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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP774-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COURTNEY C. BROWN,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE DALE ENGLISH, AND THE HONORABLE RICHARD J. NUSS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

A police officer stopped a vehicle driven by Courtney Brown after observing that the vehicle did not come to a complete stop at a stop sign. After stopping Brown's vehicle, the officer observed that Brown was not wearing a seat belt. The officer wrote a warning ticket for the seat belt violation. Before giving Brown the warning ticket and returning his driver's license to him, the officer asked Brown to step out of his car and then asked if he had anything on him that the officer should be concerned about. Brown said no. The officer then asked Brown for consent to search him.

1. Was the traffic stop impermissibly extended when the officer asked Brown to step out of his car, and then asked Brown if he had anything illegal on his person, and for consent to search him?

The circuit court concluded that the traffic stop was extended but it denied Brown's motion to suppress evidence because it concluded that the officer had reasonable suspicion of criminal activity.

The court of appeals concluded that the traffic stop was not impermissibly extended because the officer's actions were part of the mission of the traffic stop.

2. Did the officer have reasonable suspicion to investigate potential criminal activity?

The circuit court concluded that the officer had reasonable suspicion to investigate potential criminal activity, so it denied Brown's motion to suppress evidence.

The court of appeals did not reach this issue because it concluded that the traffic stop was not extended.

3. If this Court affirms the court of appeals' decision which affirmed the judgment of conviction, must this Court remand the case to the circuit court for it to make a factual finding that Brown either did or did not consent to the search?

The circuit court did not address this issue.

The court of appeals implicitly concluded that Brown is not entitled to remand. It noted that Brown pled no contest without pursuing a challenge to the voluntariness of his consent, affirmed the judgment of conviction, and did not remand the case to the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has indicated that oral argument and publication are appropriate.

INTRODUCTION

A police officer stopped Brown's car after he saw it drive away from a dead-end cul-de-sac of closed businesses, at 2:44 a.m., and not fully stop at a stop sign. When the officer stopped the car, he observed that Brown was not wearing a seat belt. He asked Brown where he had come from and was going to, and Brown gave answers that the officer found implausible. Brown told the officer that he lived in Milwaukee and he was driving a rental car. The officer ran Brown's license and learned that Brown had prior arrests for possession of cocaine with intent to deliver and armed robbery, and other drug arrests. The officer suspected that Brown might be involved in drug activity, so he requested a canine unit, but no dog was available. The officer wrote a warning ticket for the seat belt violation and asked Brown to step out of the car. The officer wanted to know if Brown had illegal weapons or drugs on him, so he asked Brown if he had anything on him that the officer should know about. Brown

said no. The officer asked Brown if he could search him. The officer testified that Brown gave consent for a search. Brown testified that he did not. The officer searched Brown and found 13 baggies of crack cocaine and more than $500.

The issues in this case concern whether asking Brown to step out of the car, if he had anything on him that the officer needed to know about, and for consent to search, violated Brown's Fourth Amendment rights. The circuit court concluded that the officer's questions were permissible because the officer had reasonable suspicion of criminal activity.[1] The court of appeals concluded that the officer's questions were permissible because the officer's actions were part of the traffic stop's mission and did not impermissibly extend the traffic stop.

Both the circuit court and the court of appeals were correct. The officer observed Brown driving a rental car a long way from home, away from a deserted place, at 2:44 a.m. He believed that Brown's account of why he was there, where he had come from, and where he was going, was implausible. And the officer learned that Brown had prior arrests for possession of cocaine with intent to deliver and armed robbery, and other drug arrests. The officer had reasonable suspicion that Brown was involved in criminal activity that morning, and he reasonably investigated.

In addition, the officer's actions were part of the mission of the traffic stop. Asking Brown to get out of the car was "of no constitutional moment." *State v. Floyd*, 2017 WI 78, ¶ 24, 377 Wis. 2d 394, 898 N.W.2d 560. And the officer's questions about whether Brown had anything on him that the officer

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[1] Judge Dale English denied Brown's suppression motion. Judge Richard J. Nuss accepted Brown's no contest pleas and entered judgment of conviction and is currently presiding over the case.

should be concerned about, and then if he could search him, were both "specifically related to the officer's safety," and only "negligibly burdensome." *Id.* ¶ 28. The officer did not violate Brown's Fourth Amendment rights by asking those questions.

STATEMENT OF THE CASE AND FACTS

City of Fond du Lac Police Officer Christopher Deering observed a vehicle coming from a dead-end cul-de-sac of closed businesses at approximately 2:44 a.m. on August 23, 2013. (R. 64:9–10.) He. (R. 64:10.) A record check showed that the vehicle was a rental car. (R. 64:11.) Officer Deering followed the vehicle, and when it did not properly stop at a stop sign, he stopped it. (R. 64:11.)

The driver identified himself as Courtney Brown. (R. 64:11.) Officer Deering observed that Brown was not wearing a seat belt. (R. 64:12.) Officer Deering asked Brown where he was coming from, and Brown said he had come directly from a Speedway gas station. (R. 64:12.) But Officer Deering had observed Brown coming from a dead-end cul-de-sac surrounded by closed businesses, and he knew that the Speedway was not in that cul-de-sac. (R. 64:12.)

Brown said that he was from Milwaukee and that he was in Fond du Lac visiting his girlfriend, but he did not know her last name or her address. (R. 64:14, 19.) Officer Deering asked Brown where he was going, and Brown said, "nowhere, really, right now." (R. 64:16.)

After two other officers arrived to assist, Officer Deering returned to his squad car, intending to write a warning for the seat belt violation. (R. 64:16–17.) Officer Deering checked Brown's record and discovered that Brown had arrests for possession of cocaine with intent to distribute and armed robbery, and other drug arrests. (R. 64:17, 30.)

Officer Deering was suspicious because Brown was driving a rental car, was not from Fond du Lac but from Milwaukee, was first seen in a dead-end cul-de-sac surrounded by closed businesses, was not forthcoming about where he had come from immediately prior to the stop, and had a prior record for possession of cocaine with the intent to deliver and armed robbery and other drug arrests (R. 64:30–32.) Officer Deering checked to see if a canine unit was available for a dog sniff, but no dog was available. (R. 64:17.) He then decided to ask Brown for permission to search to see if he had weapons or drugs on his person. (R. 64:40.)

Officer Deering finished writing the seat belt warning and then returned to Brown's vehicle. (R. 64:17.) He asked Brown to step out of his vehicle and Brown complied. (R. 64:17.) They walked to the squad car and Officer Deering asked Brown if he had anything on him that the officer should know about. (R. 64:18.) Brown said no. (R. 64:18.) Officer Deering asked for permission to search Brown. (R. 64:18.) He testified that Brown gave consent. (R. 64:18.) Brown testified that he did not. (R. 64:49.) Officer Deering searched Brown and found 13 bags of crack cocaine and approximately $500 in cash. (R. 64:18.)

The State charged Brown with possession of cocaine with intent to deliver, as a repeater. (R. 9:1.) Brown filed a motion to suppress evidence alleging that he was illegally stopped by Officer Deering. (R. 22.) After a hearing, the circuit court denied the motion, concluding that there was reasonable suspicion for the traffic stop. (R. 63.) Brown does not appeal this ruling.

Brown then filed another motion to suppress evidence, alleging that Officer Deering unlawfully prolonged the traffic stop beyond the purpose of the initial stop when he asked for consent to search. (R. 33.) After a hearing at which Officer Deering and Brown testified, the circuit court denied Brown's

motion, concluding that Officer Deering had reasonable suspicion of drug activity to legally justify the extension of the traffic stop to ask Brown if he had anything on his person and to ask for permission to search. (R. 64:72.) This decision is the basis of Brown's appeal. The court did not determine whether Brown consented to the search, saying that consent was "an issue for a different day, with potentially additional witnesses." (R. 64:72.)

Brown and the State reached a plea agreement under which Brown pled no contest to possession of cocaine with intent to deliver in this case, and to two counts of manufacturing and delivering cocaine in another case. (R. 65:2–4.) Sentence enhancers for being a repeater and for a second or subsequent offense were dismissed in this case, and a repeater enhancer and a logistical enhancer were dismissed in the other case. (R. 65:2–3.) The State also agreed to recommend a total of no more than five years of initial confinement. (R. 65:3.)

The circuit court imposed four years of imprisonment in this case, including two years of initial confinement. (R. 66:27.) It imposed six years of imprisonment, including three years of initial confinement on each count in the other case, concurrent to each other, but consecutive to the sentence in this case. (R. 66:27.) In total, the court imposed ten years of imprisonment, including five years of initial confinement.

Brown appealed. The court of appeals certified the appeal to this Court, posing the question: "after a ticket has been written but before delivery, and in the absence of reasonable suspicion, does asking a lawfully stopped motorist to exit the car, whether he or she possesses anything of concern, and to consent to a search unlawfully extend a traffic stop?" *State v. Brown*, No. 2017AP774-CR, 2018 WL8188436 (Wis. Ct. App. Nov. 21, 2018). This Court refused the certification.

The court of appeals affirmed the judgment of conviction. *State v. Brown*, 2019 WI App 34, 388 Wis. 2d 161, 931 N.W.2d 890. It noted that Brown was not challenging the stop, and that while Brown asserted in his suppression motion that he did not consent to the search, the circuit court did not decide that issue but instead held it in abeyance, and that Brown pled no contest "without further pursuing a challenge to the voluntariness of his consent." *Id.*

The court of appeals concluded that, "The request to search encompassed a search for both weapons and drugs." *Brown*, 388 Wis. 2d 161, ¶ 23. It determined that the officer's "request that Brown exit the vehicle was plainly within the stop's mission," and that his "asking of Brown if he would consent to a search also fell within the mission of the traffic stop." *Id.* ¶¶ 20, 21. And the court concluded that *State v. Wright*, 2019 WI 45, ¶ 11, 386 Wis. 2d 495, 926 N.W.2d 157, and *Floyd*, 377 Wis. 2d 394, and "the United States Supreme Court cases upon which they are based clearly establish that the requests were part of the mission of the traffic stop, and thus were not an extension of the stop." *Id.* ¶ 17. Judge Reilly concurred, explaining that while he did not agree with *Wright* and *Floyd*, the court was bound by those cases. *Id.* ¶ 26 (Reilly, J., concurring).

This Court granted Brown's petition for review.

STANDARD OF REVIEW

Whether evidence should be suppressed is a question of constitutional fact, where the circuit court's factual findings are evaluated under the clearly erroneous standard, but the circuit court's application of the historical facts to constitutional principles is reviewed de novo. *Floyd*, 2017 WI 377 Wis. 2d 394, ¶ 11.

ARGUMENT

I. Brown is not entitled to suppression of evidence because the officer's conduct, including asking him for consent to search, was part of the mission of the traffic stop and the ordinary inquiries incident to the stop.

A. The Fourth Amendment protects against unreasonable searches and seizures.

Both the United States and the Wisconsin Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. 1, § 11. Because section 11 of the Wisconsin Constitution is "substantively identical" to the Fourth Amendment to the U.S. Constitution, this Court has "historically interpreted it in accord with the Supreme Court's interpretation of the 8 Fourth Amendment." *State v. Dumstrey*, 2016 WI 3, ¶ 14, 366 Wis. 2d 64, 873 N.W.2d 502. "The touchstone of the Fourth Amendment is reasonableness." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Id.* (quoting *Jimeno*, 500 U.S. at 250).

B. A traffic stop is a seizure; accordingly, it must be performed reasonably.

"[A] traffic stop is a seizure within the meaning of our Constitutions." *Floyd*, 377 Wis. 2d 394, ¶ 20. "The reasonableness of a traffic stop involves a two-part inquiry: first, whether the initial seizure was justified and, second, whether subsequent police conduct 'was reasonably related in scope to the circumstances that justified' the initial interference." *State v. Smith*, 2018 WI 2, ¶ 10, 379 Wis. 2d 86, 905 N.W.2d 353 (quoting *Terry v. Ohio*, 392 U.S. 1, 19–20

(1968)). A traffic stop is justified when an officer "reasonably believes the driver is violating a traffic law." *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999); *see also Floyd*, 377 Wis. 2d 394, ¶ 20 ("Reasonable suspicion that a driver is violating a traffic law is sufficient to initiate a traffic stop."). The reasonableness of an officer's conduct during a traffic stop is measured by the mission of the seizure, the mission being "to address the traffic violation that warranted the stop" and to attend to the "ordinary inquiries" incident to the stop. *Rodriguez v. United States*, 575 U.S. 348, 354–55 (2015) (citation omitted). An officer may extend a stop (*i.e.*, go beyond the initial mission) and begin a new investigation when reasonable suspicion for a new crime develops during the stop. *Betow*, 226 Wis. 2d at 94–95.

There is no dispute in this case that the stop was justified. The circuit court found that the officer had probable cause that Brown violated a traffic law by failing to fully stop at a stop sign (R. 63:37), and Brown does not challenge that finding. (Brown's Br. 7 n.2.)

The issue is the reasonableness of Officer Deering's conduct during the stop. Because Officer Deering's conduct fell within the mission of the traffic stop and the ordinary inquiries incident to a stop it was reasonable under the Fourth Amendment.

C. During a traffic stop, an officer may address the traffic violation and attend to the ordinary inquiries, which include officer safety concerns.

"[A] traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket." *Rodriguez*, 575 U.S. at 354–55 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). Courts considering the reasonableness of the duration of a

stop have rejected setting "[a] hard and fast time limit" on stops. *State v. Gruen*, 218 Wis. 2d 581, 590–91, 582 N.W.2d 728 (Ct. App. 1998) (citation omitted); *see also Floyd*, 377 Wis. 2d 394, ¶ 22 ("[W]hile the temporal duration of the stop may inform those considerations, it is not in itself dispositive."). Rather, courts consider, under the totality of the circumstances, whether police are diligent in completing their tasks related to the traffic infraction. *Floyd*, 377 Wis. 2d 394, ¶ 22; *Gruen,* 218 Wis. 2d at 590–91; *see also Rodriguez*, 575 U.S. at 354–55.

Besides "determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Rodriguez*, 575 U.S. at 355 (quoting *Caballes*, 543 U.S. at 408). "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* "The justification for the ordinary inquiries is two-fold: (1) these checks serve to enforce the traffic code by 'ensuring that vehicles on the road are operated safely and responsibly'; and (2) for officer safety." *Smith*, 379 Wis. 2d 86, ¶ 19 (citation omitted); *accord Floyd*, 377 Wis. 2d 394, ¶ 26 ("[O]fficer safety [is] an integral part of every traffic stop's mission."). To that end, the permissible inquiries also encompass asking suspects if they have weapons or anything that could harm the officers. *Wright*, 386 Wis. 2d 495, ¶ 26; *Floyd*, 377 Wis. 2d 394, ¶ 28. And they include asking for consent to search. *Floyd*, 377 Wis. 2d 394, ¶ 28. Because those questions are "related to officer safety and [are] negligibly burdensome, they [are] part of the traffic stop's mission." *Id.* They do not impermissibly extend the stop.

"While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person's

voluntarily allowing a search." *Schneckloth v. Bustamonte*, 412 U.S. 218, 242–43 (1973). When a suspect consents to a search, the time associated with that search is irrelevant to the extension analysis. *Floyd*, 377 Wis. 2d 394, ¶¶ 28–29 ("Whatever additional time the actual search consumed, or the burden it imposed, is irrelevant as long as Mr. Floyd consented to it.").

D. Officer Deering did not impermissibly extend the stop, as his conduct related to addressing the violations and attending to the ordinary inquiries.

Officer Deering's actions during the traffic stop did not impermissibly extend the stop. Upon stopping Brown, the law permitted Officer Deering to "address the traffic violation that warranted the stop" and to attend to the "ordinary inquires incident to [the traffic] stop," including "related safety concerns." *Rodriguez*, 575 U.S. at 354–55 (citation omitted).

Officer Deering observed that Brown was not wearing his seat belt. (R. 64:12.) He asked Brown where he was coming from and where he was going. (R. 64:12–16.) Those questions are part of the mission of a traffic stop. *Betow*, 226 Wis. 2d at 93 ("There is no question that a police officer may stop a vehicle when he or she reasonably believes the driver is violating a traffic law, and once stopped, the driver may be asked questions reasonably related to the nature of the stop–including his or her destination and purpose.").

Officer Deering returned to his squad car to write a warning for failure to wear a seat belt. (R. 64:16–17.) He ran a record check and learned that Brown had arrests for possession of cocaine with intent to deliver and armed robbery and other drug arrests. (R. 64:17.) In addition to his arrests, Brown had a conviction for possession of cocaine with intent to deliver. (R. 66:10.) Running a record check on Brown was

"reasonably related in scope to the purpose of a traffic stop and no further justification is required." *State v. Gammons*, 2001 WI App 36, ¶ 13, 24, 241 Wis. 2d 296, 625 N.W.2d 623 (citing *State v. Griffith*, 2000 WI 72, ¶ 45, 236 Wis. 2d 48, 613 N.W.2d 72).

Officer Deering inquired about the availability of a drug sniffing dog but learned that no dog was available. (R. 64:17.) Brown does not argue that Officer Deering was not justified in making this inquiry.

Officer Deering wrote the seat belt warning. (R. 64:17.) Before he issued the warning to Brown, he asked Brown to get out of the car. (R. 64:17.) Officer Deering was justified in doing so. This Court has recognized that the United States Supreme Court has established "a per se rule that an officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation." *State v. Johnson*, 2007 WI 32, ¶ 23, 299 Wis. 2d 675, 729 N.W.2d 182) (citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1996)). Asking Brown to get out of his car during the traffic stop was therefore "of no constitutional moment." *Floyd*, 377 Wis. 2d 394, ¶ 24.

Officer Deering asked Brown if there was anything on him that the officer needed to know about, because he wanted "To ask if he had any illegal weapons or drugs on him." (R. 64:18.) Asking whether a suspect has illegal weapons on his person is part of the mission of the traffic stop. *Wright*, 386 Wis. 2d 495, ¶ 11; *Floyd*, 377 Wis. 2d 394, ¶ 28. Asking a suspect if has anything on him the officer should know about, when the question encompasses weapons and drugs, is no less a part of the mission of the traffic stop.

After Brown said he did not have anything on him the officer needed to know about, Officer Deering asked Brown for consent to search. (R. 64:18.) Officer Deering testified that he asked Brown, "mind if I search you to double check."

(R. 64:18.) Brown testified that Officer Deering asked, "could he search me." (R. 64:49.) Asking for consent to search for something that could harm the officer was part of the mission of the traffic stop. *Wright*, 386 Wis. 2d 495, ¶ 11; *Floyd*, 377 Wis. 2d 394, ¶ 28.

The court of appeals correctly concluded that Officer Deering's request that Brown step out of the vehicle, and his questions about whether Brown had anything on him the officer should know about, and if he consented to a search, "were part of the mission of the traffic stop, and thus were not an extension of the stop." *Brown*, 388 Wis. 2d 161, ¶ 17 (citing *Wright*, 386 Wis. 2d 495, ¶ 11; *Floyd*, 377 Wis. 2d 394). Accordingly, the court also correctly concluded that the officer's request and questions did not violate the Fourth Amendment. *Id.* ¶ 25.

E. Brown is incorrect in asserting that Officer Deering's asking him to get out of the car, whether he had anything on him the officer should know about, and for consent to search, were not part of the mission of the traffic stop and the ordinary inquiries incident to the stop.

1. The mission of the traffic stop had not been completed.

Brown argues that Officer Deering could not lawfully ask him to get out of his car, or ask him if he had anything on him that the officer should know about and if he consented to a search, because the mission of the traffic stop had concluded. (Brown's Br. 16–22.) He claims that once Officer Deering wrote the citation, "the stop reasonably should have been completed." (Brown's Br. 17.)

However, although Officer Deering asked Brown to get out of the car and requested consent for a search "near the

end" of the traffic stop, "the stop was not completed." *Brown*, 388 Wis. 2d 161, ¶ 24. Officer Deering had written the warning, but he had not issued it to Brown or returned Brown's driver's license to him.

In *Rodriguez*, the Supreme Court noted that in *Caballes*, it had cautioned that a lawful traffic stop for which an officer intends to issue a warning ticket, "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a warning ticket." *Rodriguez*, 575 U.S. at 354–55 (citing *Caballes*, 543 U.S. at 407).

Officer Deering, like the officer in *Caballes* intended to issue a warning ticket to Brown. (R. 64:17.) To "issue" something means to send the thing out or distribute it. Black's Law Dictionary 996 (11th ed. 2019). It means "to circulate or distribute in an official capacity," "to publish," or "to pour forth or send out; emit." The American Heritage Dictionary of the English Language 931 (5th ed. 2016). Issuing a warning ticket does not mean only writing a warning ticket. It also means giving the warning ticket to the driver. *See, e.g.*, *United States v. Walton*, 827 F.3d 682, (7th Cir. 2016) (assessing whether an officer had reasonable suspicion to search after issuing a written warning by assessing what the officer did after he gave the warning to the driver). The mission of the traffic stop in this case was not completed when Officer Deering wrote the warning ticket. Giving the warning ticket to Brown was also part of the mission. *See Caballes*, 543 U.S. at 407.

This Court's decision in *Floyd* confirms that the mission of the traffic stop did not end when Officer Deering wrote the seat belt warning.

In *Floyd*, the officer stopped a vehicle for a suspended registration. *Id.* ¶ 23. The officer then learned that the driver

"had neither insurance nor a valid driver's license." *Id.* This Court concluded that "[a]t a minimum, this authorized [the officer] to take the time reasonably necessary to draft the appropriate citations and explain them to Mr. Floyd." *Id.* (citing *Rodriguez*, 575 U.S. at 354). "Until that is done, and so long as [the officer] does not unnecessarily delay the process, the permissible duration of the traffic stop has not elapsed." *Id.* (citing *Rodriguez*, 575 U.S. at 355).

Just as the traffic stop in *Floyd* was not completed when the officer had not yet explained the citations to the driver, the stop here was not completed when Officer Deering had not yet given the written warning to Brown and returned his driver's license to him.

Brown argues that "*Floyd* does not support a conclusion that the stop in this case was ongoing when Officer Deering ordered Brown out of the car and questioned him." (Brown's Br. 18.) He points out that the driver in *Floyd* did not have a valid driver's license, so the officer could not have allowed him to drive away. (Brown's Br. 18.)

However, this Court's conclusion in *Floyd* that the traffic stop was not completed was not premised on the fact that the suspect could not legally drive away. If the traffic stop had continued until the suspect could legally drive away, the officer in *Floyd* would have been authorized to investigate matters entirely unrelated to the traffic stop or officer safety even after explaining the citation to the driver, up until the time someone came to the scene to give the driver a ride.

In *Floyd*, this Court did not say that the stop was not completed because the suspect could not legally drive away. It said that the stop was not completed at least until the officer explained the citations to the driver. *Floyd*, 377 Wis. 2d 394, ¶ 23. And while the request for consent to search in *Floyd* did not extend the traffic stop, *id.* ¶ 43, there can be no doubt

that had the driver not consented to a search and had there not been reasonable suspicion to search, the driver would have been allowed to remain in his vehicle or leave the scene. He just would have been prohibited from driving. But until the officer explained the citations to him, the mission of the stop was not completed. *Id.* ¶ 23.

Like the driver in *Floyd*, Brown could not legally have driven away because a person who operates a motor vehicle is required to have his driver's license in his immediate possession. Wis. Stat. § 343.18(1). And just like the stop in *Floyd* was not completed until the officer explained the citation to the driver, here the stop was not completed until Officer Deering issued the warning to Brown and returned his driver's license.

Brown relies on *Gammons*, asserting that there the court of appeals held that the "mission of the stop was complete after reason for initial seizure was satisfied, driver and passengers had provided identification, and officer had run record checks on the driver and passengers." (Brown's Br. 17 (citing *Gammons*, 241 Wis. 2d 296, ¶¶ 2–4, 24).)

But *Gammons* held nothing of the sort. In *Gammons*, an officer stopped a vehicle because it lacked a rear license plate. *Gammons*, 241 Wis. 2d 296, ¶ 2. The officer ran a driver's license check on the driver and warrant checks on the passengers. *Id.* The officer also asked the driver if there were drugs in the vehicle and if he could search it. *Id.* ¶ 3. The driver denied having drugs in the vehicle, and he refused to consent to a search. *Id.* When the officer said he would get a drug sniffing dog, the driver agreed to a vehicle search, which yielded cocaine. *Id.*

The court of appeals concluded that the officers did not have reasonable suspicion of drug activity, or consent to search. *Id.* ¶ 24. Therefore, once the driver refused to consent,

"The Fourth Amendment required [the officer] to terminate the stop and allow [the men] to continue about their business." *Id.*

Gammons did not hold that the stop ended when the driver and passengers provided identification, and the officer ran record checks. It said that the mission of the stop continued until the driver refused to consent.

Brown argues that the mission of a traffic stop must be completed when the officer writes a warning because otherwise "an officer could withhold a driver's license and warning to prolong the stop and 'earn bonus time to pursue unrelated criminal investigations.'" (Brown's Br. 17 (quoting *Rodriguez*, 575 U.S. at 1616).)

An officer may not, of course, hold a person's driver's license unnecessarily. As this Court explained in *Floyd*, an officer is on the "proper side of the line" between a valid traffic stop and an unconstitutional one "so long as the incidents necessary to carry out the purpose of the traffic stop have not been completed, and the officer has not unnecessarily delayed the performance of those incidents." *Floyd*, 377 Wis. 2d 394, ¶ 22.

But when an officer is issuing a written warning, the incidents necessary to carry out the purpose of the traffic stop are not completed at least until the officer gives the warning to the driver. *See Rodriguez*, 575 U.S. at 352 (justification for a traffic stop was "out of the way" when officer issued a warning to the driver, explained it, and gave the driver's documents back to him); *see also id.* at 371 (Alito, J. dissenting) (the Court held that "the authority to detain based on a traffic stop ends when a citation or warning is handed over to the driver.").

Brown asserts that this Court's opinion in *Smith*, 379 Wis. 2d 86, "does not change the result here." (Brown's

Br. 20.) The State agrees. *Smith* does not change the result here because *Smith* concerned an officer's conduct after reasonable suspicion for the traffic stop had dissipated.

In *Smith*, a police officer stopped a car because the registered owner—a woman—had a suspended driver's license. 379 Wis. 2d 86, ¶ 4. The officer approached the car and discovered that the driver was a man. *Id.* The issue in *Smith* concerned whether the officer could check the driver's identification after the reasonable suspicion supporting the traffic stop had dissipated. *Id.* ¶ 2. This Court concluded that "[a]sking for a driver's license does not impermissibly extend a stop because it is part of the original mission of the traffic stop." *Id.*

Smith does not affect the outcome of this case because here the reasonable suspicion that supported the stop—not stopping fully at a stop sign and the seat belt violation—had not dissipated. Nothing that happened after the traffic stop began showed either that Brown was not the person who failed to stop at the stop sign or wear a seat belt, or that he had not failed to do those things.

2. Officer Deering's actions were related to officer safety.

Brown argues that Officer Deering's actions in asking him to get out of the car, asking if he had anything on him that the officer should know about, and asking for consent to search, were unrelated to officer safety. (Brown's Br. 23.) He claims that "Officer Deering admitted that his purpose in further detaining Brown was nothing more than an attempt 'to fish for wrongdoing.'" (Brown's Br. 20–21.)

Although Smith says that Officer Deering "admitted" that he was fishing for wrongdoing, and uses quotation marks, he does not quote Officer Deering or cite any statement from the officer admitting anything of the sort. He

cannot do so because Officer Deering admitted no such thing. To the contrary, Officer Deering testified that he inquired about "illegal weapons or drugs." (R. 64:18).

Officer Deering was justified in asking Brown out of the car. "[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Floyd*, 377 Wis. 2d 394, ¶ 24 (quoting *Mimms*, 434 U.S. at 111 n.6).

Officer Deering then asked Brown if he had anything on him that Deering should know about. He posed that question "[t]o ask if [Brown] had any illegal weapons or drugs on him." (R. 64:18.) Officer Deering acknowledged that this was not a high-risk traffic stop, and that there were no specific factors to lead him to believe that Brown was armed. (R 64:28–29.) But he said that Brown "could have" been armed. (R. 64:29.)

As the court of appeals recognized, there was plenty of information upon which a reasonable officer would fear that Brown was armed. Before he returned to Brown's vehicle, Officer Deering knew of Brown's arrests for possession with intent to deliver cocaine and armed robbery, and his other drug-related arrests. [2] In addition, "it was 2:44 a.m.; the

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[2] The court of appeals said that Officer Deering "was aware of Brown's many drug-related arrests and *convictions* for possession with intent to deliver cocaine and armed robbery." *Brown*, 388 Wis. 2d 161, ¶ 23 (emphasis added). The court's conclusion that Brown had convictions was likely based on Officer Deering's testimony at the suppression hearing that "when I ran his name, he had priors for possession with intent to distribute cocaine, armed robbery, other charges." (R. 64:17.) The State also read Officer Deering's testimony as referring to convictions for possession of cocaine with intent to deliver and armed robbery. (State's Br. to Court of Appeals 3, 9). However, it appears that Officer Deering was referring to prior arrests, not prior convictions. He later referred to Brown having "Numerous previous arrests" (R.

(continued on next page)

vehicle was coming from a dead-end road of closed businesses; the vehicle was a rental." *Brown*, 388 Wis. 2d 161, ¶ 23. And the officer knew that "Brown falsely claimed that he was coming from a gas station; and he claimed he drove from Milwaukee to Fond du Lac to visit his girlfriend, although he did not know her last name or precise address." *Id.* As the court of appeals concluded, "The totality of the facts relating to Brown's behavior and his criminal past added to the safety hazard inherent in all traffic stops and thus supported the request for consent to search." *Id.* ¶ 24 (citing *State v. Richardson*, 156 Wis. 2d 128, 144, 456 N.W.2d 830 (1990) (drugs and guns often go hand in hand)).

Brown acknowledges that under *Floyd*, an officer who has asked a driver to exit a vehicle during a traffic stop can permissibly ask the driver "if he had any weapons or anything that could harm [the officer]." (Brown's Br. 23 (citing *Floyd*, 377 Wis. 2d 394, ¶ 28).) He claims that asking a driver if "he has anything illegal" is different. (Brown's Br. 23.)

Brown points to no authority that requires an officer to specifically use magic words like "weapons." And he ignores

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64:30), and to his "previous arrest history" (R. 64:30–31.) The circuit court also referred to Officer Deering knowing of Brown's "prior drug arrests." (R. 64:69.)

Brown did have a 2008 conviction for possession of cocaine with intent to deliver and various other convictions, but none for armed robbery. (R. 1:2) At sentencing the prosecutor mentioned that Brown had "high number of arrests from 2001 to 2014 that were either dismissed or not prosecuted," including arrests for "armed robbery, substantial battery, strangulation and suffocation." (R. 66:11.)

Even if Brown had not been convicted of armed robbery, his arrest for armed robbery would give a reasonable officer suspicion that Brown might be armed. *State v. Buchanan*, 2011 WI 49, ¶¶ 13–14, 334 Wis. 2d 379, 799 N.W.2d 775.

that Officer Deering explained at the suppression hearing that when he asked Brown if he had anything on him that the officer should know about, he meant "illegal weapons or drugs." (R. 64:18.) As the court of appeals recognized, Officer Deering's "request to search encompassed a search for both weapons and drugs." *Brown*, 388 Wis. 2d 161, ¶ 23.

3. Officer Deering's actions were related to the mission of the traffic stop and did not measurably extend the duration of the traffic stop.

Brown argues that Officer Deering's actions in asking him to step out of the car, if he had anything on him that the officer should know about and for consent to search, measurably extended the duration of the traffic stop, and were therefore impermissible. (Brown's Br. 26–27.) He argues that "[a] majority of federal circuit courts have agreed that *Rodriguez* does not permit an extension of a traffic stop for even a de minimis period of time while officers engage in ordinary criminal investigation." (Brown's Br. 25.)

Brown's argument is premised on the notion that Officer Deering's actions were not part of the traffic stop's mission. In addition to the ordinary inquiries, including those related to officer safety, "[T]he Fourth Amendment tolerate[s] certain unrelated investigations that [do] not lengthen the roadside detention." *Wright*, 386 Wis. 2d 495, ¶ 38 (citing *Rodriguez*, 575 U.S. at 354). "Inquiries unrelated to the original justification for the stop are permissible under the Fourth Amendment 'so long as those inquiries do not measurably extend the duration of the stop.'" *Id.* (quoting *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)).

But the ordinary inquiries incident to a traffic stop include asking suspects if they have weapons or anything that could harm the officers, and for consent to search. *Wright*, 386

Wis. 2d 495, ¶ 26; *Floyd*, 377 Wis. 2d 394, ¶ 28. Officer Deering's action were just like the ones this Court approved of in *Wright* and *Floyd*. *Brown*, 388 Wis. 2d 161, ¶ 22. Those actions did not impermissibly extend the stop.

Brown argues that the court of appeals suggested that "Officer Deering's actions were permissible because they did not add an unreasonable amount of time to the stop." (Brown's Br. 27 (citing *Brown*, 388 Wis. 2d 161, ¶¶ 21–22, 24 n.4).)

But the court of appeals concluded that Officer Deering's actions were permissible because they were part of the scope of the traffic stop, *Brown*, 388 Wis. 2d 161, ¶ 21, and the ordinary inquiries attendant to a stop, which concern officer safety, *id.* ¶ 22. And the court noted that asking Brown to exit his car, and then walking him to the squad car in order to complete the mission of the traffic stop, was only negligently burdensome and did not invalidate Brown's consent. *Id.* ¶ 24 & n.4.

Brown notes that the record does not reflect the precise time that all of Officer Deering's actions took. (Brown's Br. 26.) But while "a traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket," *Rodriguez*, 135 S. Ct. at 1614–15 (quoting *Caballes*, 543 U.S. at 407), nothing in the record suggests that Officer Deering performed the ordinary inquiries attendant to the traffic stop in a manner that unduly prolonged the traffic stop.

II. An extension of the stop would have been justified by reasonable suspicion that Brown was involved in criminal activity.

The court of appeals correctly concluded that Officer Deering did not extend the traffic stop when he asked Brown to get out of his car, and then asked if he had anything on him that the officer should know about and if he consented to a

search. If this Court agrees, it need not address whether Officer Deering also had reasonable suspicion of criminal activity. *See Floyd*, 377 Wis. 2d 394, ¶ 34 n.9 (there is "no reason at all" to address reasonable suspicion to extend a stop if the officer did not extend the stop). If this Court were to disagree, it should still affirm because, as the circuit court concluded, reasonable suspicion that Brown was involved in criminal activity justified asking Brown for consent to a search that, when performed, yielded 13 baggies of crack cocaine and approximately $500 in cash.

A. An officer may extend a stop if reasonable suspicion of new criminal activity develops.

If a law enforcement officer becomes aware of "additional suspicious factors" during a valid traffic stop, and those factors give rise to reasonable suspicion of new criminal activity, "the stop may be extended and a new investigation begun." *Betow*, 226 Wis. 2d at 94–95. "Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729. "[I]f any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent explanations that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry." *Id.* (quoting *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)).

While any one fact, standing alone, might not give rise to reasonable suspicion, this Court does not look at each fact individually. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Rather, this Court looks "to the totality of the facts taken together." *Id.* As the "building blocks of fact accumulate," "reasonable inferences about the cumulative effect can be drawn." *Id.* In other words, the facts relevant to

the reasonable suspicion analysis must be viewed in the aggregate. *See State v. Allen*, 226 Wis. 2d 66, 75, 593 N.W.2d 504 (Ct. App. 1999) ("[W]hen these three events occur in sequence and are combined with the officers' experience and training, the reputation of the area and the time of day, there is enough to create reasonable suspicion to justify a *Terry* stop.").

B. Officer Deering had reasonable suspicion that Brown was involved in criminal activity.

Four categories of facts, taken together, created reasonable suspicion that Brown was involved in criminal activity.

1. Time and location when Officer Deering first observed Brown's.

Officer Deering first observed Brown's vehicle coming from a dead-end cul-de-sac of closed businesses at 2:44 a.m. (R. 64:10.) Driving from this type of area is not by itself suspicious. But doing so at 2:44 a.m. raises a reasonable question of what a driver is doing in such a spot at such a late hour. *See State v. Morgan*, 197 Wis. 2d 200, 214, 539 N.W.2d 887 (1995) ("[T]he time of night—four a.m.—may be considered in determining the legality of the pat-down search of [the suspect.]"); *see also Allen*, 226 Wis. 2d at 74–75 ("The contact between [the suspect], his companion and the car took place late at night; the time of day is another factor in the totality of the circumstances equation.")

2. Brown was driving a rental car.

After observing Brown's vehicle at the dead-end business cul-de-sac at 2:44 a.m., Officer Deering ran a check on the vehicle, which showed it was a rental car. (R. 64:10–11.) He testified that, based on his training related to drug

enforcement, rental cars are commonly used by drug dealers. (R. 64:9, 19, 30.)

It is beyond dispute that a vast majority of people driving rental cars are not involved in criminal activity. But courts have recognized that people involved in drug activity often use rental cars. *See e.g.*, *United States v. Thomas*, 913 F.2d 1111, 1116 (4th Cir. 1990) ("[I]llegal transport of drugs often involves the use of rental cars traveling from source cities such as Miami."); *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1996) (considering the use of a rental car as a factor supporting reasonable suspicion of drug activity).

3. Brown said he had come from Milwaukee and he gave an account of his route of travel and his reason for being at the location where he was stopped that Officer Deering found vague and untruthful.

After lawfully stopping Brown, Officer Deering asked Brown where he was coming from and what he was doing. (R. 64:12.) Brown replied that he was coming directly from a nearby Speedway gas station. (R. 64:12.) Officer Deering knew that this statement was untrue as he first observed Brown coming from a dead-end cul-de-sac of closed businesses and followed Brown's vehicle continuously from that point. (R. 64:12.) And Officer Deering knew that the Speedway gas station was not in that cul-de-sac. (R. 64:12.)

Brown explained that he had come from Milwaukee to Fond du Lac to visit his girlfriend Brandy, but he did not know his girlfriend's last name or her address. (R. 64:14, 16.) While it is possible that Brown went to the cul-de-sac to turn around, and he may not have known his girlfriend's last name and her actual address, these possible innocent explanations do not ameliorate the added suspicion caused by these statements from a driver stopped at 2:44 a.m., far from his home. A

suspect's vagueness and lying about where he was coming from when stopped is a factor pointing to reasonable suspicion. *State v. Malone*, 2004 WI 108, ¶ 37, 274 Wis. 2d 540, 683 N.W.2d 1. And a suspect's inadequate explanation for conduct is a legitimate factor in a reasonable suspicion analysis. *Betow*, 226 Wis. 2d at 97.

Traveling from Milwaukee is not, by itself, suspicious. But Officer Deering testified that Milwaukee is known as a source city for drugs (R. 64:19), and this fact becomes suspect when combined with his observation of a rental car, in a dead-end cul-de-sac of closed businesses at 2:44 a.m, and with the driver's vague and untruthful explanation of what he was doing there.

4. Brown had a prior conviction for possession of cocaine with the intent to deliver and arrests for armed robbery and numerous drug crimes.

After stopping Brown, and hearing his explanation for his whereabouts, Deering observed that Brown was not wearing a seat belt. He wrote a warning for not wearing a seat belt and checked on Brown's record. (R. 64:17.) The record check revealed that Brown had prior arrests for possession with the intent to distribute cocaine and armed robbery, and other arrests for drug crimes. (R. 64:17.) Brown also had a 2008 conviction for possession with the intent to distribute cocaine. (R. 66:10.)

A suspect's arrest record is not itself sufficient to create reasonable suspicion. *State v. Eason*, 2001 WI 98, ¶¶ 20–21, 245 Wis. 2d 206, 629 N.W.2d 625. But a suspect's arrest record is a factor that, along with other factors, may be considered under the totality of the circumstances to provide reasonable suspicion. *State v. Buchanan*, 2011 WI 49, ¶¶ 13–14, 334 Wis. 2d 379, 799 N.W.2d 775. And knowledge of a

subject's prior drug activity is a factor in a reasonable suspicion analysis. *Id.* 13; *Gammons*, 241 Wis. 2d 296, ¶ 21 (considering the officers' "knowledge of prior drug activity by each of the three men in the vehicle" in its reasonable suspicion analysis).

Upon learning of Brown's record, Officer Deering he had "enough suspicion to check if [there] was a canine on duty." (R. 64:17.) When Officer Deering learned that no drug sniffing dog was available, he decided to ask Brown for consent to search his person. (R. 64:40.) He finished writing the warning ticket and returned to Brown's car to ask Brown if he had weapons and drugs for consent to search. (R 64:17–18.)

The circuit court concluded that Officer Deering had reasonable suspicion of criminal activity to extend the traffic stop and investigate. (R. 64:71–72.) Officer Deering observed Brown driving away from a dead-end cul-de-sac of closed businesses at 2:44 a.m. in a rental car, he found Brown's explanation of where he was coming from and going vague and untruthful, and Brown's criminal record included a conviction for possession of cocaine with intent to deliver, and arrests for armed robbery, possession of cocaine with intent to deliver, and other drug arrests. (R. 64:70–72.) The circuit court concluded that, viewed in the aggregate, these facts would have given a reasonable officer reasonable suspicion of criminal activity. (R. 64:72.) Officer Deering therefore would have been justified in extending the traffic stop and beginning a new investigation.

The circuit court was correct. In *State v. Floyd*, the court of appeals concluded that an officer had reasonable suspicion of drug activity on facts less compelling than the ones in this case. 2016 WI App 64, ¶ 13, 371 Wis. 2d 404, 885 N.W.2d 156. This Court affirmed the court of appeals' decision in *Floyd* on the ground that the traffic stop was not completed when the

officer began investigating potential drug activity. *Id.* ¶ 34. It therefore did not address whether there was reasonable suspicion of drug activity to support an extension of the traffic stop. *Id.* The court of appeals' reasonable suspicion holding in *Floyd* is thus precedential because it was not "called into question" when this Court affirmed on alternative grounds. *Sweeney v. Gen. Cas. Co. of Wis.*, 220 Wis. 2d 183, 197, 582 N.W.2d 735 (Ct. App. 1998).

In *Floyd*, the officer stopped the vehicle during the evening in a high crime area, and he observed that the stopped car had tinted windows and air fresheners in every vent of the vehicle and on the rear view mirror. *Floyd*, 377 Wis. 2d 394, ¶¶ 2–3.

Here, Officer Deering observed Brown driving a rental car from Milwaukee at 2:44 a.m in a dead-end cul-de-sac of closed businesses. When the officer stopped the car, Brown gave an account of his route of travel and his whereabouts that was vague and that the officer knew was untrue. And the officer learned that Brown had prior arrests involving drugs and weapons.

The circumstances in this case support reasonable suspicion where the ones in *Gammons* and *Betow* did not. In *Gammons*, 241 Wis. 2d 296, police stopped a vehicle for not having a rear license plate. *Id.* ¶¶ 1–3. The issue was whether there was reasonable suspicion of drug activity based on "'an out-of-town vehicle in an area purportedly known for drug activity,' at night, and the suspect was nervous." (Brown's Br. 36 (quoting *Gammons*, 241 Wis. 2d 296, ¶ 23).) In addition, the officer had "personal knowledge of [the suspect's] prior drug activity." *Id.*

The court of appeals concluded that these factors did not establish reasonable suspicion. But the vehicle was not a rental car, *Gammons*, 241 Wis. 2d 296, ¶ 2, and it was stopped

at 10:00 p.m. *Id.* ¶ 21. And nothing in *Gammons* indicates that the driver or the suspect gave a vague or untruthful account of his route of travel or whereabouts.

In contrast, Brown was driving a rental car, he was observed in a dead-end cul-de-sac of closed businesses at 2:44 a.m., and he gave an account of his route of travel and whereabouts that Officer Deering knew was untrue.

In *Betow*, a vehicle was stopped late in the evening for speeding. 226 Wis. 2d at 92, 96. The driver appeared nervous and he had a picture of a mushroom on his wallet. *Id.* at 92. The driver said he was coming from Madison, where he had dropped off a friend, and was on his way back to his home in Appleton. *Id.* at 97.

The State argued reasonable suspicion based on the mushroom picture on the wallet, the driver's nervousness, his traveling from Madison, and the implausible nature of his claim that at a late evening hour he had dropped off a friend. *Id.* at 95–96. The court of appeals found no reasonable suspicion.

Again, the circumstances here are much more compelling than those in *Betow*. The driver in *Betow* was stopped late in the evening, coming from Madison, and he gave an explanation for his whereabouts that the officer found implausible. Brown was stopped even later, at 2:44 a.m., he was from Milwaukee, and he gave a vague explanation the officer knew was at least partly untrue.

In *Betow* the State did not present evidence that Madison was a drug source city or cite "any case that stands for the proposition that drugs are more likely to be present in a car at night than at any other time of day." *Betow*, 226 Wis. 2d at 96–97. Here, Officer Deering testified that "Milwaukee would be what's called a source city for drugs. So people will come down - - or drive drugs up from Milwaukee because you

can sell them at a much higher cost up here in the suburbs." (R. 64:19.) And as the State has pointed out, the hour at which Brown was stopped "may be considered in determining the legality of the pat-down search," *Morgan*, 197 Wis. 2d at 214, and "the time of day is another factor in the totality of the circumstances equation," *Allen*, 226 Wis. 2d at 74–75.

The only other factors in *Betow* were that the driver appeared nervous and had a picture of a mushroom on his wallet. But the driver was not in a rental car in a dead-end cul-de-sac of closed businesses, and the officer did not learn that the driver had prior arrests involving drugs and weapons.

The facts of this case are more compelling than those in *Floyd*, *Gammons*, or *Betow*. Officer Deering had reason to be suspicious based on where and when he observed Brown's vehicle, that Brown was from Milwaukee and in a rental car, and that Brown's account of his route of travel and his whereabouts was vague and untrue. When Officer Deering learned about Brown's prior arrests involving drugs and weapons, there was reasonable suspicion of criminal activity.

C. Brown's arguments that reasonable suspicion did not support the search are not persuasive.

Brown acknowledges that a court is to consider the totality of the circumstances in determining whether reasonable suspicion supported a search. (Brown's Br. 30.) But he argues that each of the circumstances separately, would not provide reasonable suspicion. (Brown's Br. 31–35.) "The totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018) (citation omitted). It makes no difference whether any of the circumstances, alone, would not constitute reasonable suspicion. As the circuit court

recognized, the totality of the circumstances provided reasonable suspicion to search.

Brown asserts that "Officer Deering lacked reasonable suspicion to prolong the traffic stop to engage in an investigation of illegal drug activity." (Brown's Br. 29.) He claims that the information that Officer Deering had does not provide reasonable suspicion of criminal activity, but only "reflect[s] a consistent story of an out-of-town driver in an unfamiliar location." (Brown's Br. 29.) But Brown downplays the significance of information that, as the circuit court concluded, provided reasonable suspicion.

Brown argues that being from Milwaukee and driving a rental car late at night, in another city, did not provide reasonable suspicion of illegal activity. (Brown's Br. 32–33.) The State agrees that any of those facts alone would not provide reasonable suspicion. But those facts, along with exactly where Brown was, and his explanation for why he was there, where he came from and where he was going, and his criminal record, provided reasonable suspicion.

Brown points out that an overwhelming majority of people using rental cars are innocent travelers. (Brown's Br. 32.) But as Brown acknowledges, "some drug traffickers may use rental cars." (Brown's Br. 32). And the use of a rental car is a factor in assessing reasonable suspicion. *Thomas*, 913 F.2d at 1116; *Finke*, 85 F.3d at 1280.

Brown points out that being from Milwaukee "is an innocent activity common to many." (Brown's Br. 33.) But as Officer Deering testified, Milwaukee is known to law enforcement as a source city for drugs in the Fond du Lac area. (R. 64:19.)

Brown argues that it being "late at night when Officer Deering encountered Brown does not increase suspicion of drug activity." (Brown's Br. 33.) But Wisconsin courts have

recognized that the fact of an encounter occurring late at night or early in the morning is a consideration in assessing probable cause. *Morgan*, 197 Wis. 2d at 214; *Allen*, 226 Wis. 2d at 74–75.

Brown argues that these factors "fit the profile of 'a very large category of presumed innocent travelers.'" (Brown's Br. 34 (citation omitted).) The State agrees. Had those been the only factors, there would not have been reasonable suspicion of criminal activity. But those weren't the only factors.

Brown argues that "Officer Deering's conclusion that Brown gave evasive answers to questions about where he had been that evening was objectively unreasonable." (Brown's Br. 34.) He says that not knowing the last name or address of a person he met online "is devoid of information suggesting Brown had a close relationship with the friend." (Brown's Br. 34.) However, Brown told Officer Deering that he had seen his "girlfriend." (R. 64:15–16.) Brown's use of the word "girlfriend," his travelling from Milwaukee to Fond du Lac to see her, and his staying at her house until very late at night suggest that he should have known her last name and address.

Brown claims that there was nothing suspicious about his telling Officer Deering he had come from a Speedway gas station. (Brown's Br. 34.) But Brown told Officer Deering he had come directly from a Speedway gas station, and Officer Deering—who knew the area—knew that explanation was untrue. (R. 64:12.) Brown points out that he "testified that he merely had pulled onto the dead-end street to turn around." (Brown's Br. 35.) But Brown did not tell Officer Deering that he had only turned around there. He said he came directly from the Speedway. (R. 64:12.) And Brown does not mention that when Officer Deering asked him where he was going, he answered, "nowhere really." (R. 64:16.) Vagueness and lying

in the explanation of where an individual had been coming from when stopped is a factor pointing to reasonable suspicion. *Malone*, 274 Wis. 2d 540, ¶ 37. And a suspect's inadequate explanation for his conduct is a legitimate factor in a reasonable suspicion analysis. *Betow*, 226 Wis. 2d at 97.

Brown argues that Officer Deering's knowledge that Brown "had been arrested twice for drug-related crimes" did not provide reasonable suspicion. (Brown's Br. 35.) But Brown had been convicted of possession of cocaine with intent to deliver, and had arrests for possession of cocaine with intent to deliver, armed robbery, and other drug crimes. (R. 64:17.); *Brown*, 388 Wis. 2d 161, ¶¶ 6, 23.

Brown claims that his record should not "attach a suspicious character to Brown's innocent actions." (Brown's Br. 36.) But knowledge of a subject's prior drug activity is a factor in a reasonable suspicion analysis. *State v. Lange*, 2009 WI 49, ¶ 33, 317 Wis. 2d 383, 766 N.W.2d551; *Gammons*, 241 Wis. 2d 296, ¶ 21. And Brown's record added to actions that already did not appear innocent.

Brown likens this case to *Gammons*, 241 Wis. 2d 296, in which the court of appeals found no reasonable suspicion when there was "'an out-of-town vehicle in an area purportedly known for drug activity,' at night, and the suspect was nervous," and the officer knew of the suspect's prior drug activity. (Brown's Br. 36 (citation omitted).)

But the car was not a rental car, *Gammons*, 241 Wis. 2d 296, ¶ 2, and it was stopped at 10:00 p.m. *id.* ¶ 21. And nothing in *Gammons* indicates that the driver or the suspect gave vague or untruthful explanations of where they had come from, where they were going, or what they were doing.

In contrast, Brown was driving a rental car, and his car was not observed on a highway at 10:00 p.m., but in a dead-end cul-de-sac of closed businesses at 2:44 a.m. And unlike in

Gammons, Officer Deering knew that Brown's explanation of his whereabouts was untrue. There was no reasonable suspicion in *Gammons*, but the circuit court correctly concluded that under the totality of circumstances, there was reasonable suspicion that Brown was involved in criminal activity.

III. This Court should affirm the decision on the court of appeals and should not remand the case to the circuit court.

Brown moved to suppress the drugs that police found when they searched him, asserting that the traffic stop was impermissibly extended, there was no reasonable suspicion to extend the stop, and he did not consent to the search. (R. 33.) The circuit court denied the motion on the ground that the officer had reasonable suspicion of criminal activity. (R. 64:70–72.) The court assumed without deciding that Brown consented to the search. (R. 64:72). The court said, "So at this point, based on the issues before the court today, the court is denying the motion to suppress." (R. 64:72.) It added, "There's a separate issue as to whether Mr. Brown actually consented to the search, and if he did not, whether the search of him was constitutionally valid." (R. 64:72.) The court said, "But that's an issue for a different day, with potentially additional witnesses." (R. 64:72.)

Brown pled no contest in this case and another case without another hearing or a determination whether he consented to the search. He appealed his conviction but did not raise the consent issue. The court of appeals noted that the circuit court had "held the consent issue in abeyance for a further hearing," and that "Brown pled to the charge without further pursuing a challenge to the voluntariness of his consent." *Brown*, 388 Wis. 2d 161, ¶ 16. And it noted that

Brown appealed only the issue regarding the stop being extended. *Id.*

Brown now asserts that if this Court affirms the circuit court's decision that affirmed his judgment of conviction, it must remand the case to the circuit court to make a factual finding that he did or did not consent to the search. (Brown's Br. 37–40.)

That issue is not properly before this Court for two independent reasons: Brown did not raise the issue in the court of appeals or in his petition for review. "Generally, a petitioner cannot raise or argue issues not set forth in the petition for review unless this court orders otherwise." *Jankee v. Clark Cty.*, 2000 WI 64, ¶ 7, 235 Wis. 2d 700, 612 N.W.2d 297. An issue is also forfeited before this Court if it was not raised in the court of appeals. *See, e.g.*, *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶ 30 n.5, 274 Wis. 2d 1, 681 N.W.2d 914; *State v. Margaret H.*, 2000 WI 42, ¶ 37 n.5, 234 Wis. 2d 606, 610 N.W.2d 475.

In any event, there is no need to remand this case to the circuit court, because by pleading no contest before the court decided whether he consented to the search, Brown abandoned the issue. A defendant who files a suppression motion but is convicted before the circuit court has decided the issue, has abandoned the suppression issue. *State v. Woods*, 144 Wis. 2d 710, 716, 424 N.W.2d 730 (Ct. App. 1998); *see State v. Jacks*on, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) (citing *Woods* for principle that "motion made but not pursued is abandoned").

While represented by counsel, Brown chose to enter a no contest plea before the circuit court decided one the issues in his suppression motion. The decision "not to pursue a previously filed motion to suppress . . . is a waiver binding on"

Brown. *State v. Wilkens*, 159 Wis. 2d 618, 624, 465 N.W.2d 206 (1990).

Brown points out that the State "bore the burden of proving by clear and convincing evidence that Brown's consent to the search was voluntary." (Brown's Br. 39.)

But Brown relieved the State of its burden by abandoning the issue and pleading no contest.

Brown also points out that the State "did not request an additional hearing or otherwise provide the accounts of the fact witnesses" that the circuit court "determined were needed to resolve the issue of consent." (Brown's Br. 39–40.)

But the State had no need to request a hearing or prove what witnesses would have said had Brown pursued the issue, because Brown abandoned the issue and pled no contest.

By pleading no contest, Brown waived the consent issue. "[A] guilty, no contest, or *Alford* plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886 (footnote omitted) (citing *State v. Multaler*, 2002 WI 35, ¶ 54, 252 Wis.2d 54, 643 N.W.2d 437).

The general rule has two exceptions. One, a judicially created exception for double-jeopardy multiplicity claims that can be resolved based on the appellate record, *Kelty*, 294 Wis. 2d 62, ¶¶ 19, 34, plainly does not apply in this case.

The second exception is statutory. "As a matter of state public policy, the legislature has abandoned the guilty-plea-waiver rule in one situation." *State v. Riekkoff*, 112 Wis. 2d 119, 124, 332 N.W.2d 744 (1983). Specifically, Wis. Stat. § 971.31(10) creates a "narrow exception to the rule of waiver." *State v. Nelson*, 108 Wis. 2d 698, 702, 324 N.W.2d 292 (Ct. App. 1982). Under section 971.31(10):

> An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint.

The statutory exception applies to an order denying a motion to suppress evidence. A Judicial Council comment to the statutory exception explains that the exception "permits a defendant to appeal from a guilty plea when, prior to the entry of the guilty plea, the court had denied a motion to suppress evidence. On review, the appellate court can determine whether or not the order denying a suppression of evidence was proper." *Riekkoff*, 112 Wis. 2d at 125 (citing 1970 Wisconsin Annotations 2142).

The statutory exception authorized review of the circuit court's order denying Brown's motion to suppress evidence. But the statutory exception does not apply to an issue in the suppression motion that the circuit court never decided, when it made clear that it would later decide the issue.

If this Court affirms, and Brown wishes to pursue the consent issue that he abandoned and waived by pleading no contest, he perhaps could move to withdraw his plea. But he is not entitled to remand in this case for the circuit court to decide an issue that he has he has abandoned and waived.

CONCLUSION

This court should affirm the court of appeals' decision affirming the judgment of conviction.

Dated this 20th day of December 2019.

Respectfully submitted,

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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 10,998 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 20th day of December 2019.

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