to a civil forfeiture. Wisconsin Stat. § 110.07(1)(a)3. authorizes a state trooper to stop an automobile for the purpose of investigating violations of Wisconsin's littering statute. It also permits a trooper to arrest anyone who litters in violation of Wis. Stat. § 287.81. And even without probable cause, an officer may

detain a person based upon the officer's reasonable suspicion that the person is violating a forfeiture offense.

When Trooper Larsen observed that someone had thrown a cigarette butt from Iverson's Jeep, Larsen had probable cause or, at a minimum, a reasonable suspicion to believe that Iverson or an occupant in the Jeep had littered. Larsen acted reasonably and with proper legal authority when he stopped Iverson's Jeep. The circuit court should have denied Iverson's motion to suppress the evidence.

ARGUMENT

Trooper Larsen lawfully stopped Iverson's Jeep to investigate the forfeiture offense of littering after Larsen observed that someone had discarded a cigarette butt from Iverson's Jeep.

A. Applicable constitutional provisions.

The Fourth Amendment to the United States Constitution and article I, § 11 of the Wisconsin Constitution protect "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. I, § 11. The Wisconsin Supreme Court has historically interpreted article I, § 11 and its protections against unreasonable searches and seizures in a manner consistent with the United States Supreme Court's interpretation of the Fourth Amendment. *State v. Felix*, 2012 WI 36, ¶ 38, 339 Wis. 2d 670, 811 N.W.2d 775 (finding no reason "to depart from our customary practice of interpreting Article I, Section 11 in accord with the Fourth Amendment").

B. Applicable statutes.

Wisconsin Stat. § 110.07(1)(a) authorizes the creation of the Wisconsin State Patrol and specifies the duties and authority of state troopers. It provides in relevant part:

110.07 Traffic officers; powers and duties.

(1)(a) . . . Members of the state traffic patrol shall:

1. Enforce and assist in the administration of this chapter and chs. 194, 218, 341 to 349 and 351, and ss. 23.33, 125.07(4)(b), 125.085(3)(b), 167.31(2)(b) to (d) **and 287.81** and ch. 350 where applicable to highways, or orders or rules issued pursuant thereto.

2. Have the powers of sheriff in enforcing the laws specified in subd. 1. and orders or rules issued pursuant thereto.

3. Have authority to enter any place where vehicles subject to this chapter, ss. 167.31(2)(b) to (d) **and 287.81** and chs. 194, 218 and 341 to 350 are stored or parked at any time to examine such vehicles, or to stop such vehicles while en route at any time upon the public highways to examine the same and make arrests for all violations thereof.

Wis. Stat. § 110.07.

Wisconsin Stat. § 110.07(1)(a) expressly authorizes state troopers to enforce Wis. Stat. § 287.81, which prohibits littering and provides in relevant part:

287.81 Littering.

....

(2) Except as provided in sub. (3), a person who does any of the following may be required to forfeit not more than \$500:

(a) Deposits or discharges any solid waste on or along any highway, in any waters of the state, on the ice of any waters of the state or on any other public or private property.

(b) Permits any solid waste to be thrown from a vehicle operated by the person.

Wis. Stat. § 287.81.

C. Standard of review.

Whether police conduct violates the protections against unreasonable searches and seizures presents a question of constitutional fact. On review, an appellate court will uphold the circuit court's factual findings unless they are clearly erroneous. But the application of Fourth Amendment principles to the facts found presents a question of law that appellate courts review independently. *State v. Brereton*, 2013 WI 17, ¶ 17, 345 Wis. 2d 563, 826 N.W.2d 369. "A finding is clearly erroneous if 'it is against the great weight and clear preponderance of the evidence.'" *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citations omitted).

The applicability of Wis. Stat. §§ 110.07(1)(a) and 287.81(2) to Iverson's case presents a question of statutory interpretation. Statutory interpretation and a statute's application to specific facts present questions of law that this Court reviews independently, benefiting from the lower courts' analysis. *State v. Matasek*, 2014 WI 27, ¶ 10, 353 Wis. 2d 601, 846 N.W.2d 811.

D. An officer has the authority to stop an automobile and seize its occupants when the officer has probable cause to believe that an occupant has committed a non-traffic forfeiture offense.

Here, the court of appeals held that an officer who possesses probable cause or reasonable suspicion that a person has committed a non-traffic forfeiture offense lacks the authority to seize the person without a warrant. *Iverson*, slip op. ¶¶ 11-12 (Pet-Ap. 104-05). The State respectfully disagrees with the court of appeals.

Wisconsin courts have long recognized an officer's authority to seize persons who commit forfeiture offenses. This authority is not limited to violations of traffic regulations and extends to non-traffic forfeiture offenses. These same principles that allow an officer to stop an automobile in the course of enforcing civil traffic regulations reasonably extend to non-traffic forfeiture offenses as well.

1. General legal principles governing the reasonableness of traffic stops.

An officer's detention of an individual during a traffic stop constitutes a seizure of a person within the meaning of the Fourth Amendment. A seizure must be reasonable under the circumstances. A traffic seizure is reasonable if the officer has probable cause or reasonable suspicion to believe that a crime or a traffic violation has occurred. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569; *see also State v. Brown*, 2014 WI 69, ¶ 20, 355 Wis. 2d 668, 850 N.W.2d 66 ("A traffic stop can be based on probable cause or reasonable suspicion.").

The State bears the burden of proving that a stop satisfies the reasonableness requirement. *Id.* The constitutional reasonableness of a traffic stop does not

depend on the actual motivations of the individual officer involved. *Whren v. United States*, 517 U.S. 806, 812-13 (1996). As long as the officer has an objectively reasonable basis to seize and search an automobile and its occupants, an officer's subjective intent does not render otherwise lawful conduct illegal or unconstitutional. *State v. Baudhuin*, 141 Wis. 2d 642, 651-52, 416 N.W.2d 60 (1987).

2. Officers may conduct traffic stops based on probable cause to believe that a non-criminal forfeiture violation has occurred.

Probable cause refers to the “quantum of evidence which would lead a reasonable police officer to believe” that a crime or a traffic violation has occurred. *Popke*, 317 Wis. 2d 118, ¶ 14, (citing *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)). Probable cause exists when the officer has reasonable grounds to believe that the person is committing or has committed a crime or a traffic violation. The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that the information “lead a reasonable officer to believe that guilt is more than a possibility.” *Popke*, 317 Wis. 2d 118, ¶ 14 (internal quotation marks and citation omitted).

An officer possesses the authority to arrest a person without a warrant for violating a non-criminal “traffic regulation” if the officer has reasonable grounds to believe that the person is violating a traffic regulation. Wis. Stat. § 345.22. “Implicit in the authority to arrest for a traffic violation is the authority to stop the vehicle where the officer has reasonable grounds to believe the violation has occurred.” *Baudhuin*, 141 Wis. 2d at 648; *see also Johnson*, 75 Wis. 2d at 348 (“‘Reasonable grounds’ and probable cause are synonymous.”) (quoted source omitted).

The automobile stops in *Popke* and *Baudhuin* related to potential violations of traffic regulations. But nothing in those decisions precludes extension of the principles that supported those stops to non-traffic forfeiture offenses.

3. An officer's authority to seize a person without a warrant extends to non-traffic forfeiture violations.

The court of appeals questioned whether an officer could seize a person for an offense that is neither a crime nor a traffic forfeiture. *Iverson*, slip op. ¶ 11 (Pet-Ap. 104). As the State noted in its motion for reconsideration, this Court had previously resolved this issue (Pet-Ap. 135).

In *Nelson*, 149 Wis. 2d at 440, officers arrested Nelson for violating the city's loitering ordinance. Nelson challenged the constitutionality of the loitering ordinance and Wis. Stat. § 800.02(6), which authorized officers to make a warrantless arrest for a municipal ordinance violation. The officer may only arrest if the officer has "reasonable grounds to believe that the person is violating or has violated the ordinance." *Id.* at 455. Nelson asserted that the ordinance and Wis. Stat. § 800.02(6) violated his Fourth Amendment protection against unreasonable seizures. *Id.* at 453-54.

This Court disagreed. It concluded that a statute that authorizes officers to make warrantless arrests for violations of municipal ordinances does not violate the Fourth Amendment. *Nelson*, 149 Wis. 2d at 439, 461. "[A] custodial arrest for offenses whose penalties are only civil forfeitures is not *per se* unconstitutional." *Id.* at 456. Further, a warrantless arrest is lawful if the officers have probable cause to believe that the offender violated the ordinance and the violation occurred in the officer's presence, unless other factors exist. *Id.* at 458. *Nelson* stands for the following proposition: an officer may arrest a person without a

warrant for a forfeiture offense provided that: (1) the violation occurred in the officer's presence, unless other factors exist; and (2) a statute authorizes the officer to make the warrantless arrest.⁵ *Id.* at 457-58.

4. A state trooper has the authority to investigate littering violations, including the authority to stop an automobile on a highway and arrest violators.

In *Popke*, this Court held that even in the absence of probable cause, an officer may conduct a traffic stop if the officer “has grounds to reasonably suspect that a crime or traffic violation has been or will be committed.” *Popke*, 317 Wis. 2d 118, ¶ 23. The court of appeals declined to apply *Popke* to Iverson’s case because littering, as prohibited under Wis. Stat. § 287.81, constitutes neither a crime nor a traffic offense. *Iverson*, slip op. ¶ 8 (Pet-Ap. 104). The court of

⁵ Several statutes authorize law enforcement officers to make arrests for forfeiture offenses. *See* Wis. Stat. § 345.22 (arrest without a warrant for a traffic code violation); Wis. Stat. § 800.02(6) (arrest without a warrant for municipal ordinance violation); *see also* Wis. Stat. § 16.84(2) (Capitol police officers possess the arrest powers of law enforcement officers “regardless of whether the violation is punishable by forfeiture or criminal penalty”); Wis. Stat. § 23.57 (authority of Department of Natural Resources conservation wardens to arrest without a warrant for violations of specific enumerated statutes and any administrative rules); Wis. Stat. § 29.921 (DNR wardens may arrest without a warrant for certain offenses punishable by forfeiture); Wis. Stat. § 36.11(2)(a) (University of Wisconsin police officers may arrest a person with or without a warrant if they have reasonable grounds to believe that a person has violated a state law or any rule); Wis. Stat. § 73.031 (Department of Revenue special agents have authority to arrest for certain forfeitures related to gaming); Wis. Stat. § 110.07(2m) (Wisconsin State Patrol officers possess arrest authority of a law enforcement officer and may arrest for an offense whether it is punishable by forfeiture or criminal penalty); and Wis. Stat. § 125.14 (authorizing officers to arrest for any violation of ch. 125 or ch. 139).

appeals reached this conclusion even though (1) *Nelson* expressly authorizes officers to make arrests for civil forfeiture offenses when a statute authorizes it, and (2) Wis. Stat. § 110.07(1)(a) expressly authorizes state troopers to stop vehicles to investigate littering violations and arrest persons for littering (Pet-Ap. 134-37).

Wisconsin Stat. § 287.81(2) creates a civil forfeiture offense of littering. This subsection defines a wide variety of conduct that constitutes littering. This includes the depositing or discharging of any solid waste on or along any highway. Wis. Stat. § 287.81(2)(a). Liability for littering also extends to a person who “[p]ermits any solid waste to be thrown from a vehicle by the person.” Wis. Stat. § 287.81(2)(b). The term “solid waste” is broadly defined and includes “any garbage, refuse . . . and other discarded or salvageable materials” Wis. Stat. §§ 287.01(10) & 289.01(33). Refuse “means all matters produced from industrial or community life, subject to decomposition, not defined as sewage.” Wis. Stat. § 289.01(28).

Wisconsin Stat. § 110.07 specifies the duties and powers of state troopers. Among those duties include the authority to enforce both traffic regulations and selected non-traffic regulations, including littering under Wis. Stat. § 287.81. Specifically, a trooper may “enforce and assist in the administration of . . . [Wis. Stat. §] 287.81 . . . where applicable to highways” Wis. Stat. § 110.07(1)(a).⁶ In addition, a trooper’s authority to investigate littering violations includes the authority to stop “vehicles while en route at any time upon the public highways to examine the

⁶ A highway includes “all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel.” Wis. Stat. §§ 340.01(22) & 110.01.

same and make arrests for all violations thereof.” See Wis. Stat. § 110.07(1)(a)3.⁷

The State has a legitimate interest in enforcing littering laws. Littering creates hazards for other motorists. Carelessly discarded lit cigarettes may lead to fires that endanger public safety and cause property damage.⁸ The court of appeals’ decision prohibiting officers from enforcing littering laws would effectively deny the State from protecting its legitimate interests in prohibiting littering.

5. Trooper Larsen had probable cause to believe that an occupant in Iverson’s Jeep had littered.

For the reasons provided above, Trooper Larsen had authority to seize the Jeep and its occupants. Wisconsin Stat. § 110.07(1)(a)1. enumerates several offenses that a trooper is authorized to enforce. Littering, contrary to Wis. Stat. § 287.81(2), is one of those offenses that a trooper may enforce to the extent that the offense is “applicable to highways” Wis. Stat. § 110.07(1)(a)1.

Additionally, probable cause supported Trooper Larsen’s stop of the Jeep. Larsen first noticed Iverson’s Jeep travelling northbound on Rose Street (12:4, 8; Pet-Ap. 114, 118). While following behind Iverson’s Jeep on Rose Street,

⁷ In addition to state troopers, other law enforcement officers may also enforce Wis. Stat. § 287.81. See Wis. Stat. § 110.07(1)(b).

⁸ On an annual basis, smoking materials are the heat source in approximately 11% of the brush, grass, and forest fires to which local fire departments respond. Marty Ahrens, National Fire Protection Association, *Brush, Grass, and Forest Fires*, 37 tbl. 7a, (Nov. 2013), <http://www.nfpa.org/~media/files/research/nfpa-reports/brush-grass-and-forest-fires/osbrushgrassforest.pdf?la=en>.

Trooper Larsen observed that someone had thrown a cigarette butt from the Jeep's passenger side. The butt struck the ground causing the ashes to scatter across the right lane (12:6; Pet-App. 116).

Based upon his firsthand observations, Trooper Larsen had reasonable grounds to believe that an occupant had deposited or discharged solid waste on a highway, contrary to Wis. Stat. § 287.81(2)(a). Further, Trooper Larsen also had reasonable grounds to believe that the Jeep's driver had permitted solid waste to be thrown from the Jeep, contrary to Wis. Stat. § 287.81(2)(b). Hence, Trooper Larsen had probable cause to believe that an occupant inside the Jeep had committed the forfeiture offense of littering.

When Trooper Larsen observed the cigarette butt land in the right northbound lane of a highway, Larsen had the authority to stop the Jeep to investigate the littering violation. In addition, Larsen also had the authority to arrest Iverson and others in the Jeep for littering. Wis. Stat. §§ 110.07(1)(a)3. & 287.81. Under the circumstances, Larsen acted reasonably and upon probable cause when he stopped Iverson's vehicle based upon his observation of the littering violation.

E. Alternatively, Trooper Larsen acted lawfully and on reasonable suspicion when he stopped Iverson's Jeep based upon his observation of a littering violation.

Trooper Larsen had probable cause for a traffic stop based upon his observation that someone had thrown a cigarette from the Jeep. Because the higher probable cause standard has been met, this Court need not decide whether reasonable suspicion supported the traffic stop. *See Miesen v. D.O.T.*, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (appellate courts should decide cases on the narrowest

ground possible). Should this Court disagree and determine that Larsen lacked probable cause for the stop, then the State contends that Larsen acted lawfully and upon reasonable suspicion. Larsen acted lawfully because an officer may conduct a traffic stop based upon reasonable suspicion that a person inside a vehicle has committed a non-traffic forfeiture offense.⁹ In this case, Larsen's observations provided reasonable suspicion that an occupant in the Jeep had littered.

1. Officers may conduct traffic stops based upon reasonable suspicion that a non-traffic forfeiture violation has occurred.

The court of appeals recognized that an officer could make a traffic stop based upon a reasonable suspicion that the person had violated a non-criminal traffic regulation. *Iverson*, slip op. ¶ 10 (Pet-Ap. 104). Relying upon *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991), the court of appeals declined to extend these same principles that permit investigatory stops based upon violations of traffic regulations to non-traffic forfeiture offenses. *Iverson*, slip op. ¶ 12 (Pet-Ap. 105).

In *Krier*, the court of appeals held that an officer may conduct a valid investigatory stop when the conduct may constitute either a forfeiture or a crime. *Id.* at 677. “Just as there is no prohibition for stopping because the behavior may end up being innocent, there is also no prohibition for stopping because the behavior may end up constituting a

⁹ In *State v. Richard E. Houghton, Jr.*, No. 2013AP1581-CR (scheduled for oral argument April 22, 2014), this Court has been asked to decide whether an officer may stop a vehicle based on a reasonable suspicion, but not probable cause, of a traffic violation.

mere forfeiture.” *Id.* at 678. Based upon this language, the court of appeals concluded that “‘a mere forfeiture’ standing alone does not justify an investigatory stop” *Iverson*, slip op. ¶ 12 (Pet-Ap. 105) (quoted source omitted). The court of appeals disregarded several post-*Krier* decisions that recognized the authority of officers to initiate investigatory stops based solely upon the violation of a traffic regulation (Plaintiff-Appellant’s Supplemental Brief in the Court of Appeals at 2-3).

Even without probable cause, an officer may still conduct a traffic stop when he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed, under the totality of the circumstances. The officer must be able to identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop. *Popke*, 317 Wis. 2d 118, ¶ 23, (citing *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634).

Wisconsin courts have upheld the temporary seizure of an automobile’s driver based solely upon an officer’s reasonable suspicion that the driver had violated a non-criminal traffic regulation. In *State v. Griffin*, 183 Wis. 2d 327, 330-31, 515 N.W.2d 535 (Ct. App. 1994), the court held that an officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation. Relying on *Griffin*, this Court subsequently explained: “[A]n officer may make an investigative stop if the officer ‘reasonably suspects’ that a person has committed or is about to commit a crime, . . . or reasonably suspects that a person is violating the non-criminal traffic laws.” *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (quoted source omitted) (footnote omitted). In several cases decided after *Renz*, the court of appeals has upheld

stops based solely upon an officer's reasonable suspicion that a vehicle's operator had committed a non-criminal traffic offense.¹⁰

When the Legislature has expressly authorized an officer to conduct a traffic stop to investigate a non-traffic forfeiture offense, this Court should find that it includes the authority to conduct an investigatory stop based on reasonable suspicion. Here, Wis. Stat. § 110.07(1)(a)1. expressly authorizes officers to stop moving vehicles to investigate specific forfeiture offenses, including littering. *Id.* (troopers shall “have the authority . . . to stop such vehicles while en route at any time upon the public highways to examine the same and make arrests for all violations thereof”). Wis. Stat. § 110.07(1)(a)3.

Wisconsin courts have consistently held that officers may conduct a vehicle stop based solely upon an officer's reasonable suspicion that a person has violated a non-criminal traffic regulation. No sound reason exists for differentiating between traffic and non-traffic forfeiture

¹⁰ In *Colstad*, the court proceeded on the assumption that an officer could temporarily detain a person if the officer had a reasonable suspicion that the person violated a civil traffic ordinance. *State v. Colstad*, 2003 WI App 25, ¶ 13, 260 Wis. 2d 406, 659 N.W.2d 394 (temporary investigative stop of the driver following an accident justified by reasonable suspicion that defendant violated civil traffic offense of inattentive driving). In *Newer*, the court of appeals applied the reasonable suspicion standard to uphold a stop when the officer knew the owner of the vehicle had a suspended license, but did not know who was driving the vehicle. *State v. Newer*, 2007 WI App 236, ¶ 2, 306 Wis. 2d 193, 742 N.W.2d 923. In *Batt*, the court of appeals applied the reasonable suspicion standard to a suspected traffic violation when the driver was stopped after police received a tip that two vehicles were speeding near a park. *State v. Batt*, 2010 WI App 155, ¶¶ 2, 16-18, 330 Wis. 2d 159, 793 N.W.2d 104. In *Tomaszewski*, the court of appeals applied the reasonable suspicion standard to uphold a stop after an officer observed the driver following a semi truck within 400 feet without dimming his high beams. *State v. Tomaszewski*, 2010 WI App 51, ¶¶ 5-11, 324 Wis. 2d 433, 782 N.W.2d 725.

offenses, permitting officers to conduct investigatory stops for the former, but not the latter. Prohibiting an officer from briefly seizing a person whom the officer reasonably and articulably suspects of violating a non-traffic forfeiture offense prevents the officer from enforcing laws that the Legislature has deemed important to enforce.

2. Trooper Larsen had reasonable suspicion that Iverson or someone in his car committed the non-traffic forfeiture offense of littering.

For the same reasons articulated in D.5. above, the record demonstrates that Trooper Larsen had a reasonable suspicion that an occupant in the Jeep had violated Wis. Stat. § 287.81(2). Trooper Larsen observed that someone had thrown a cigarette butt from the Jeep's passenger side. The butt struck the ground and caused the ashes to scatter across the right lane (12:6; Pet-Ap. 116). These observations provided Trooper Larsen with a reasonable suspicion that an occupant in the Jeep had littered. In addition, it also gave Trooper Larsen a reasonable belief that the Jeep's driver had permitted another person to litter. A traffic stop allowed Trooper Larsen to freeze the situation so that he could verify or dispel his suspicions. Under the circumstances, Trooper Larsen acted reasonably when he stopped the Jeep and temporarily seized its occupants for the purpose of investigating the littering violation.

CONCLUSION

The State respectfully requests this Court to reverse the court of appeals' decision affirming the circuit court's order granting Iverson's motion to suppress evidence and dismissing his case.

Dated this 15th day of April, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Appellant-
Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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 5,176 words.

Dated this 15th day of April, 2015.

Donald V. Latorraca
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 15th day of April, 2015.

Donald V. Latorraca
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of April, 2015.

Donald V. Latorraca
Assistant Attorney General