STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2007AP1104-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROY S. ANDERSON,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. PIONTEK, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Under Act 79,[1] a Wisconsin police officer has authority to search a person on extended supervision for a felony when the officer reasonably suspects that the person is committing, is about to commit, or has committed a crime.

1. Did a police officer, who knew that Roy S. Anderson had been released from prison to community supervision five months earlier on a felony sentence, reasonably believe that Anderson was subject to Act 79 when he lawfully stopped him?

2. Did the officer have reasonable suspicion to search Anderson where he knew Anderson and his past record of drug trafficking; where the officer received tips within the previous two weeks from a reliable and credible informer that Anderson was selling crack cocaine in a particular alley; where the officer saw Anderson in that alley; and where, upon seeing the officer, Anderson acted evasively?

The circuit court and court of appeals answered both questions, "Yes."

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for September 4, 2019. This Court normally publishes its decisions.

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[1] Wis. Stat. § 302.113(7r).

INTRODUCTION

This case asks this Court to answer two questions. First, did the police officer in this case reasonably believe that Anderson was subject to Act 79, a law that allows police to search individuals who have commenced community-supervision felony sentences after December 2013, when the officer has reasonable suspicion that the person was involved in a crime? And second, did the officer in this case have reasonable suspicion to search Anderson?

The answer to both questions is "yes." The arresting officer had a reasonable belief that Anderson—who was in fact subject to Act 79—was subject to the Act, and he had reasonable suspicion under the circumstances that Anderson was engaging in illegal drug activity when he searched him. This Court should reject Anderson's arguments to the contrary and affirm.

STATEMENT OF THE CASE

Based on his no-contest plea, Anderson stands convicted of possession with intent to distribute cocaine, less than or equal to one gram, second and subsequent offense. (R. 14:1.) The conviction stemmed from an August 25, 2015, incident when Racine police arrested Anderson—who was then on extended supervision for a previous second-or-subsequent conviction for felony possession with intent to distribute cocaine—after finding cocaine and other evidence of distribution on him during a search under Act 79. (R. 1:1–4; 14:1.)

I. 2013 Act 79

In December 2013, the Legislature enacted 2013 Wis. Act 79, which allows law enforcement to search individuals serving a community-supervision portion of a sentence,

when law enforcement has reasonable suspicion to believe that the individual has committed, is committing, or is about to commit a crime or violation of a condition of his release to the community. *See* 2013 Wis. Act 79.

The statute applies to persons who begin serving extended supervision,[2] parole,[3] or probation[4] after the December 2013 effective date. 2013 Wis. Act 79, § 10.

Anderson does not dispute that as of March 17, 2015, he began serving the extended supervision portion of a prior felony sentence and that, at the time of his encounter with police on August 25, 2015, he was subject to the search provisions in Act 79. He asserts that the police did not have sufficient knowledge that he was subject to the Act before the search and that they otherwise lacked reasonable suspicion justifying the search.

II. Motion to suppress

Before the trial court, Anderson filed a motion to suppress the evidence that police found. (R. 7:1–2.) He asserted that police lacked reasonable suspicion to stop, detain, and search him. (R. 7:1–2.) The circuit court held a hearing on the motion, from which most of the facts below are taken. (R. 24.)

Officer Michael Seeger was the sole witness at the hearing. An eight-year veteran of the Racine Police Department, Seeger knew Roy Anderson well before he arrested him on August 25, 2015. In 2012, citizen informants

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[2] *See* Wis. Stat. §§ 302.043(4), 302.045(3m), 302.05(3)(c)4., 302.113(7r), 302.114(8g).

[3] *See* Wis. Stat. §§ 302.11(6m), 304.02(2m), 304.06(1r).

[4] *See* Wis. Stat. § 973.09(1d).

brought Anderson's name to Seeger's attention during the course of his duties. (R. 24:18.) And, in 2012, Seeger arrested Anderson for possession with intent to distribute crack cocaine in Racine. (R. 24:18.) Seeger was aware that Anderson had been convicted of felony possession of crack cocaine after that 2012 arrest, and he knew that Anderson had been released from prison to "probation" on March 17, 2015.[5] (R. 24:18–19.) Specifically, when asked whether he was aware that Anderson's status made him subject to Act 79 on August 25, 2015, Seeger said, "Yeah. Once he was released on probation, I ran him out. I did a record check of him and knew that he felony [sic] under Act 79." (R. 24:19.)

The record bore out Seeger's testimony regarding his understanding of Anderson's status. After Seeger arrested Anderson in 2012, Anderson was convicted of two felony counts of possession of cocaine, second offense, in Racine County Case No. 12CF1144 on June 9, 2013. (R. 11:9.) In that case, the court sentenced Anderson on October 29, 2013; he was placed in prison for one year to be followed by two years of extended supervision. (*Id.*) Anderson's two years of extended supervision commenced on March 17, 2015, when he was released from prison. (*Id.*)

Further, as Officer Seeger testified, there were a few reasons that Anderson came to his attention on August 25, 2015. In the previous two-and-a-half weeks, Officer Seeger received two tips "from a reliable and credible" informant advising that Anderson was selling crack cocaine in the back

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[5] Seeger did not refer to any of Act 79's statutory provisions, but he used the term "probation" in his testimony to describe Anderson's status. Anderson was on extended supervision and subject to Act 79 under Wis. Stat. § 302.113(7r).

alley behind 1619 South Memorial Drive in Racine, an area known for drug trafficking. (R. 24:9–10.) And, consistent with those tips, on August 25, 2015, at approximately 4:15 p.m., Officer Seeger saw Anderson at 1619 South Memorial Drive. Anderson, at the time, was riding a bicycle on the sidewalk, which was a violation of a city ordinance. (R. 24:5–6, 9–10.)

Upon observing Anderson riding on the sidewalk, Officer Seeger made a U-turn in his squad so that he could stop him.[6] (R. 24:7.) Officer Seeger testified that Anderson, upon seeing Officer Seeger, made a right turn down the immediate close-by alley, repeatedly glanced back over his shoulder at Seeger as he followed him in his car, and put his left hand over his left front jacket pocket. (R. 24:8–10, 13.)

After Officer Seeger pursued Anderson by driving into the alley, he observed that Anderson kept his left hand over his left front jacket pocket, as though he was attempting to conceal an item. (R. 24:8–9, 14.) Anderson kept his hand in his pocket until Seeger ordered him to stop. (R. 24:11, 14.) Seeger testified that based on his training and experience, "individuals involved in criminal activity such as possession of illegal narcotics will be overly curious about police's position and will also attempt to evade them as they attempt to approach." (R. 24:7.) Moreover, Seeger testified that Anderson's keeping his left hand in his pocket was consistent, in his training and experience, with an "attempt to hide or destroy or conceal illegal narcotics when they have police interaction or being approached by police." (R. 24:9.)

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[6] Officer Seeger described his squad as a "Racine Police Department unmarked Impala" with "interior lights and sirens." (R. 24:8.)

Based on the two tips, Seeger's observations of Anderson's evasive actions, Anderson's prior criminal history, Anderson's being in the exact area described by the tipster, and the proliferation of drug trafficking in the area, Officer Seeger suspected that Anderson possessed illegal drugs and searched Anderson under Act 79. (R. 24:8–11, 15.) This search led to the discovery of two individual bags of crack cocaine, over $200 in cash, and two cell phones. (R. 24:11–12.)

After Officer Seeger testified, the parties agreed that, given that Anderson was subject to Act 79, Officer Seeger needed only reasonable suspicion that Anderson was committing a crime to support the search.[7] They disputed whether Officer Seeger had that reasonable suspicion. (R. 24:20–23.)

The circuit court made the following findings and conclusions:

First, as to whether the initial stop was legal, the court found that on August 25, 2015, Anderson was riding his bicycle on a sidewalk. (R. 24:24.) Because that activity was in violation of a city ordinance, Officer Seeger had a right to "come into contact" with Anderson. (R. 24:24.)

Second, the court then considered whether the officers were authorized to search Anderson, and concluded that they were, based on the following findings: "The properly proven facts are that initially [Anderson] had his hands on

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[7] Although Anderson pointed out that Seeger, in his police report, referred to the statute applying Act 79 to parolees, he did not advance an argument to the circuit court that Seeger did not know that Anderson was subject to Act 79. (R. 24:20–23.)

the handlebars of the bicycle. The officer testified specifically that when [Anderson] turned around and looked at the police officer, he removed one of his hands" from the handlebars "and placed it into a pocket." (R. 24:24–25.)

"But before all that happened," the court continued, Officer Seeger "had personal information in that he had arrested the defendant in the past for possession with intent to deliver. He knew that [Anderson] was on parole or probation . . . or extended supervision from that arrest" and knew that he was subject to an Act 79 search. (R. 24:25.)

And, the court found, Officer Seeger had additional information available to him, including two tips that Anderson "was selling cocaine in the area and the alley" where Seeger found Anderson. (R. 24:25–26.) Even though the tips were "dated"—the most recent being within eight days of the encounter—the court found that their nature suggested that Anderson's selling was "a continuing activity." (R. 24:10, 13, 25.) The court further found that Anderson, in addition to putting his hand in his pocket, "kept riding until he was verbally instructed to stop. Even though he saw the police behind him, he made no effort to stop." (R. 24:26.) In addition, the court noted that Officer Seeger testified that Anderson was in "a high drug area in terms of drug sales and purchases." (R. 24:26.)

"[U]nder all the facts and circumstances," the court concluded that Officer Seeger had reasonable suspicion to search Anderson for possessing illegal drugs. (R. 24:26–27.) Accordingly, the circuit court denied Anderson's motion. (R. 24:26–27.)

III. Plea, conviction, and appeal

Anderson ultimately pleaded no contest to possession of cocaine, one gram or less, with intent to deliver (second or subsequent offense) and was sentenced to 10 years' imprisonment, comprised of five years' initial confinement and five years' extended supervision. (R. 26:24; 14:1.)

Anderson appealed, and the court of appeals affirmed in a five-page per curiam decision. *State v. Roy S. Anderson*, Case No. 2017AP1104-CR (Wis. Ct. App. Sept. 12, 2018) (A-App. 101–05). The court of appeals held that Seeger had a sufficient basis to believe that Anderson was subject to Act 79:

> Seeger was familiar with Anderson, having arrested him before for possession of cocaine. He knew that Anderson had been convicted of a felony and released on community supervision on March 17, 2015. Although Seeger did not know the length of Anderson's supervision, it was reasonable to presume that it lasted for a period beyond the date of the search, which was August 25, 2015.

Id. ¶ 9. (A-App. 104.)

And like the circuit court, the court of appeals held that Seeger had reasonable suspicion that Anderson was engaged in illegal drug activity justifying an Act 79 search, based upon the tips, Anderson's record, his location at the time of the encounter, and his evasive behavior upon seeing Seeger:

> the tips [Seeger] received from a confidential informant, advising that Anderson was selling narcotics near the location where Seeger first observed him. It was also based upon: (1) Anderson's history of possessing illegal narcotics; (2) his presence in a high drug trafficking area; and (3) his peculiar behavior upon seeing Seeger, which

> included turning down a nearby alley, repeatedly glancing backwards, and taking his left hand off the bicycle's handlebars and placing it into his front jacket pocket, as though he was attempting to conceal something. These facts, taken together with rational inferences, give rise to the reasonable suspicion that Anderson was engaged in illegal drug activity.

Id. ¶ 10. (A-App. 104.)

This Court granted Anderson's petition for review.

STANDARD OF REVIEW

Ultimately, this Court is reviewing the circuit court's denial of Anderson's motion to suppress. This Court will uphold the circuit court's findings of fact unless they are clearly erroneous, but it reviews de novo whether those facts constitute reasonable suspicion. *State v. Young*, 2006 WI 98, ¶ 17, 294 Wis. 2d 1, 717 N.W.2d 729 (cited source omitted).

ARGUMENT

I. The circuit court's findings that Anderson was subject to Act 79 and that Officer Seeger knew it were not clearly erroneous.

Anderson first asserts that Officer Seeger did not sufficiently know Anderson's community-supervision status and that he was subject to Act 79. (Anderson's Br. 8–19.) He is wrong. Because the circuit court made sound findings to the contrary and both lower courts reached correct legal conclusions, Anderson is not entitled to relief on this portion of his claim.

A. Parolees, probationers, and supervisees have diminished protections under the Fourth Amendment compared to law-abiding citizens.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Young*, 294 Wis. 2d 1, ¶ 17. But "what is unreasonable for a probationer differs from what is unreasonable for a law-abiding citizen." *State v. Purtell*, 2014 WI 101, ¶ 22, 358 Wis. 2d 212, 851 N.W.2d 417. While "[l]aw-abiding citizens are entitled to the full panoply of rights and protections provided under the Fourth Amendment," probationers, parolees, and supervisees "'do not enjoy the absolute liberty to which every citizen is entitled'" and have "'significantly diminished privacy interests.'" *Id.* (citing *Samson v. California*, 547 U.S. 843, 849–50 (2006)).

That is so, in part, because "'the very assumption of the institution of probation'" is that the probationer and other individuals serving a criminal sentence in the community are "'more likely than . . . ordinary citizen[s] to violate the law.'" *See United States v. Knights*, 534 U.S. 112, 120 (2001). Accordingly, to balance the State's dual interest in an offender successfully completing a term of supervision and its concern that the offender will commit new crimes, searches of individuals on probation or other forms of community supervision can be subject to searches supported by reasonable suspicion that the offender has committed, is committing, or is about to commit a new crime. *See id.* at 121 (upholding reasonableness of law enforcement search of probationer's home "[w]hen an officer has reasonable suspicion that a probationer is subject to a search condition is engaged in criminal activity").

Act 79 took effect on December 14, 2013, and applies to people released on parole, extended supervision, and probation after that date. *See* Wis. Stat. § 302.113(7r). The Act, as it relates to people released on extended supervision under Wis. Stat. § 302.113(7r), provides in relevant part:

> A person . . . , his or her residence, and any property under his or her control may be searched by a law enforcement officer at any time during his period of supervision if the officer reasonably suspects that the person is committing, is about to commit, or has committed a crime or a violation of a condition of release to extended supervision.

Id.

B. Under Wisconsin law, Officer Seeger needed to have a reasonable belief that Anderson was subject to Act 79.

Wisconsin courts have not considered what quantum of information an officer must have available to him or her to know whether a person is subject to Act 79.

Generally, in assessing questions whether law enforcement had sufficient knowledge of a person's legal status or the legality of their actions, the officer must have a "reasonable belief" that the status or action in question was legal. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (applying "reasonable belief" standard to question whether officer knew warrantless entry was legal).

Under this standard, a court examines whether the officer's belief was reasonable under the totality of the circumstances test. *Id.* For example, in *State v. Kassube*, a police officer stopped Kassube because he believed that Kassube did not have a driver's license. 2003 WI App 64, ¶ 2, 260 Wis. 2d 876, 659 N.W.2d 499. There, the police officer had known Kassube for nine to twelve years, during which Kassube had never had a license, and as of eleven months

before the stop at issue, the officer knew that Kassube had no license. *Id.* ¶¶ 2, 8. The court of appeals held that the officer's belief was reasonable: "It was reasonable for [the officer] to believe that if Kassube had not obtained a license in nine to twelve years, he did not do so in the last eleven months and was likely to be driving without a license." *Id.* ¶ 8.

Similarly, in *State v. Tomlinson*, 2002 WI 91, ¶ 27, 254 Wis. 2d 502, 648 N.W.2d 367, the issue was whether police sufficiently knew that a girl opening a door at Tomlinson's house was his daughter and thus had authority to consent to their entry. There, this Court held that the officers reasonably believed that the girl opening the door was one of Tomlinson's daughters, based on their knowledge that he had two teenage daughters, the girl opening the door was a teenager, and Tomlinson was nearby when she answered the door and did not object when the girl allowed the officers inside. *Id.* ¶ 28.

That reasonable belief test is appropriate to apply to whether an officer knows that a person is subject to Act 79. And Anderson appears to agree on that standard, based on his citations to cases applying the objective reasonable belief test for assessing a police officer's actions. (Anderson's Br. 12–13 (citing *Scott v. United States*, 436 U.S. 128, 137 (1978); *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305).) Hence, the dispute here boils down to whether Officer Seeger objectively reasonably believed that Anderson was subject to Act 79 under the circumstances. As discussed below, he did.

C. Officer Seeger objectively reasonably believed that Anderson was subject to Act 79 under the circumstances.

Here, Officer Seeger testified that he was aware of Anderson's status because he had checked Anderson's record at some point after Anderson was released from prison on a felony conviction on March 17, 2015, which was after Act 79 went into effect. (R. 24:19.) Officer Seeger's curiosity about Anderson's status was understandable for several reasons. He had arrested Anderson in 2012 for the felony—possession with intent to deliver crack cocaine—that resulted in Anderson's imprisonment and release to extended supervision. (R. 24:18–19.) Given that testimony, the circuit court soundly found that Officer Seeger "had . . . arrested [Anderson] in the past for possession with intent to deliver," "knew that [Anderson] was on parole or probation . . . or extended supervision from that arrest," and knew that Anderson was subject to an Act 79 search. (R. 24:25.) And those findings support the conclusion that Seeger's belief was objectively reasonable under the circumstances.

Anderson disagrees. He emphasizes that Officer Seeger used the term "probation" to refer to Anderson's status when he was actually on extended supervision. (Anderson's Br. 12, 16–18.) But that Seeger misstated the form of community supervision that Anderson was serving makes no difference: Officer Seeger knew that Anderson had been convicted of a felony, which would have made him subject to Act 79 regardless whether he was serving probation or extended supervision. Wis. Stat. §§ 302.113(7r); 973.09(1d).

Moreover, it is not unusual for parties or courts to use the term "probation" interchangeably with other forms of community supervision like supervision or parole. *See, e.g.,*

G.G.D. v. State, 97 Wis. 2d 1, 4 n.2, 292 N.W.2d 853 (1980) (explaining its choice to use the term "probation" to refer to juvenile "supervision"). Accordingly, the circuit court—to the extent that it found that Seeger knew that Anderson "was on parole or probation . . . or extended supervision" from the 2012 arrest for a felony—was entitled to infer that Officer Seeger used the term "probation" to refer generally to Anderson's community-supervision status, particularly given that Seeger credibly testified that he actually checked Anderson's record to make himself aware of his status.[8]

Anderson suggests that Officer Seeger was operating off of stale information, in part because "probation can last for less than five months in some cases and it can be terminated early." (Anderson's Br. 17.) There are a few flaws with that argument. To start, it is built on the faulty factual premise that Officer Seeger learned no later than March 17, 2015—Anderson's release date—that Anderson was on community supervision. (*See* Anderson's Br. 8, 16.) The record, however, is not clear as to when between March 17 and August 25 that Officer Seeger located Anderson's record and learned his status. Again, when asked whether he was aware that Anderson was subject to Act 79 on August 25, 2015, Seeger answered, "Yeah. Once he was released on probation, I ran him out. I did a record check of him and

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[8] Anderson is wrong to deem clearly erroneous any findings by the circuit court beyond that Seeger arrested Anderson in 2012 for possession with intent to deliver and that he was released on probation in March 2015. (Anderson's Br. 17 n.5.) Seeger was also aware that he was released on felony charges in March 2015 (R. 24:19), and as discussed, the circuit court was entitled to infer that Seeger understood that Anderson had been released on a form of community supervision on a date that made him subject to Act 79.

knew that he felony [sic] under Act 79." (R. 24:19.) In other words, at some point after Anderson was released, Seeger checked and saw that Anderson was released on a felony conviction on March 17, 2015, which meant that Anderson was serving community supervision and subject to Act 79. It is not clear when, between March 17 and August 25, 2015, Seeger made that check.

But even assuming that Officer Seeger checked Anderson's record on or near March 17, 2015, his belief that Anderson was still subject to Act 79 five months later was objectively reasonable. That is so because the community supervision portion for anything but the most minimal felony sentence is highly unlikely to be less than six months. *See, e.g.*, Wis. Stat. § 973.01(2) (setting minimum and maximum periods for bifurcated sentences).

To that end, Anderson's claims to the contrary lack support because the statutes Anderson cites (*see* Anderson's Br. 17 (citing Wis. Stat. § 973.09(2)(a)1.)), provide for minimum probation periods for misdemeanors, which are generally at least *six* months. Here, Seeger knew that Anderson was convicted of a felony, which would carry a minimum probation period of one year. Wis. Stat. § 973.09(2)(b)2. Moreover, the availability of shortened probation only applies after a petitioner has served at least half of his term of probation, which for a felon given a minimal probation of one year would still mean that he would serve at least six months' time. Wis. Stat. § 973.09(3)(d).

Further, the out-of-state cases that Anderson cites are off-point and do not lend persuasive support. (Anderson's Br. 13–16.) In *United States v. Williams*, 702 F. Supp. 2d 1021, 1031 (N.D. Ill. 2010), a federal district court held that

under Illinois law regarding parole searches, officers needed to be aware of three things: (1) the offender was on parole, (2) the parole agreement contained a search condition, and (3) the place to be searched was the offender's residence. There, the State satisfied the first prong because an officer knew before the search that the offender was on parole, but it failed the second and third prongs, because it did not know whether the offender's agreement contained a search provision and whether the apartment that police searched was his residence. *Id.*

Unlike the law in Illinois, under Act 79, Officer Seeger only needed to know that Anderson was on parole, probation, or extended supervision for a felony and that the period of supervision commenced after the Act's effective date in December 2013. As discussed, he knew that information. *Williams* does not assist Anderson.

Nor does *People v. Sanders*, 73 P.3d 496, 507–08 (Cal. 2003). (Anderson's Br. 14–15.) In *Sanders*, the officers who searched the defendant did not know that the defendant was on parole or that he was subject to a search condition of his parole; rather, they learned this information after the search. *Id.* at 499. In contrast, here, Officer Seeger did not make an unlawful search and then seek to have the evidence salvaged by a later discovery of Anderson's status. Rather, he made a lawful search based on his reasonable belief that Anderson was subject to Act 79 under the circumstances. That Anderson's record in fact confirmed Seeger's reasonable belief did not turn Seeger's actions into the "search-first, check-later" scenario criticized in *Sanders*.

For the same reasons, none of the other cases Anderson cites (Anderson's Br. 16) support his position.[9] He has identified no cases that suggest that information similar to what Officer Seeger had available to him before he stopped Anderson was insufficient to establish an objectively reasonable belief that a defendant was on community supervision.

To the contrary, at least one case provides persuasive authority supporting the State's position. In *People v. Douglas*, 193 Cal. Rptr. 3d 79, 93–94 (Cal. Ct. App. 2015), a defendant challenged a search under California's equivalent to Act 79 by arguing that the police officer did not know he was subject to a probation search, where the officer had last verified the defendant's post-release community supervision (PRCS) status two months before the search. The California court held that the officer had an objectively reasonable belief of the defendant's status under circumstances similar to those here. The court wrote that "[o]ne of the key distinguishing feature of this case is that [the detective] had personally been involved in a previous arrest of [the defendant] for a weapons violation approximately two years before the current offense." *Id.* In addition, the detective

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[9] *See People v. Coleman*, 2 N.E.3d 1221, 1224–25 (Ill. App. 2013) (holding that search was unlawful where officers did not know that the defendant was on parole); *State v. Donaldson*, 108 A.3d 500, 504 (Md. 2015) (holding that search by officer with no knowledge of defendant's probationary status could not be saved by later discovery of that status); *Moreno v. Baca*, 431 F.3d 633, 638–39 (9th Cir. 2005) (holding that valid parole search required officers to know that the defendant was on parole); *Riccardi v. Perini*, 417 F.2d 645, 648 (6th Cir. 1969) (invalidating search where officers did not know the defendant, had no prior information about him, did not know he was on parole, and had no knowledge that a crime had been committed).

knew that the defendant had been released from prison to supervision for the conviction from that prior arrest, and "his presumed knowledge of the law pertaining to firearms offenses, related punishments, and the usual length of PRCS, it was reasonable for him to make a rough calculation that [the defendant] would still be on PRCS as a result of the earlier offense." *Id.*

Anderson also suggests that upholding the court's findings regarding Officer Seeger's reasonable belief here would encourage a search-first, check-later approach that police could exploit. (Anderson's Br. 18.) Not so. Again, Officer Seeger knew Anderson, he was aware of his status, and he knew that Anderson was subject to Act 79. This wasn't a situation where law enforcement encountered an unknown person who they thought was more likely than not was subject to Act 79 and opted to "play the odds" by searching him or her.

Finally, Anderson urges this Court to adopt a rule requiring police officers, "when possible, to simply run a records check to determine an individual's supervision status prior to conducting a search." (Anderson's Br. 18–19.) But reasonable belief under the totality of the circumstances does not require absolute certainty. Asking officers to check, when practicable, a defendant's record before conducting an Act 79 search is certainly a good practice, but it is unnecessary when, as here, the law enforcement officer reasonably believed, based on all the facts available to him, that Anderson was subject to Act 79. This Court should affirm on this question.

II. Officer Seeger had reasonable suspicion to search Anderson under Act 79.

As shown above, Anderson was subject to Act 79. Before searching a person who is subject to the Act, law

enforcement must have reasonable suspicion that the person was also engaged in criminal activity. Here, Officer Seeger had that reasonable suspicion, and Anderson is not entitled to relief.

A. Reasonable suspicion is a fact-intensive, totality-of-the-circumstances test that does not require police to rule out the possibility of innocent behavior.

Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young*, 294 Wis. 2d 1, ¶ 21 (citation omitted). What constitutes reasonable suspicion is a common-sense, totality-of-the-circumstances test that asks, under all the facts and circumstances present, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience"? *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citing *State v. Anderson*, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990)). That suspicion cannot be inchoate, but rather must be particularized and articulable: "A mere hunch that a person . . . is . . . involved in criminal activity is insufficient." *Young*, 294 Wis. 2d 1, ¶ 21 (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

That said, a police officer has reasonable suspicion to stop a person when he or she observes acts that are individually lawful, but when taken together, allow that officer to objectively discern "a reasonable inference of unlawful conduct." *Waldner*, 206 Wis. 2d at 60. In other words, police do not need "to rule out the possibility of innocent behavior before initiating a brief stop." *Id.* at 59 (citing *Anderson*, 155 Wis. 2d at 84).

A suspect's prior criminal history is a legitimate factor in a reasonable suspicion analysis. *State v. Lange*, 2009 WI

49, ¶ 33, 317 Wis. 2d 383, 766 N.W.2d 551. To that end, police knowledge of a subject's prior drug activity is relevant to a reasonable suspicion inquiry. *State v. Gammons*, 2001 WI App 36, ¶¶ 22–23, 241 Wis. 2d 296, 625 N.W.2d 623.

Further, informants' tips to police and the credibility and reliability of those tips inform the reasonable suspicion analysis. In assessing whether police reasonably relied on a source's information, this Court balances two overarching factors: (1) the quality of the information, which depends on the source's reliability, and (2) the quantity or content of the information. *State v. Miller*, 2012 WI 61, ¶ 31, 341 Wis. 2d 307, 815 N.W.2d 349. The balance of those factor depends heavily on the reliability of the source: "if an informant is more reliable, there does not need to be as much detail in the tip or police corroboration in order for police to rely on that information." *Id.* ¶ 32.

The reliability of the informant primarily hinges on the informant's willingness to disclose his or her identity to the police. *Id.* ¶ 33. Accordingly, courts distinguish between citizen or confidential informants on one hand and purely anonymous tipsters on the other. As for the former groups of informants, "an informant who provides some self-identifying information is likely more reliable than an anonymous informant because," in part, an informant who identifies him- or herself to police risks being held accountable if his or her allegations turn out to be fabricated. *Id.*

And in that group of more-likely-reliable informants are police tipsters whom the police personally know and have supplied correct information in the past such that the officer reasonably believes the tip to be truthful without significant corroboration. *State v. Rutzinski*, 2001 WI 22, ¶ 19, 241 Wis. 2d 729, 623 N.W.2d 516. If there are strong

indicia of the informant's veracity, there does not have to be any indicium of the informer's basis of knowledge. *Id.* ¶ 21.

In contrast, a totally anonymous tip, in which police do not know the identity of the tipster, requires more corroboration by police to establish its reliability. *Id.* ¶ 22.

B. Officer Seeger formulated the requisite reasonable suspicion for an Act 79 search based on the two tips, Anderson's behavior when Officer Seeger observed him, Anderson's criminal history, and the location where Anderson was found.

Here, Officer Seeger testified that he received two tips from a "reliable and credible confidential informant" that Anderson was selling crack cocaine in an alleyway behind 1619 South Memorial Drive in Racine. (R. 24:10.) Officer Seeger received these two tips within two-and-a-half weeks of his stopping Anderson; the most recent tip came within eight days. (R. 24:10, 14.) Officer Seeger was not cross examined on this point and there is nothing in the record disputing Seeger's remarks as to the informer's reliability. Moreover, based on Seeger's testimony (R. 24:9, 17), the circuit court could fairly infer that Officer Seeger knew the informant's identity and had reason to find him or her credible. And while the record does not show whether the tipster told Officer Seeger the source of his or her knowledge, Officer Seeger's testimony points to his confidence as to the informer's veracity. A strong indicium of an informant's veracity reduces the need to show the informer's basis of knowledge. *Rutzinski*, 241 Wis. 2d 729, ¶¶ 19–21.

In addition, Officer Seeger incorporated his observation of Anderson—whom Officer Seeger knew and who reacted upon seeing Seeger by veering toward the alley, darting backward glances, and removing one of his hands from his bicycle handlebars and placing it into his jacket pocket—into the reasonable suspicion calculus. (R. 24:8–9, 14.) Officer Seeger explained that Anderson's behavior and furtive movements were consistent, based on his training and experience, with a person trying to hide or dispose of illegal drugs. (R. 24:7, 9, 13.) Seeger's knowledge of Anderson's criminal record adds strength to the two tips alleging Anderson's drug activity, and to the suspicious nature of Anderson's evasive behavior when he recognized Officer Seeger's presence in his area.

Finally, Officer Seeger initially observed Anderson in the exact location where the tipster had indicated Anderson was illegally selling crack cocaine, which was an area known for high drug trafficking. (R. 24:9, 26.) So, the location where Officer Seeger first observed Anderson adds further strength to the two tips, to the suspicious nature of Anderson's actions upon first observing the police, and to Anderson's prior record of illegal drug activity.

In all, Officer Seeger had an objectively reasonable basis to suspect that Anderson was in possession of illegal drugs. Under Act 79, he was authorized to search Anderson.

C. Anderson's arguments to the contrary ignore the totality-of-the-circumstances inquiry.

Anderson tries to isolate and discount some of those factors individually to argue that both the circuit court and court of appeals wrongly concluded that Seeger had reasonable suspicion to search Anderson. Specifically, he

discounts the value of the tips (Anderson's Br. 20–25), and Anderson's evasive actions. (Anderson's Br. 25–27.)

As a general matter, those arguments ignore the other factors (Officer Seeger's knowledge of Anderson's criminal history, that Seeger saw Anderson exactly where the informant said he was selling drugs, and that the area was known for drug-trafficking) and the law that reasonable suspicion is a totality-of-the-circumstances test. Even if any one factor is not enough, it is the cumulative effect that matters. And the cumulative effect here was sufficient to justify the search.

As for the reliability of the informant, Anderson tries to align the facts of this case with those in *State v. Kolk*, 2006 WI App 261, ¶ 1, 298 Wis. 2d 99, 726 N.W.2d 337, in which the court of appeals held that the informant's tip in that case was insufficient to supply reasonable suspicion for police to stop Kolk. (Anderson's Br. 22–23.) *Kolk* is unhelpful for two reasons. First, the stop in *Kolk* was based almost solely on a tip; here, as discussed, multiple factors in Officer Seeger's knowledge in addition to the tips informed his reasonable suspicion.

Second, the tip in *Kolk* was distinguishable from the two tips here. There, an officer received a tip from an informant who provided identifying information but asked to be confidential. 298 Wis. 2d 99, ¶ 2. The officer had no past experience with the informant. *Id.* The informant told police that Kolk was driving between Madison and Milwaukee to pick up some Oxycontin and provided a description of Kolk and his car. *Id.* ¶ 3. Police were able to corroborate the tip to the extent that they identified Kolk's identity, his car, and

located him possibly driving his car toward Madison (though not on the most direct route from Milwaukee).[10] *Id.* ¶ 17.

Here, in contrast, Officer Seeger's testimony supports the inference that he knew the informant's identity and that he had reason to believe that the informant was credible, in part based on Seeger's history with Anderson. Seeger was familiar with Anderson, he had arrested Anderson in the past for selling cocaine, and he knew that Anderson was convicted of a felony as a result of that arrest.[11] He found Anderson in the exact location that the informant said Anderson was selling drugs, the area was known for drug-trafficking, and Anderson's reaction corroborated the tip to the extent that it was consistent with possessing illegal drugs.

As for Officer Seeger's observations of Anderson's reactions to seeing him, Anderson similarly tries, but fails, to align the facts here with *State v. Gordon*, 2014 WI App 44, 353 Wis. 2d 468, 846 N.W.2d 483. (Anderson's Br. 25–26.) In *Gordon*, police stopped a group of men walking in a high-crime area of Milwaukee after one of them, Gordon, saw the

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[10] Nor can Anderson align his case with *Florida v. J.L.*, 529 U.S. 266 (2000), which involved a wholly anonymous and uncorroborated tip that the defendant was carrying a gun, an activity that is presumed legal in Florida, and officers otherwise had no evidence supporting reasonable suspicion of illegal activity conduct a *Terry* stop. (Anderson's Br. 24.)

[11] By ignoring Seeger's other statements regarding the informant and the inferences that can be drawn from them, Anderson mischaracterizes Officer Seeger's testimony as conclusory. (Anderson's Br. 24.) Moreover, *State v. Mansfield*, 55 Wis. 2d 274, 279–80, 198 N.W.2d 634 (1972), is inapposite because it concerns probable cause standards required in a search-warrant affidavit. (Anderson's Br. 24.)

officer's squad car and made a brief, one-to-two-second adjustment of his left pants pocket. *Id.* ¶¶ 3–4. The court of appeals held that those facts did not supply reasonable suspicion to make a *Terry* stop. *Id.* ¶ 18.

Unlike here, however, there was no evidence in *Gordon* that officers had any other information available to them, that they had past dealings with Gordon, that they knew his criminal history, or that Gordon or his companions did anything else—i.e., walked faster, made other furtive movements, or otherwise appeared to be attempting to flee—to contribute to the officers' reasonable-suspicion calculus.

Anderson's arguments on these points fail for two additional reasons. First, they illustrate that fact-matching in the highly fact-intensive reasonable-suspicion analysis has limited utility. Given that the test requires a totality-of-the-circumstances analysis of all the facts, circumstances, and inferences available to police in a particular situation, whether one court held that there was no reasonable suspicion in a different set of circumstances cannot drive the analysis.

Second, the thrust of Anderson's argument in this portion of his brief is that the tips could have been wrong and Anderson's actions could have had innocent explanations. But police do not need "to rule out the possibility of innocent behavior" to have reasonable suspicion under *Terry*. *See Waldner*, 206 Wis. 2d at 59 (citing *Anderson*, 155 Wis. 2d at 84). The facts in *Terry*, as discussed in *Waldner*, illustrate that principle.

In *Terry*, the Court upheld the legality of a police officer's investigative stop where the officer "observed the defendants repeatedly walk back and forth in front of a store

window at 2:30 in the afternoon, and then confer with each other. The officer suspected the two of contemplating a robbery and stopped them to investigate further." *Waldner*, 206 Wis. 2d at 59.

Even though walking "back and forth in front of a store is perfectly legal behavior . . . reasonable inferences of criminal activity can be drawn from such behavior." *Id.* Indeed, "the suspects in *Terry* 'might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store.'" *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989) (quoting 3 Wayne R. LaFave, *Search and Seizure* § 9.2(c) at 357–58 (2d ed. 1987)). But the officer in *Terry* permissibly stopped the defendants because "Terry's conduct though lawful was suspicious" and "gave rise to a reasonable inference that criminal activity was afoot." *Waldner*, 206 Wis. 2d at 60.

In other words, the presence of ambiguity does not defeat reasonable suspicion. "Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity." *Id.* (citing *Anderson*, 155 Wis. 2d at 84). "Thus, when a police officer observes lawful but suspicious conduct," if that officer can objectively discern "a reasonable inference of unlawful conduct . . . , notwithstanding the existence of other innocent inferences . . . ," that officer may "temporarily detain the individual for the purpose of inquiry." *Id.* (citing same).

As discussed, Officer Seeger's reasonable inference of unlawful conduct followed: when Anderson saw Seeger, whom he knew, he rode his bike away from him, repeatedly looked back to see where Seeger was, put a hand over his left

pocket, and turned down an alley. That reaction, coupled with Seeger's personal knowledge of Anderson and Anderson's history, the two tips that Anderson was selling drugs in that area, and Seeger's experience apprehending people possessing illegal drugs and recognition that Anderson behaved consistently with such possession, supported the reasonable inference that Anderson had illegal drugs on him and was trying to avoid contact with Seeger for that reason.

True, it was possible that the tipster had bad information, that Anderson just happened to be in the neighborhood, and that he simply did not want to interact with the police when he saw Seeger. But under the *Terry* standard, Officer Seeger did not have to eliminate that innocent explanation before acting on his reasonable inference to the contrary.

In sum, the totality of the circumstances in this case point to Anderson engaging in illegal drug activity when Officer Seeger searched him. Thus, the trial court and court of appeals correctly held that Officer Seeger had the objectively reasonable suspicion to believe that Anderson was engaged in illegal drug trafficking. (R. 24:26.) And since, as discussed, Officer Seeger knew that Anderson was subject to Act 79, Officer Seeger properly searched Anderson.

CONCLUSION

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

Dated this 2nd day of July 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 7,150 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).

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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 2nd day of July, 2019.

_____
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