STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP000435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES TIMOTHY GENOUS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court,
the Honorable Dennis C. Cimpl Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

1. Did the police have reasonable suspicion to stop Mr. Genous' car after an officer saw a woman exit a residence late at night and enter his car for ten to fifteen seconds, where the woman matched the general description of an individual with a drug history who lived at that residence?

   The circuit court answered yes.

2. If the initial traffic stop was lawful, did the police exceed the permissible scope of the stop by ordering Mr. Genous to exit the car, sit on the curb, and remove his shoes and socks?

The circuit court implicitly answered no by finding the stop constitutional.

3. Did the police have probable cause to search Mr. Genous' car by opening the car door after they saw hand sanitizer, multiple cell phones, and cigar wrappers in his car?

   The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs will fully address the issues presented, so Mr. Genous does not request oral argument. *See* Wis. Stat. § 809.22(2)(b). He does not

request publication because the case can be resolved by applying established legal precedent to the facts. *See* Wis. Stat. § 809.23(1)(b)1.,3.

STATEMENT OF THE CASE AND FACTS

The State charged Mr. Genous with possession of a firearm by a felon. The complaint alleged that Mr. Genous was driving a car parked outside the residence of a known heroin user. It further alleged that he "appeared to make a transaction before driving off." After making this observation, the police conducted a traffic stop. Inside the car, they observed a handgun sticking out from underneath the driver's seat. The complaint further alleged that Mr. Genous had previously been convicted a felony. (1:1).

Mr. Genous filed a motion to suppress the evidence discovered during the traffic stop and search of his vehicle. (7). His motion alleged that the police did not have reasonable suspicion to believe he was engaged in criminal activity simply because an individual with a prior drug history had briefly entered his car. (7:4-5).

At the suppression hearing, the State called two witnesses: Officer Adam Stikl and Officer Bernie Molthen. Officer Stikl testified that he was on patrol in an unmarked squad car in the city of West Allis when he observed a black sedan around 3:30 a.m. (49:6-7; 24). The vehicle was running, but legally parked on the street across from the residence located the 1601 South 65th Street. (49:6-8). At that

point, Officer Stikl turned his headlights off and drove his car to a location about half a block behind the black sedan. (49:7). The sedan turned its lights off, but no one got out of the car. (49:7).

Officer Stikl offered the following reason for why he decided to stop and watch the vehicle:

> Based on my training and experience, a lot of these drug cars will come into our city, park in front of a house where they are going to sell their drugs to, make the deal inside their vehicle in front of the house and then leave.

(49:8). Officer Stikl also claimed that this area was a "high drug trafficking area." (49:8).

Officer Stikl stated that he watched the black sedan for about one minute. Shortly after the vehicle's lights turned off, a female came out of the residence at 1601 South 65th Street and approached the vehicle. (49:9). According to Officer Stikl, the female matched the general physical description of an individual named Kayla Sienko, a known drug user who lived at address. (49:10-11). Officer Stikl explained that:

> Based on other reports involving this individual where she had been arrested for drug offenses, that's the—the address that she provided when she was arrested. She also worked with our drug unit, and our department sent out—or one of our detectives sent out an email regarding about [sic] that individual.
>
> . . . .

> [W]e've had prior contacts with her. Obviously, she's a heroin user as well as narcotics, and our drug unit sent an email out saying that they were no longer going to work with her and just keep an eye on her because she does obviously still use.

(49:11-13).

Officer Stikl testified that the woman entered the passenger side of the black sedan; however, he was not able to see anything that happened inside the car. (49:13). After about ten to fifteen seconds, the woman exited the vehicle and went back inside her house. (49:14). She did not appear to be carrying anything, Officer Stikl said, either when she entered the vehicle or exited. (49:14). Officer Stikl nevertheless suspected that he had witnessed a drug transaction. (49:14). He therefore radioed other officers to inform them about what he had seen and tell them that he was going to perform a traffic stop. (49:14).

Within a few seconds, the sedan turned its headlights back on and drove off. (49:15). Officer Stikl followed for approximately three blocks and then initiated a traffic stop. (49:15). He stated that the sole basis for the stop was his observations of the woman entering and exiting the car; no traffic violations had occurred. (49:15). Prior to stopping the vehicle, Officer Stikl ran the car's license plate and discovered that it was registered to a person who lived in the city of Milwaukee. (49:34-35).

Officer Stikl testified that the driver of the vehicle, who he identified as Mr. Genous, pulled over right away. (49:16). After Officer Stikl made contact with him, Mr. Genous told Officer Stikl that he had been meeting his mistress; however, she failed to show up. When Officer Stikl told him that he had seen a female enter his car, Mr. Genous agreed that a woman named Kayla had, in fact, entered his car. (49:17-18). He explained that the woman wanted money from him, and when he did not give it to her, she got upset and left his car. (49:18).

Officer Stikl noted that when he was speaking with Mr. Genous, he observed multiple cell phones, hand sanitizer, and cigar wrappers in the car. (49:46-47). Regarding the significance of the hand sanitizer, he stated that "[i]t's common knowledge drugs dealers actually conceal narcotics within their anal area. And what they do is they use the hand sanitizer after removing that stuff to clean their hands." (49:46). He also noted that cigar wrappers can be used to smoke marijuana by rolling the marijuana in the wrapper, which is called a "blunt." (49:47).

Officer Stikl further testified that at some point, two other officers arrived on scene—Officer Molthen and Officer Martin. After Officer Stikl returned to his squad car to run Mr. Genous' license, Officer Molthen notified him that he had seen Mr. Genous make a "furtive movement" by reaching underneath his seat. (49:18-21, 39). After that,

Officer Stikl asked Mr. Genous to exit the car so he could question him. (49:18-19).

Mr. Genous cooperated and exited his vehicle. According to Officer Stikl, while he was speaking with Mr. Genous, Officer Molthen told him he had observed a gun in Mr. Genous' car sticking out from underneath the driver's seat. (49:21). Officer Stikl claimed that Officer Molthen did not enter Mr. Genous' car; rather, he saw the gun in "plain view" while looking through the front windshield. (49:21).

No drugs were ever discovered in Mr. Genous' car. The officers also never spoke with Ms. Sienko. While they later attempted to make contact with her, she did not answer her door. (49:22).

On cross-examination, Officer Stikl admitted that prior to this incident, he had no knowledge of a black sedan being used to transport drugs to Ms. Sienko, her residence, or any other location in West Allis. (49:24, 30-31). He also admitted that he had never seen a picture of Ms. Sienko or had any contact with her before. (49:28-29). His sole basis of knowledge concerning Ms. Sienko was the email he received from a detective at the West Allis Police Department, which had been sent approximately two weeks earlier. (49:28-29). Through this email, Detective Stikl was informed that Ms. Sienko was a heavy heroin user and that she had had several contacts with the West Allis Police Department for various drug cases. (49:29). The email, however, did

not mention any prior cases where drugs had been sold in front of 1601 South 65th Street. (49:32). Nor did the email contain any information about anyone else who may have lived at 1601 South 65th Street. (49:29-30). Officer Stikl therefore did not know how many people actually lived at that address. (49:30). He claimed, however, that he had looked up Ms. Sienko's physical description in his department's "local system." (49:29).

Officer Stikl also stated on cross-examination that after running Mr. Genous' license, he returned to question Mr. Genous further. By that point, one of the other officers had directed Mr. Genous to exit the car,[1] and he was sitting on the curb. (49:40-42). Officer Stikl asked Mr. Genous multiple times for permission to search the car, and each time Mr. Genous said no. (49:40-41). He also ordered Mr. Genous to take his shoes and socks off so he could search them. (49:41-43). Mr. Genous complied, and nothing illegal was found in his shoes or socks. (49:42-43). While Officer Stikl was searching Mr. Genous' shoes and socks, the other officers were shining their flashlights through the windows of his car. (49:44).

The next witness called by the State was Officer Molthen. He testified that he responded as back-up to the traffic stop in this case. (49:50). He

[1] This statement contradicted Officer Stikl's earlier statement that he was the one who told Mr. Genous to exit the car. (*See* 49:18-19).

stated that when Officer Stikl returned to his squad car to run Mr. Genous' license, he positioned himself by the passenger side door of Officer Stikl's squad car, about twenty feet behind Mr. Genous' car. (49:52-53). From there, he saw Mr. Genous make several movements with his right shoulder, which he described as "dipping his right shoulder down like he was reaching for something underneath his seat or trying to place something underneath the seat." (49:53).

Officer Molthen claimed that he communicated these observations to Officer Martin who then approached the vehicle and asked Mr. Genous to step out of the car. (49:54). After Mr. Genous complied, Officer Molthen continued to look inside his car from the passenger side of the vehicle. Officer Molthen testified that he moved a little bit forward while remaining near the passenger side, and looked through the windshield and saw the handle of a black handgun sticking out from underneath the driver's seat. (49:55, 60).

After hearing testimony, the circuit court viewed the dash cam video from Officer's Stikl's squad car and found that what it showed was inconsistent with significant portions of the officers' testimony. (49:64). The court summarized the relevant parts of the video, beginning when the officers returned to Officer's Stikl's squad car after having initially made contact with Mr. Genous. First, the court described the officers' initial attempts

to see what was in the car by looking through the windows:

> When the three officers go back to the car, there is a discussion that they've seen the drug stuff[2] on the floor. And the one officer, I believe it's Stikl, sends the other one back to look for the drug stuff. That officer, who I assume was Molthen but I can't discern who's who based upon the video, that officer goes back with his flashlight and looks into the front of the car from the passenger side on two occasions.
>
> And then he gets the third occasion, and the other officer—another officer is there with him. They're both looking there. It's at that point—Well, it's— It's before that third incident when the defendant is pulled out of the car or told to get out of the car and is seated behind the car. There was no— And the— The audio of the cops was—was pretty clear. There's no discussion of any guns. There is repeated questioning of the

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[2] With respect to the court's reference to the "drug stuff," the video shows that Officer Stikl states that he saw cigar wrappers along with a white plastic bag on the center console, but he could not see if anything was in the bag. He also states that he thought he may have seen marijuana on the passenger-side floor boards. He therefore asks the other officers to go back and look again. After looking three times through the windows, the other officers state that they too saw cigar wrappers, but could not smell any marijuana. They also appear to indicate that they did not see any marijuana either, although the audio is somewhat unclear in this respect. (Squad cam video at 00:02:20 to 00:06:10). In any event, neither officer testified at the suppression hearing that they actually saw marijuana inside Mr. Genous' car.

> defendant. The officers, when they come back after that third look through the windshield, do note that they've seen the cell phones and the sanitizer and the blunt.

(49:64-65; App. 102-03).

Next, the court summarized the portion of the video that shows that the officers had, in fact, opened the driver's side door before discovering the gun, contrary to their testimony:

> The officers then go back and one of the officers approaches the driver's side and opens the door and at that point looks in and comes running back to the side accusing the defendant of being a felon in possession.

(49:65; App. 103). The squad cam video also shows that right before this, the officer says "we're gonna do it" and then walks over to the driver-side door of the car. (Squad cam video at 00:10:00 to 00:10:10). Both attorneys agreed that the court's summary of the video was accurate. (49:65; App. 103).

After hearing additional arguments from the attorneys (49:66-86; App. 104-24), the court rendered its decision from the bench, denying Mr. Genous' motion to suppress. First, the court concluded that the initial traffic stop was lawful. In this respect, it stated that the following facts supplied reasonable suspicion for the stop:

1. Mr. Genous had short-term contact with a woman who exited the residence at 1601 South 65th Street and entered his car at 3:30 a.m.

2. Immediately before that contact, Mr. Genous' car "was parked on the street suspiciously running with its lights on and then turns its lights off."[3]

3. The woman matched the general description of Ms. Sienko,[4] who Officer Stikl knew was a drug user who lived at that address.

4. It was a high drug-trafficking area.

(49:89; App. 127).

Regarding the subsequent discovery of the gun, the court acknowledged that Officer's Molthen's "testimony that he saw the gun in plain view just doesn't compute," noting that a "picture is worth more than the testimony." (49:90; App. 128). The court noted that if Officer Molthen had actually seen the gun in plain view, "he would not have gone back

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[3] The circuit court also stated that Mr. Genous turned the car off, in addition to turning the lights off. (49:49; App. 127). There was no testimony, however, that Mr. Genous turned the car off; Officer Stikl only stated that he turned the lights off. (*See* 49:9).

[4] The circuit court stated that the officer observed Ms. Sienko exit the residence and enter Mr. Genous' car. Officer Stikl, however, only said that the woman he saw matched the general description of Ms. Sienko; he did not positively identify the woman as Ms. Sienko. (49:10-11, 28-29).

there not once but twice but three times." (49:90; App. 128).

The court also noted, however, that Officer Stikl had seen hand sanitizer, multiple cell phones, and cigar wrappers in Mr. Genous car. These items, the court reasoned, were all indicia of drug use or drug dealing based on the officer's training and experience. (49:90; App. 128). The court thus concluded that the observation of these items gave the officers probable cause to search Mr. Genous' car for drugs, stating:

> And I think at that point, they've got the right to go into the car and see whether or not that is, in fact, a blunt. And when they do that, I think that's when they see the gun, which is then in plain view when they open that—that driver's door. And therefore, the seizure of the gun is valid; and therefore, I will deny the motion.

(49:91; App. 129).

Mr. Genous subsequently pled guilty to felon in possession of a firearm. (52:3). The circuit court sentenced him to one year of initial confinement and one year of extended supervision. (53:31-32).

This appeal follows.[5]

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[5] A defendant may appeal an order denying a suppression motion despite a guilty plea. Wis. Stat. § 971.31(10).

ARGUMENT

I. The initial traffic stop was unconstitutional because the police lacked reasonable suspicion that Mr. Genous had engaged in a drug transaction.

In this case, Mr. Genous had short-term contact with a woman late at night in his car. Nothing about that is criminally suspicious. The fact that the woman may have had a prior drug history does not change that. People with criminal histories—and the people they associate with—cannot be randomly stopped and searched simply because of their prior records. The fact that this was a high drug-trafficking area also did provide reasonable suspicion for the stop. People who live in or visit high-crime neighborhoods are entitled to the same level of constitutional protection as everyone else. This court should therefore reverse the trial court's ruling and order that the evidence obtained as a result of the illegal stop be suppressed.

A. General legal principles and standard of review.

The right to be free from unreasonable searches and seizures is guaranteed by the Fourth Amendment to the United States Constitution, and Article I, § 11 of the Wisconsin Constitution. Wisconsin courts generally follow the United States Supreme Court's interpretation of the Fourth Amendment in construing Article I, § 11. *State v.*

Betterly, 191 Wis. 2d 407, 417, 529 N.W.2d 216 (1995).

The Fourth Amendment governs all police intrusions, including investigatory or *Terry* stops. *See Terry v. Ohio*, 392 U.S. 1 (1968). Where an unlawful stop occurs, the remedy is usually to suppress the evidence it produced. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *State v. Washington*, 2005 WI App 123, ¶19, 284 Wis. 2d 456, 700 N.W.2d 305 (2005).

An investigatory stop must be based on more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27. To conduct a lawful *Terry* stop, an officer must have reasonable suspicion, based on specific and articulable facts, to believe the person is engaged in criminal activity. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

Determining whether an officer had reasonable suspicion to stop a defendant involves an objective analysis of the totality of the circumstances, considering the facts in the record and rational inferences from those facts. *Ohio v. Robinette*, 519 U.S. 33, 34 (1996). However, "to accommodate public and private interests some quantum of *individualized* suspicion is usually a prerequisite to a constitutional search or seizure." *United States v. Martinez-Fuente*, 428 U.S. 543, 560 (1976) (emphasis added); *see also Michigan v. Summers*, 452 U.S. 692, 699 n.9 (1981).

In reviewing the denial of a motion to suppress, an appellate court applies a two-step standard. *State v. Martin*, 2012 WI 96, ¶28, 343 Wis. 2d 278, 816 N.W.2d 270. First, it upholds the trial court's findings of fact unless they are clearly erroneous. Second, it independently reviews whether those facts meet the applicable constitutional standard. *Id.*

B. Mr. Genous' short-term contact with a woman late at night did not provide reasonable suspicion for the traffic stop, even if the woman may have had a drug history.

Again, as found by the circuit court, the relevant facts at the time of the stop were: (1) Mr. Genous had short-term contact with a woman who exited a house and entered his car at 3:30 a.m.; (2) shortly before the woman exited the house, Mr. Genous had turned his car's headlights off; (3) the woman matched the general description of Ms. Sienko, who Officer Stikl knew to be a drug user who lived at that address; and (4) it was a high drug-trafficking area. (49:89; App. 127). None of these facts, whether considered alone or taken together, provided a reasonable basis to suspect that Mr. Genous sold the woman drugs or committed any other crime.

First, the fact that Mr. Genous had short-term contact with a woman in his car was not criminally suspicious, even when considered with the other facts in this case. In *State v. Young*, 212 Wis. 2d 417, 433,

569 N.W.2d 84 (Ct. App. 1997), this court held a defendant's short-term contact with another individual on the sidewalk in a high drug-trafficking area did not create reasonable suspicion, even though the officer had testified that in his experience drug transactions in that neighborhood often took place on the street during brief meetings. The court noted that the officer did not actually know if the defendant had exchanged anything with the other person. *Id.* at 429-30. It also noted that stopping briefly on the street when meeting another person is an ordinary, everyday activity, even in high-crime neighborhoods. This was conduct, the court stated, that "large numbers of innocent citizens engage in every day for wholly innocent purposes, even in residential neighborhoods where drug trafficking occurs." *Id.*

As in *Young*, Officer Stikl did not see Mr. Genous exchange money, drugs, or any other item with the woman who entered his car. In fact, he did not see anything that occurred inside the vehicle after the woman got in. (49:13, 27). He also did not see the woman enter the car with money in her hand or emerge with a bag or package. (49:14, 27). All he saw was a woman enter Mr. Genous' car, remain in there for about ten seconds, and then exit the car and go back in her house. (49:9, 13-14). This brief encounter cannot support a reasonable inference that the woman entered Mr. Genous' car for the purpose of buying or selling illegal drugs.

Furthermore, the fact that the short-term contact in this case took place late at 3:30 in the

morning does not make it any more suspicious than the contact in *Young*. *See State v. Wilson*, No. 2014AP2358-CR, unpublished slip op., ¶20 (Wis. Ct. App. April 21, 2015) ("'Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes.'") (quoting *State v. Doughty*, 239 P.3d 573, 575 (Wash. 2010)) (App. 135). Significantly, neither officer in this case testified that in their experience, drug dealing in this area (or anywhere else) was more likely to occur at 3:30 in the morning than at any other time. As Officer Stikl acknowledged, "drug dealers [do not] only work third shift." (49:45); *see also State v. Betow*, 226 Wis. 2d 90, 96, 593 N.W.2d 499 (Ct. App. 1999) ("The State has not referred us to 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.").

Also, many law-abiding citizens work third shift or are otherwise up and about at 3:30 at night. The fact that their schedules may be less common than those who keep more regular hours does not make them criminally suspicious. Nor are they entitled to less constitutional protection.

For these reasons, this court has repeatedly rejected the notion that conduct that would not provide a reasonable basis for a *Terry* stop during the day is somehow transformed into criminally suspicious conduct just because it occurs at night. This is true even when the late hour is considered with other facts. For example, in *Betow*, the State

argued that the following facts supported the existence of reasonable suspicion justifying the extension of a traffic stop: the defendant's wallet had a picture of a mushroom on it, which the State argued indicated drug activity; he was stopped late at night; he appeared to be nervous; he was returning to Appleton from Madison, a city the State claimed was well known for its drug traffic; and the defendant's story about what he had been doing in Madison seemed implausible to the officer. *Betow*, 226 Wis. 2d at 95-97. This court held that the officer could not have concluded that these facts reasonably justified further detention of the defendant for a drug investigation. *Id.* at 98.

Similarly, in *State v. Gammons*, 2001 WI App 36, ¶21, 241 Wis. 2d 296, 625 N.W.2d 623, this court held that the following facts did not supply reasonable suspicion: the vehicle was stopped in a "drug-related" or "drug crime" area; it was 10:00 p.m.; the vehicle was from Illinois; the officer had knowledge of prior drug activity by each of the three men in the car; and the defendant, who was one of the passengers, appeared to be nervous and uneasy.

And, the fact that Mr. Genous had contact with the woman in his car, rather than on the street or out in the open, also does not make this case materially different than *Young*. It may be true that some drug dealers use their cars to sell drugs, as Officer Stikl noted. (49:5-6, 8). Other drug dealers, however, no doubt sell drugs in different ways and at other places.

By the same token, the fact that there is such a thing as a "drug car" does not make it is reasonable to assume that every individual who has short-term contact with another person in a car is engaged in a drug activity. Just because something is possible does not mean there is a reasonable basis to infer or suspect that possibility.

There are any number of lawful reasons why Mr. Genous might have met with the woman who entered his car for a brief time. For example, perhaps he forgot something at her house earlier that day, like his cell phone, wallet, or any other innocuous item, and went back to get it. Perhaps he was returning something she had left at his house or something he had borrowed. Perhaps he was paying her back money he owed her. Or Perhaps she needed to borrow money from him. On this record, there was simply no way for Officer Stikl to know why Mr. Genous met with the woman who entered his car. His conclusion that Mr. Genous did so for purposes of selling drugs was pure speculation and conjecture.

The unpublished case *State v. King*, No. 2013AP1068-CR, unpublished slip op., ¶¶17-18 (Wis. Ct. App. Feb. 13, 2014) (App. 137-40), illustrates this point perfectly. In that case, this court concluded that the fact that the defendant's vehicle was parked at 9:25 p.m. in a parking lot that had been the subject of "numerous [pieces of] intelligence regarding illegal drug activity" did not create reasonable suspicion supporting an investigatory stop. The police in that case observed the two occupants in the car for

approximately five minutes, during which time the interior lights were turned on and off "a couple [of] times." *Id.*, ¶3 (App. 137). This court held that the officer's observations and knowledge did not give rise to reasonable suspicion to initiate a seizure. *Id.*, ¶20 (App. 140).

Second, the fact that Mr. Genous turned his car's lights off right before the woman exited her house was not suspicious in any way, shape, or form.[6] It is not even clear how this fact adds anything to the reasonable suspicion analysis. *See id.*, ¶19 ("The fact that the [car's] interior light went on and off appears to add nothing to the analysis.") (App. 140).

Third, with respect to the fact that Ms. Sienko was a known drug user, this court has repeatedly held that a person's prior drug history or criminal record does not create reasonable suspicion. *See, e.g., Washington*, 284 Wis. 2d 456, ¶¶2-3, 17; *Gammons*, 241 Wis. 2d 296, ¶21. Thus, the fact that the woman in this case matched the general description of Ms. Sienko did not create reasonable suspicion of criminal wrongdoing. The police cannot set up surveillance outside a person's house just because they have a prior drug conviction and stop that person or any

[6] The fact that Mr. Genous' car was registered to a person from Milwaukee is also utterly irrelevant. (49:34-35). Any person from any city should be able to travel to any other city without fear of being of being stopped and searched by the police. Moreover, this court must be careful to ensure that the idea that someone is "from Milwaukee" is not used as a code for someone who is a racial minority.

anyone else with whom they happen to have incidental contact. "People, even convicted felons, have a right to walk down the street without being subjected to unjustified police stops." *Washington*, 284 Wis. 2d 456, ¶17.

Additionally, Officer Stikl did not even know for certain that the woman he saw was actually Ms. Sienko. Officer Stikl had never met Ms. Sienko before, and he had never seen a picture of her. (49:28-29). He also did not know how many people lived at the residence. (49:29-30). All he knew was that the woman matched Ms. Sienko's general description. (49:10-11). But he was conspicuously vague as to what that general description consisted of. It may be that Officer Sienko simply knew that Ms. Sienko was a white female of a certain age. At the time of the stop, it was thus further speculation on Officer Stikl's part that the woman he saw was really Ms. Sienko.

Finally, the additional fact that the contact in this case occurred in a "high drug trafficking area" (49:8) did not justify the traffic stop. *See Washington*, 284 Wis. 2d 456, ¶¶2-3, 17 (there was insufficient basis for a stop where the defendant was standing in front of a vacant house in a high-crime area, the police knew he did not live there, he had been previously arrested for narcotics, and a citizen had called to complain about drug dealing and loitering at the house). The objective facts here regarding Mr. Genous' actual contact with the woman are too speculative and innocuous to permit a high-crime

area factor to justify an investigative stop. Only in a case where the reasonable suspicion determination is a close call should this court let a high-crime area factor tip the scales. As this court recognized in *State v. Gordon*, 2014 WI App 44, 353 Wis. 2d 468, 846 N.W.2d 483:

> . . . sadly, many, many folks, innocent of any crime, are by circumstances forced to live in areas that are not safe—either for themselves or their loved ones. Thus, the routine mantra of "high crime area" has the tendency to condemn a whole population to police intrusion that, with the same additional facts, would not happen in other parts of our community. "An individual's presence in an area of expected criminal activity, standing along, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."

Id., ¶15 (citing *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). The Wisconsin Supreme Court has similarly noted:

> We recognize . . . that many persons 'are forced to live in areas that have "high crime" rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crimes areas." Furthermore, Professor LaFave warns that "simply being about in a high-crime area should not by itself ever be viewed as a sufficient basis to make an investigative stop."

State v. Morgan, 197 Wis. 2d 200, 212-13, 539 N.W.2d 887 (1995).

In sum, none of the facts in this case, whether considered alone or together, provided reasonable suspicion that Mr. Genous was engaged in criminal activity. Having short-term contact with a woman in a car late at night does not amount to reasonable suspicion of drug activity, even if the woman may be a known drug user.

The traffic stop in this case was accordingly unreasonable and unconstitutional, and the evidence it produced should be suppressed.

II. The officers exceeded the permissible scope of the *Terry* stop by ordering Mr. Genous to take off his shoes and socks.

Even if the initial stop was constitutional, the gun discovered in Mr. Genous' car should still be suppressed because the police exceeded the lawful scope of the *Terry* stop. The officers' actions of ordering Mr. Genous to take off his shoes and socks constituted an unlawful search that went beyond the limited bounds of what is permissible during a *Terry* stop. This rendered the detention itself unconstitutional, and the evidence discovered during the ongoing unlawful stop should be suppressed.

During an investigative stop, whether the intrusion is reasonable depends on whether the police conduct is reasonably related to the circumstances

justifying the initial police interference. *Terry*, 392 U.S. at 19-20; *State v. Griffith*, 2000 WI 72, ¶26, 236 Wis. 2d 48, 613 N.W.2d 72. Under this approach, an appellate court must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20.

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). When an investigative stop is extended beyond the time reasonable necessary to complete the mission of the stop, the seizure becomes unreasonable and unconstitutional. *See Rodriguez v. United States*, ___ U.S. ___, ___, 135 S.Ct. 1609, 1614-15 (2015). Evidence discovered during such an illegal detention should be suppressed. *See Wong* Sun, 371 U.S. at 487-88; *Washington*, 284 Wis. 2d 456, ¶19.

As with the duration of a stop, "[t]he *scope* of the [*Terry* stop] must be carefully tailored to its underlying justification." *Royer*, 460 U.S. at 500 (emphasis added). That is, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the

officer's suspicion in a short period of time."[7] *Id.* When an officer exceeds the permissible scope of a *Terry* stop, the detention also becomes unlawful. *See id.*; *see also* Amy L. Vazquez, Comment, *"Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?" What Questions Can a Police Officer ask During a Traffic Stop?*, 76 Tul. L. Rev. 211, 226 (2001) ("By separating scope and duration, the Court here clearly suggested that scope is something more than the length of the detention. A reasonable inference can be made that the 'something more' should be, and is, the type of questioning and investigation."). Evidence discovered during such an ongoing unconstitutional detention should therefore be suppressed, as well. *See Wong* Sun, 371 U.S. at 487-88; *Washington*, 284 Wis. 2d 456, ¶19; *see also Goodman v. Las Vegas Metropolitan Police Dept.*, 963 F. Supp. 2d 1036 (D. Nev. 2013) ("where a *Terry* stop is invalid, it is nearly impossible for the seizure of property incident to that stop to be constitutional").

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[7] In *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), the Supreme Court reaffirmed the duration/length limitation on *Terry* stops, declaring that a seizure "can become unlawful if it is prolonged beyond the time reasonably required" to serve it lawful purpose. It also reaffirmed the scope/intrusiveness limitation, although it held that an investigative technique does not violate that limitation unless the particular tactic employed "itself infringed [the suspect's] constitutional protected interest in privacy," i.e., was itself a search. *Id.* at 408. As noted below, ordering Mr. Genous to remove his shoes and socks was a search, and an unreasonable one at that.

The State has "the burden to demonstrate that the seizure it seeks to justify on the basis of reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Royer*, 460 U.S. at 500.

Several investigative techniques are permissible during a *Terry* stop. These include interrogation or inquiry regarding the suspicious conduct, which also includes a request for identification or a license. 4 Wayne R. LaFave, *Search and Seizure*, § 9.2(f) (5th ed. Supp. Oct. 2018). It may also include searching the area or a non-search examination of the suspect's person, car, or objects he is carrying. *Id.* And of course, an officer may conduct a limited pat-down of a suspect for weapons, if there are specific and articulable facts that warrant a reasonable belief that the suspect is armed and dangerous. *See Terry*, 392 U.S. at 21, 24.

An officer may not, however, conduct a full-blown search of the defendant or his property during a *Terry* stop, absent probable cause that the defendant has committed a crime. *See State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999). In *Sibron v. New York*, 392 U.S. 40 (1968), the Supreme Court confirmed the limited nature of a *Terry* stop, explicitly stating that the "only goal which might conceivably" justify a search in the context of a *Terry* stop is a limited pat-down search for weapons. *Id.* at 65. In subsequent cases, the Court has unequivocally explained that "[t]he purpose of this limited search is not to discover evidence of crime,

but to allow the officer to pursue his investigation without fear of violence." *Adams v. Williams*, 407 U.S. 143, 146 (1972). This is so, the Court explained in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), because searches that exceed the scope of what is necessary to determine if an individual is armed "amount[] to the sort of evidentiary search that *Terry* expressly refused to authorize" and the Court "condemned" in *Sibron* and *Michigan v. Long*, 463 U.S. 1032. *Dickerson*, 508 U.S. at 378.

Based on these principles, full-blown searches conducted during an otherwise lawful *Terry* stop have been held to be unconstitutional. *See, e.g., Dickerson*, 508 U.S. at 378 (reaching into a suspect's pocket); *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008) (unzipping a suspect's jacket) (plurality opinion).

In this case, even if the officers had reasonable suspicion to stop Mr. Genous' car, they exceeded the permissible scope of that stop by ordering Mr. Genous to take off his shoes and socks. Like reaching into a suspect's pocket or unzipping his jacket, forcing a detainee to take off his shoes and socks to find illegal drugs constitutes a full-blown search that is well beyond the limited scope of a *Terry* stop. Forcing a person to take off their shoes and socks is something that is highly invasive and intrusive to a person's privacy interest. It is also offensive and damaging to their personal dignity.

That type of search cannot be characterized as a limited pat-down for weapons. First, there was no reasonable basis for the officers in this case to believe that Mr. Genous was armed and dangerous, even though they claimed (49:53) to have seen him "dipping his right shoulder." *See State v. Johnson*, 2007 WI 32, ¶36, 299 Wis. 2d 675, 729 N.W.2d 182 (there was insufficient basis for a pat-down during a traffic stop where the defendant made a movement with his head and shoulders while in the vehicle). There is also no evidence that the officers even conducted a pat-down of Mr. Genous. Most importantly, it is highly unlikely that a weapon could be concealed in a shoe, much less a sock. It certainly could not be concealed in sock in a way that a pat-down of the exterior of the sock would not discover it.

Here, the police lacked probable cause to search Mr. Genous' shoes and socks. Probable cause to search exists when there is "a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *State v. Robinson*, 2010 WI 80, ¶26, 327 Wis. 2d 302, 786 N.W.2d 463. This is the same evidentiary standard that applies when determining if there is probable cause to arrest a suspect. *Secrist*, 224 Wis. 2d 201, ¶13 ("Generally, the same quantum of evidence is required whether one is concerned with probable cause to search or probable cause to arrest.")

Clearly, Officer Stikl's initial observation that a woman who matched Ms. Sienko's general description had entered Mr. Genous' car for a few

seconds late at night did not give him probable cause to arrest Mr. Genous or search his car. The officers' subsequent observations during the traffic stop likewise did not create probable cause. The officers did not see or smell marijuana in Mr. Genous' car. *Compare Secrist*, 224 Wis. 2d 201, ¶16 ("The unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime."). All they saw in the car was hand sanitizer, a few cell phones, and cigar wrappers. (49:46-47). The presence of these everyday items in a car is simply not enough to justify a lawful arrest or search of a car for a drug offense.

Hand sanitizer is very common, everyday item. Many people use it, and its possession is not criminally suspicious in any way, shape, or form. In fact, the percentage of people who use hand sanitizer who are criminals is probably no different than the percentage of criminals that exist in the general population. And contrary to Officer Stikl's suggestion, it is not "common knowledge" that drug dealers use hand sanitizer after they hide drugs "within their anal area." (49:46). Similarly, many people have multiple cell phones and/or smoke cigars, which is perfectly legal. These, too, are common, everyday items. The officer's observation of these items, even when considered with the other facts in this case, did not provide a fair probability that Mr. Genous had illegal drugs on his person or in his car.

Consequently, the search of Mr. Genous' shoes and socks in this case exceeded the permissible scope of a lawful *Terry* stop. At that point, the stop was transformed into an illegal and unconstitutional detention, and the evidence discovered during that ongoing detention should be suppressed.

III. The officers lacked probable cause to search Mr. Genous' vehicle by opening the car door.

The circuit court found that Officer Molthen did not see the gun in plain view through the car's windshield, as he claimed. Instead, the court found that the squad cam video showed that Officer Molthen opened the car door, and when he did so, it was at that point he observed a gun underneath the driver's seat—a gun that he had been unable to see previously from outside the car. (49:65, 90; App. 103, 128).

Officer Molthen's opening of Mr. Genous' car door constituted an illegal search of the vehicle. Because the gun was fruit of that unlawful search, it should be suppressed for this reason, as well.

A search occurs under the Fourth Amendment when "an expectation of privacy society is prepared to consider reasonable is infringed." *Soldal v. Cook County*, 506 U.S. 56, 63 (1992); *see also Kyllo v. United States*, 533 U.S. 27, 32-33 (2001). The Wisconsin Supreme Court has recognized that the driver of a car, even when the driver is not the owner of the car, has a reasonable expectation of privacy in

the interior of the car. *State v. Dixon*, 177 Wis. 2d 461, 474, 501 N.W.2d 442 (1993). To search a car during a traffic stop, the police must have probable cause to believe that the car contains contraband or evidence of a crime. *United States v. Ross*, 456 U.S. 798, 824 (1982); *State v. Pallone*, 2000 WI 77, ¶58, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled on other grounds by State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, N.W.2d 97.

Here, Officer Molthen searched Mr. Genous' car when he opened the driver's side door, thereby discovering the gun underneath the seat. By opening the door, Officer Molthen exposed the interior of the car and everything inside of it, including the gun. Mr. Genous had a right to privacy in the interior of the car. As noted above, Officer Molthen did not have probable cause to believe that the car contained evidence of a crime just because he had seen everyday items like hand sanitizer, cell phones, and cigar wrappers. He therefore violated Mr. Genous' Fourth Amendment rights against unreasonable searches when he opened the driver's side door.

In *New Jersey v. Woodson*, 566 A.2d 550 (App. Div. 1989), the New Jersey Court of Appeals recognized that an illegal car search occurs when the police open a car door during a traffic stop. In that case, the police pulled the defendant over for speeding. *Id.* at 551. After the car pulled over, an officer walked up to the car and immediately opened the door to speak with the driver without making any attempt to communicate with him first. An open beer

can fell out the car. *Id.* New Jersey argued that there was no difference between ordering the driver to exit the car and opening the door for him to get out. *Id.* at 552. The New Jersey Court of Appeals disagreed, explaining:

> There is a significant difference between ordering one out of a car and opening a car door without warning. In the former case, the occupant has an opportunity, before opening the door and leaving the car, to safeguard from public view matters as to which he has a privacy interest.

Id.

Like the New Jersey court, this court should hold that Officer Molthen's action of opening the driver's side door of Mr. Genous' car was an illegal search. A Fourth Amendment violation is even more compelling here because unlike the defendant in *Woodson*, Mr. Genous had already exited the car and was sitting on the curb. Officer Molthen was thus not trying to speak with Mr. Genous, like the officer in *Woodson*. Rather, he was trying to look inside his vehicle for evidence of a crime—evidence that, as the circuit court found, Officer Molthen had tried but failed to see three times through the car's windows. (49:64-65; App. 102-03).

CONCLUSION

For these reasons, Mr. Genous respectfully requests that this court reverse the judgment of the circuit court, order the evidence obtained as a result of the unlawful *Terry* stop and unlawful search of Mr. Genous' vehicle to be suppressed, and remand the case to the circuit court for further proceedings consistent with this court's opinion.

Dated this 17th day of June, 2019.

Respectfully submitted,

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,570 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of June, 2019.

Signed:

LEON W. TODD
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 17th day of June, 2019.

Signed:

LEON W. TODD
Assistant State Public Defender

APPENDIX

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