STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP001294-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEWIS O. FLOYD, JR.,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals Decision Affirming a Judgment of Conviction and Order Denying Postconviction Relief, Entered in the Racine County Circuit Court, The Honorable Allan B. Torhorst, Presiding.

AMICUS CURIAE BRIEF OF THE OFFICE OF THE WISCONSIN STATE PUBLIC DEFENDER

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INTRODUCTION

Wisconsin has the highest rate in the nation of confinement of African American males.[1]

Implicit bias is an unconscious response that, as applicable to this case, most individuals have to persons on the basis of race. In the field of criminal justice, implicit bias affects discretionary decisions, including law enforcement interactions with the public such as decisions to observe, stop, question, and search individuals.

In light of the alarming degree of racial disparity in our justice system, the State Public Defender asks this Court to disapprove the use of generic criteria for profiling in police stops and searches and to set forth a clear requirement that reasonable suspicion requires observation of particularized conduct or circumstances that support an inference of criminal activity.

ARGUMENT

Reasonable Suspicion Must Be Supported By Specific Facts That Justify Stopping and Detaining an Individual.

Nearly 40 years ago, the United States Supreme Court approved the practice of investigatory stops on the basis of reasonable suspicion. ***Terry v. Ohio***, 392 U.S. 1 (1968).

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[1] L.M. Quinn & J. Pawasarat, *Statewide Imprisonment of Black Men in Wisconsin* (Employment and Training Institute, University of Wisconsin-Milwaukee 2014) (citing 2010 U.S. Census data, which showed Wisconsin at nearly twice the national average and three percentage points higher than second-place Oklahoma).

Balancing the governmental interest in public safety and the individual's liberty interest, the Court required that an investigative stop be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21.

The ***Terry*** Court recognized that allowing broad discretion for investigative stops came at a cost in terms of police-community relations. 392 U.S. at 14 n.11 (citing a 1967 Presidential task force report finding that "field interrogations are a major source of friction between the police and minority groups"). The decision of the court of appeals in this case deviates from the careful balancing done by the ***Terry*** Court, and increases the risk of discriminatory practices that jeopardize police-community relations and public perceptions of the justice system.

A. Generic and innocent factors should be given minimal weight when determining whether suspicion was reasonable.

The circumstances that the officer relied upon in deciding to extend the stop and to frisk Floyd were generic and innocent factors, in sharp contrast to the officer's observations in ***Terry*** of suspicious and unusual conduct.[2] In this case, the circuit court noted the following facts as relevant to its determination of reasonable suspicion: Mr. Floyd was alone in his vehicle, he was from Kenosha, the time of day was 6:45 p.m., the car windows were tinted, and

[2] In ***Terry***, an experienced officer in Cleveland, Ohio, observed two men repetitively walking back and forth in a small area and looking into the same store window. 392 U.S. at 5-6. During a 10-12 minute period of observation, the two also conferred briefly with a third man, whom they met up with a short time later in front of the same store. 392 U.S. at 6.

he had multiple air fresheners in the car. (Pet. Brief at 2, 6). The court of appeals gave no weight to the time of day and Kenosha residence, but did focus on the high-crime area, air fresheners in vehicle, and tinted windows. ***State v. Floyd***, 2016 WI App 64, ¶ 16, 371 Wis. 2d 404, 417-19, 885 N.W.2d 156, 162-63 (Ct. App. 2016). None of these factors are unusual, and the combination of these factors is common to many vehicles and motorists every day. By accepting these generic circumstances as grounds for detaining an individual, the requirement of individualized suspicion is diminished.

1. High-crime area

The officer who stopped Floyd described the area as a high-crime area characterized by a large amount of drug and gang activity. ***Floyd***, 2016 WI App 64, ¶ 3. The record does not reflect any descriptions of specific criminal activity suspected or reported on the date in question. Similarly, the record does not establish any connection between Floyd (or Floyd's vehicle) and any crimes previously reported or investigated.

Many people work, shop, travel, and live in areas that have high crime rates. ***State v. Gordon***, 2014 WI App 44, ¶ 15, 353 Wis. 2d at 468, 846 N.W.2d at 483. When the racial and socioeconomic demographics of high-crime neighborhoods are considered, giving weight to location implies "that Fourth Amendment protections are reserved only for a certain race or class of people." ***Gordon***, 2014 WI App 44, ¶ 15 (citing ***U.S. v. Black***, 707 F.3d 531, 542 (4th Cir. 2013)).

Although the U.S. Supreme Court has recognized high-crime areas as "among the relevant contextual considerations," the Court has also acknowledged that presence in such an area is not by itself a sufficient basis for a

seizure. ***Illinois v. Wardlow***, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000). The ***Wardlow*** Court gave much greater weight to an individualized factor, "headlong flight" at the sight of the police, as "certainly suggestive of wrongdoing." *See* 528 U.S. at 124. Furthermore, ***Wardlow*** seemingly involved a patrol of four squad cars converging on an active, open-air drug market, rather than a generalized characterization of a neighborhood. *See* 528 U.S. at 121-22 (police "expected to find a crowd of people in the area, including lookouts and customers").

In evaluating the weight of the label "high-crime area," courts should also consider whether any objective evidence supports the characterization. *See* ***State v. Young***, 212 Wis. 2d 417, 429-433, 569 N.W.2d 84, 90-92 (Ct. App. 1997) (officer's experience and defendant's "short-term contact" with another individual in a "high drug-trafficking neighborhood" did not constitute a sufficient objective basis for suspicion). An officer's opinion may be a self-fulfilling prophesy if he or she is regularly patrolling a specific neighborhood. Particularly with offenses not commonly reported to police, the number of arrests in different neighborhoods says more about where police are deployed than about how many offenses are occurring.

2. Air fresheners

The officer described Floyd's vehicle as having air fresheners in every vent, as well as hanging from the rear view mirror. ***Floyd***, 2016 WI App 64, ¶ 15. The officer testified that the presence of the air fresheners made him suspicious because they are used to mask the odor of narcotics. ***Floyd***, 2016 WI App 64, ¶ 15. The record does not contain any information regarding the prevalence of air

fresheners in vehicles, such as the percentage of vehicles with these accessories or the average number of fresheners in the vehicles that have one or more on board.

As with the other factors relied upon in this case, the presence of air fresheners is a generic and innocent factor, rather than an individualized factor. Contrast this case with the facts in ***Rodriguez v. U.S.***, in which the presence of individualized circumstances, such as driving onto the shoulder of the road, the nervousness of the passenger, and the passenger's improbable explanation of the travel itinerary, arguably supported an inference that the air freshener smell was present to mask controlled substances. ***Rodriguez***, 135 S. Ct. 1609, 1622-23 (Thomas, J., dissenting).

This Court has considered the presence of air fresheners as a relevant factor under the totality test for reasonable suspicion when a car was stopped for speeding; the occupants gave inconsistent accounts of where they were going; one occupant said that the group was en route to a rave party; and that occupant also said that he was on probation for drug charges. *See* ***State v. Malone***, 2004 WI 108, ¶¶ 35-39, 274 Wis. 2d 540.

Without other facts providing individualized suspicion, the presence of air fresheners is a generic and innocent circumstance that should not be afforded significant weight, either independently or when added to other generic and innocent circumstances. No individualized observations in this case supported the link of a common vehicle accessory to criminal conduct.

3. Tinted windows

Window tint (the record is silent as to the level or whether it was the common factory tint) is another generic and innocent factor invoked in this case. Among the many legitimate reasons for motorists to have their windows tinted are comfort (reduce heat), energy savings (reduce need for air conditioning), protection from exposure to sun, reduction of fading of vehicle interior, strength of window, and aesthetics. *See* M. Schaffer, *7 Reasons to Get Your Windows Tinted*, mobileedgeonline.com/7-reasons-to-get-your-windows-tinted/ (last viewed April 10, 2017).

As with other generic and innocent circumstances, tinted windows (assuming lawful tint levels) should be given minimal weight under the totality test.

B. Reaffirming the individualized suspicion standard of ***Terry*** can help reduce the impact of selective enforcement and implicit bias in the justice system.

Implicit bias is an unconscious judgment or opinion, by which we process information on the basis of our cumulative life experiences. S. Marsh, *The Lens of Implicit Bias*, Juvenile and Family Justice Today, 16, 17 (Summer 2009). Implicit bias influences snap judgments and evaluations of virtually everything we perceive, from traffic signals to individuals. *Id.* As related to responses to individuals, components of implicit bias include the following:

> *Stereotyping*: we unconsciously draw a conclusion about a person on the basis of his or her social category (we assume that the individual has the perceived group characteristics);

> *Prejudice*: we have positive or negative impressions about a person because of our opinion of the social category; and
>
> *Discrimination*: we act in a certain way on the basis of the person's social category.

Id.

The "relatively universal" prevalence of implicit bias has been shown through research, most notably testing of latent response or reaction time to measure how we quickly and unconsciously respond to images, words, colors, etc. *Id*. pp. 17-18.

"[R]esearch demonstrates that implicit biases can affect whether police interpret an individual's ambiguous behaviors as suspicious. For instance, studies repeatedly reveal that people evaluate ambiguous actions performed by non-Whites as suspicious and criminal while identical actions performed by Whites go unnoticed." *See* L.S. Richardson, *Police Efficiency and the Fourth Amendment*, 87 Ind. Law J. 1143, 1145 (2012).

Judge Reilly recognized this pernicious, though generally unintentional, form of discrimination. ***Floyd***, 2016 WI App 64, ¶¶ 29-31, 371 Wis. 2d at 426-27, 885 N.W.2d at 166-17 (Reilly, P.J., concurring) (application of reasonable suspicion test has tacitly condoned racial profiling). The State attempts to dismiss this reality by arguing that the generic and innocent observations in this case would equally justify an extended detention of a white, suburban soccer mom with aversion to the post-game odor of the team's uniforms. (State's Brief at 31). However, despite this theoretical uniform standard, current police practices (and judicial review of these practices) continue to produce an alarming

disparity in incarceration rates by race. *See* L.M. Quinn & J. Pawasarat, *Statewide Imprisonment of Black Men in Wisconsin* (Employment and Training Institute, University of Wisconsin-Milwaukee 2014).

A 2011 study of Milwaukee traffic stops showed an alarming rate of racial disparity in traffic stops. *Racial gap found in traffic stops in Milwaukee* (Milwaukee Journal Sentinel, Dec. 3, 2011). African-American drivers were seven times more likely than whites to be stopped. *Id.* Furthermore, African-Americans were twice as likely as whites to have their vehicles searched, although the rate of finding contraband was virtually identical. *Id.*; *see also* Richardson, 87 Ind. Law J. at 1145 (summarizing similar findings from other states).

These empirical studies strongly suggest that "implicit biases may cause police officers to pay more attention to Blacks than to Whites and to interpret the behaviors of Blacks as suspicious more readily than the identical behaviors of Whites." Richardson, 87 Ind. Law J. at 1151. The studies also show something not apparent from case law developed through review of suppression hearings: the vast majority of the post-***Terry***-stop searches do not result in evidence of a crime. *See id.*; *see also Racial gap found in traffic stops in Milwaukee* (rate of finding contraband reported at 22%).

This Court cannot resolve all the discriminatory effects of implicit bias. For example, a study involving police officers shows that "implicit racial stereotypes caused them to pay more attention to black faces than to white faces." Richardson, 87 Ind. Law J. at 1171 (footnote omitted). Furthermore, U.S. Supreme Court precedent allows for pretext traffic stops, which police can then use as a starting point for possible further observation, detention, questioning,

and/or searching. *See* ***Whren v. U.S.***, 517 U.S. 806, 809-819, 116 S. Ct. 1769 (1996) (officer's motive does not invalidate a stop supported by an objectively reasonable basis).

However, by requiring that reasonable suspicion be supported by particularized circumstances (specific to the suspect or to others accompanying or communicating with the suspect), the court can discourage the use of generic and innocent factors that perpetuate and magnify the effects of implicit racial bias.

C. By disapproving the use of generic and innocent factors to establish reasonable suspicion, the Court can promote procedural justice, which in turn enhances public safety.

Fair procedures in government operations are closely connected with the degree to which the persons involved accept decisions. P. Esaiasson, M. Persson, M. Gilljam, and T. Lindholm, *Reconsidering the Role for Procedures for Decision Acceptance* (Cambridge University Press 2016), p. 1. When people believe that police procedures are fair, they are more likely to respect and defer to police authority, not only in a specific encounter with police, but also "through a generally increased level of compliance with the law and cooperation with the police." Police Executive Research Forum, *Legitimacy and Procedural Justice: A New Element of Police Leadership* (U.S. Department of Justice, Bureau of Justice Assistance 2014), pp. 10-11. This attitude of respect and deference to police authority extends to a positive perception toward the entire justice system. *Id.*, p. 11.

This case raises procedural justice concerns, particularly in light of the racial disparity in Wisconsin's justice system. Reliance on generic and innocent factors, such as common vehicle accessories and the conclusory label

"high-crime area," condones and perpetuates practices that many reasonably perceive as fundamentally unfair. *Cf. Legitimacy and Procedural Justice: A New Element of Police Leadership*, pp. 26-27 (African-Americans generally have less confidence than whites that police provide equal treatment).

Courts generally review cases in which an officer's suspicion of wrongdoing was validated by the ensuing stop or search. Charges are not pursued (and suppression motions are not litigated) when nothing is found. Therefore, courts may attach undue weight to generic and innocent factors, when police theorize a reason for suspicion. However, courts are likely not seeing the majority of stops-the ones in which cars with tinted windows and air fresheners did not contain contraband.

Before conclusive or substantial weight should be given to such factors, the State should be required to provide empirical evidence showing a correlation between any of the factors cited in this case and criminal conduct.

By reinforcing the need recognized in ***Terry*** for articulable and individualized suspicion, this court can promote fairness in law enforcement decisions regarding traffic stops and subsequent encounters with motorists.

CONCLUSION

Judge Reilly accurately summarized the unfortunate shift of the ***Terry*** standard from a requirement of particularized facts supporting suspicion to reliance upon generic and innocent factors. The generic factors in this case, two popular vehicle accessories and travel in a neighborhood labelled as "high crime," typify the pernicious trend identified by Judge Reilly. That trend is to tacitly condone "the profiling of suspects in the application of our reasonable suspicion test." ***Floyd***, 2016 WI App 64, ¶ 29 (Reilly, P.J., concurring).

Amicus asks this Court to disapprove of use of generic criteria for profiling, by setting forth a clear requirement that reasonable suspicion requires observation of particularized conduct or circumstances that support an inference of criminal activity.

Dated this 11th day of April, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,591 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 parties.

Dated this 11th day of April, 2017.

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