STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES TIMOTHY GENOUS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS C. CIMPL, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did police have reasonable suspicion to stop Defendant-Appellant James Timothy Genous's car?

The circuit court answered "yes."

This Court should answer "yes."

2. Did police legally find a gun in Genous's car?[1]

The circuit court answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

Genous pled guilty to possessing a firearm as a felon after police found a gun under the driver's seat in his car during a traffic stop. He argues that the circuit court erred by denying his motion to suppress evidence of the gun. He argues that he is entitled to suppression on three alternative grounds: (1) police illegally stopped his car, (2) police illegally extended the traffic stop to search his shoes and socks, and (3) police found the gun after illegally opening his driver-side car door.

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[1] The State identifies the discovery of the gun as a single issue. Genous presents discovery of the gun as two issues. But Genous is simply presenting two bases to suppress the same evidence—the gun. Whether presented as one or two issues does not change the same question of whether police lawfully found the gun.

This Court should affirm because none of Genous's arguments has merit.

First, police lawfully stopped Genous's car because they had reasonable suspicion that he was involved in illegal drug activity. Police saw a woman enter Genous's car for 10 to 15 seconds late at night in a high drug-trafficking area, Genous turned off the headlights just before the woman got to his car, and the woman had the same residence and physical description as a known drug user. Reasonable suspicion exists on those facts under controlling case law.

Second, police lawfully searched Genous's socks and shoes because they had reasonable suspicion to do a protective search for weapons. They reasonably believed that Genous was dealing drugs, drug dealers often carry weapons, and Genous made a furtive reaching movement under his car seat. In any event, even if police illegally searched Genous's socks and shoes, he is not entitled to suppression of the gun that police found in his car. Police would have searched Genous's car and found his gun even if they had not searched his shoes and socks.

Third, contrary to Genous's argument, police found the gun in his car *before* opening his driver-side car door. And even if a police officer opened the door first, he could lawfully do so because police had probable cause to search the car for drugs and reasonable suspicion to search it for weapons. Besides the suspicious facts that justified the traffic stop, police saw items through Genous's car window that were consistent with drug use or drug dealing. These facts established probable cause of drug dealing and bolstered the case for a protective search of the car for weapons.

STATEMENT OF THE CASE

At 3:30 a.m., in a "high drug trafficking area," Genous parked his car on the roadside and turned off his headlights. (R. 49:7, 89.) A woman came outside of a nearby home "within a few seconds" of the headlights turning off, and she got into Genous's car for about 10 to 15 seconds. (R. 49:9, 13–14.) This woman matched the physical description of Kayla Sienko, who lived in that house. (R. 49:10–11.) Police knew from "prior contacts" with Sienko that she was "a heroin user," and she "still use[s]." (R. 49:12–13.)

A few seconds after the woman ran back into the house, Genous turned his headlights back on and began to drive away. (R. 49:15.) Police officer Adam Stikl pulled over Genous's car a few blocks later because he thought that he had witnessed a possible drug transaction. (R. 49:14–15.) While speaking to Genous, Officer Stikl saw multiple cell phones, cigar wrappers, and hand sanitizer in Genous's car. (R. 49:46–47.) Officer Stikl knew from training and experience that those items were indications of drug use or drug dealing. (R. 49:90.) Officer Stikl knew that drug dealers sometimes use hand sanitizer to clean their hands after removing drugs hidden in their "anal area." (R. 49:46.) He also knew that cigar wrappers are used to create blunts for smoking marijuana. (R. 49:47.) Officer Stikl thought that he "saw some weed" on the passenger-side floor. (R. video at 2:35–37.)[2]

[2] This brief cites the video media player's runtimes, rather than the timestamps in the video. The video starts with a runtime of 0:00 and a timestamp of 3:37:22. This brief cites to the video with a file name of "GB106544."

Officer Stikl asked for and received Genous's driver's license. (R. 49:37–38.) Officer Stikl returned to his squad car, checked Genous's history, and learned that Genous was a convicted felon. (R. 49:39.)

Another police officer, Bernie Molthen, saw Genous "making several movements with his right shoulder—dipping his right shoulder down like he was reaching for something underneath his seat or trying to place something underneath the seat." (R. 49:53.) Officer Molthen was concerned that Genous "might be accessing a weapon to assault officers." (R. 49:54.) Officer Molthen could not tell whether Genous was trying to place something under his seat or was retrieving something from under his seat. (R. 49:54.)

While Officer Stikl was in his squad car, another officer told Genous to exit his car and sit on a curb. (R. 49:42.) Officer Stikl walked over to Genous and had him remove his socks and shoes. (R. 49:42–43.) Police did not find anything illegal in the socks and shoes. (R. 49:43.) Officer Stikl asked Genous for consent to search his car, but Genous refused. (R. 49:44–45.)

Officer Stikl asked Genous about the woman who was briefly in his car. (R. 49:18.) Genous said that her first name was "Kayla," but he did not give a last name when asked for one. (R. 49:18; video at 7:33–47.)

Minutes later, while Genous was sitting on the curb talking to police, an officer looked through the driver-side window of Genous's car. (R. video at 10:12–30.) The officer then ran over to Genous, and the officers appeared to force Genous to lie down and handcuffed him. (R. video at 10:30–45.) An officer then told Genous that he is "a felony offender" and that a gun was in his car. (R. video at 10:32–11:10.) One officer said to Genous, "you're arrested for felon in possession." (R. video at 11:13–15.) An officer then returned

to Genous's car, opened the driver-side door, and looked inside. (R. video at 11:25–28.)

The State charged Genous with one count of possession of a firearm by a felon. (R. 1.) Genous filed a motion to suppress the gun evidence. (R. 7.) The circuit court held a hearing on the suppression motion. (R. 49.) The court denied the motion. (R. 49:91.)

Genous pled guilty, and the circuit court accepted the plea and convicted him. (R. 52:3, 10.) The court later sentenced him to one year of initial confinement followed by one year of extended supervision. (R. 53:31–32.)

Genous appeals his judgment of conviction. (R. 44.)

STANDARD OF REVIEW

When reviewing a decision on a motion to suppress evidence, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Lonkoski*, 2013 WI 30, ¶ 21, 346 Wis. 2d 523, 828 N.W.2d 552.

ARGUMENT

I. Police lawfully stopped Genous's car.

A. Police officers may perform a traffic stop if they have reasonable suspicion of illegal behavior.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729 (footnotes omitted). A traffic stop is a seizure. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569.

"[P]olice officers who reasonably suspect an individual is breaking the law are permitted to conduct a traffic stop 'to try to obtain information confirming or dispelling the officer's suspicions.'" *State v. Houghton*, 2015 WI 79, ¶ 22, 364 Wis. 2d 234, 868 N.W.2d 143 (citation omitted). To determine whether police had reasonable suspicion, a court considers "the facts known to the officer at the time the stop occurred, together with rational inferences and inferences drawn by officers in light of policing experience and training." *State v. Wortman*, 2017 WI App 61, ¶ 6, 378 Wis. 2d 105, 902 N.W.2d 561.

When determining whether reasonable suspicion supported a traffic stop, a court "look[s] to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn." *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

"Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young*, 294 Wis. 2d 1, ¶ 21. "A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient." *Id.* "On the other hand, 'police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.'" *Id.* (citation omitted). Reasonable suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence." *Alabama v. White*, 496 U.S. 325, 330 (1990).

B. Police had reasonable suspicion to stop Genous's car.

In one instructive case, this Court found reasonable suspicion of illegal drug activity because (1) the defendant and another man approached a car, and one of them entered the car for about one minute; (2) the brief contact with the car happened "late at night" in "a high-crime area"; and (3) the defendant and the other man hung "around the neighborhood

for five to ten minutes" after the car drove away. *State v. Allen* 226 Wis. 2d 66, 74–75, 593 N.W.2d 504 (Ct. App. 1999). This Court considered the "cumulative effect" of those facts and viewed the events "in sequence." *Id.* at 75 (citation omitted).

Police here likewise had reasonable suspicion to stop Genous. Like in *Allen*, police here observed a person's brief contact with a car in a "high drug trafficking area" late at night—specifically, 3:30 a.m. (R. 49:89.) Only one relevant fact in *Allen* is missing here: Genous did not remain in the neighborhood for several minutes after the brief contact. But other facts made Genous's situation more suspicious than the one in *Allen*. Genous turned his headlights off after parking his car on the roadside. (R. 49:7.) A woman came outside of a nearby home "within a few seconds" of the headlights turning off, and she got into Genous's car for about 10 to 15 seconds. (R. 49:9, 13–14.) This woman matched the physical description of Kayla Sienko, who lived in that house. (R. 49:10–11.) Police knew from "prior contacts" with Sienko that she was "a heroin user," and she "still use[s]." (R. 49:12–13.) When viewed cumulatively and in sequence, these facts created reasonable suspicion to stop Genous's car to investigate possible drug activity.

C. Genous's arguments against reasonable suspicion have no merit.

In arguing that the stop of his car was illegal, Genous relies heavily on three cases: *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623; *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999); and *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997). (Genous's Br. 15–18.) Those cases do not help him.

In *Young*, police lacked reasonable suspicion to stop the defendant after observing him briefly interact with another person on a sidewalk "in a high drug-trafficking area." *Young*, 212 Wis. 2d at 429. The *Young* court reasoned that this

behavior was "conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in residential neighborhoods where drug trafficking occurs." *Id.* at 429–30.

This Court in *Allen*, however, distinguished *Young*. *Allen*, 226 Wis. 2d at 74–75. Unlike in *Young*, the suspicious behavior in *Allen* was "not conduct that a large number of innocent citizens engage in every night for wholly innocent purposes either in crime-free areas or high-crime areas." *Id.* at 74. *Allen*, rather than *Young*, controls here because Genous's case involves brief contact with a car late at night.

In *Betow*, police unlawfully extended a traffic stop to search for drugs even though (1) the defendant looked nervous; (2) his wallet had a picture of a mushroom on it; (3) it was nighttime; and (4) the defendant was coming from Madison, which the State argued was "a city regrettably well known as a place where drugs may be readily obtained." *Betow*, 226 Wis. 2d at 95–97. The *Betow* court relied on *Young*. *Id.* at 98.

In *Gammons*, a police officer lacked reasonable suspicion to extend a traffic stop to search for drugs even though "the vehicle was stopped in a 'drug-related' or 'drug crime' area; it was 10:00 p.m.; the vehicle was from Illinois; [a police officer] had knowledge of prior drug activity by each of the three men in the vehicle; and Gammons appeared to be nervous and uneasy." *Gammons*, 241 Wis. 2d 296, ¶ 21. The *Gammons* court relied heavily on *Betow*. *Id.* ¶¶ 19–23.

Genous's case is unlike *Betow* and *Gammons* because it involved a known drug user's brief, late-night contact with a parked car. Those facts were absent from both *Betow* and *Gammons*. Genous's case is analogous to *Allen*, not *Betow* and *Gammons*.

Besides relying on inapposite case law, Genous focuses on each suspicious fact and argues that it, by itself, does not create reasonable suspicion. (Genous's Br. 19–22.) For example, he argues that "a person's prior drug history or criminal record does not create reasonable suspicion," and "the fact that the woman in this case matched the general description of Ms. Sienko did not create reasonable suspicion of criminal wrongdoing." (*Id.* at 20.) But "[t]he totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018) (citation omitted).

Genous argues that his meeting with a woman in his car might have had "lawful reasons." (Genous's Br. 19.) But "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Young*, 294 Wis. 2d 1, ¶ 21 (citation omitted). Police may perform an investigatory stop "if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn." *Id.* (citation omitted). The facts discussed above, when viewed together, created a reasonable inference that Genous was engaged in drug dealing.

Genous further argues that his presence in a "high drug trafficking area" "did not justify the stop." (Genous's Br. 21.) He quotes case law which notes that a person's presence in a high-crime area, *by itself*, does not create reasonable suspicion. (*Id.* at 22.) True, but an area's reputation is a "factor in the totality of the circumstances equation." *Allen*, 226 Wis. 2d at 74. Genous is once against engaging in an improper divide-and-conquer argument against reasonable suspicion.

Genous also argues that "Officer Stikl did not even know for certain that the woman he saw was actually Ms. Sienko." (Genous's Br. 21.) But reasonable suspicion does not require "absolute certainty." *State v. Newer*, 2007 WI App 236,

¶ 7, 306 Wis. 2d 193, 742 N.W.2d 923. Instead, reasonable suspicion exists if "rational inferences" from the facts create a "reasonable inference of wrongful conduct." *State v. Conaway*, 2010 WI App 7, ¶ 5, 323 Wis. 2d 250, 779 N.W.2d 182. Police could rationally infer that Sienko was the woman who entered Genous's car, because this woman matched Sienko's physical description and came from Sienko's house. (R. 49:10–11.)

Finally, Genous argues that his act of turning his headlights off was not suspicious. (Genous's Br. 20.) But courts often consider a driver's act of turning headlights off when finding reasonable suspicion. *See, e.g.*, *United States v. Salazar*, 609 F.3d 1059, 1069 (10th Cir. 2010); *United States v. Brown*, 63 F. App'x 655, 656 (4th Cir. 2003) (per curiam) (R-App. 101–02); *United States v. Watson*, 953 F.2d 895, 897 (5th Cir. 1992); *State v. Resch*, No. 2010AP2321–CR, 2011 WL 1564008, ¶¶ 14–15 (Wis. Ct. App. Apr. 27, 2011) (unpublished) (R-App. 103–07). Genous's conduct was suspicious because he turned off his headlights seconds before a woman came outside of a house and got into his car. (R. 49:7, 9.) One rational inference is that Genous turned off his headlights to avoid drawing attention to his car while he engaged in a drug deal. In any event, under *Allen*, there was reasonable suspicion to stop Genous's car even without considering his headlights.

II. Police lawfully found a gun in Genous's car.

Genous next argues that, if police lawfully stopped his car, the gun evidence must be suppressed. He presents two arguments in support of suppression: one pertaining to his socks and shoes, the other pertaining to a car door. Both arguments fail because the police lawfully found the gun.

A. The search of Genous's socks and shoes was lawful and, in any event, is irrelevant.

Genous argues that the gun evidence must be suppressed because police unlawfully extended his traffic stop to search his socks and shoes. (Genous's Br. 23–30.)[3] That argument fails for two separate reasons: (1) police lawfully searched Genous's shoes and socks; and (2) even if that search was unlawful, it had no bearing on the search of his car, where police found the gun.

1. Police lawfully searched Genous's socks and shoes.

"A pat down, or 'frisk,' is a search." *State v. Morgan*, 197 Wis. 2d 200, 208, 539 N.W.2d 887 (1995) (citation omitted). A police officer may frisk a person if the officer has a reasonable suspicion that the person might be armed and dangerous to the officer or others. *State v. Kyles*, 2004 WI 15, ¶ 7, 269 Wis. 2d 1, 675 N.W.2d 449. The officer "need not reasonably believe that an individual *is armed*; rather, the test is whether the officer has a reasonable suspicion that a suspect *may be armed*." *Morgan*, 197 Wis. 2d at 209 (emphases added) (citations omitted).

Here, three factors allowed police to order Genous to remove his socks and shoes so police could do a protective search of them.

First, police encountered Genous in a "high drug trafficking area" at 3:30 a.m. (R. 49:89.) Nighttime and presence in a high-crime area support the reasonableness of

[3] Genous does not argue that police unlawfully ordered him to exit his car, nor could he plausibly do so because "an officer may ask a driver to step out of the car during a traffic stop." *State v. Smith*, 2018 WI 2, ¶ 31, 379 Wis. 2d 86, 905 N.W.2d 353, *cert. denied*, 139 S. Ct. 79 (2018).

a frisk. *State v. McGill*, 2000 WI 38, ¶¶ 24–25, 234 Wis. 2d 560, 609 N.W.2d 795. In fact, the supreme court has "consistently upheld protective frisks that occur in the evening hours, recognizing that at night, an officer's visibility is reduced by darkness and there are fewer people on the street to observe the encounter." *Id.* ¶¶ 26, 32.

Second, "those who deal drugs often keep weapons on their person or nearby." *State v. Guy*, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992); *see also State v. Johnson*, 2007 WI 32, ¶¶ 29, 38, 299 Wis. 2d 675, 729 N.W.2d 182 (noting that drug selling is associated with possession of deadly weapons). As explained above, police had a lawful basis to stop Genous on suspicion of drug dealing based on his brief contact with a woman who fit the description of a known drug user, Kayla Sienko. After stopping Genous but before ordering him out of his car, police saw items in his car that were "consistent with drug dealing": multiple cell phones, cigar wrappers, and hand sanitizer. (R. 49:46–47.) Officer Stikl knew from training and experience that those items were indications of drug use or drug dealing. (R. 49:90.) Officer Stikl also thought that he "saw some weed" on the passenger-side floor. (R. video at 2:35–37.) All these facts created a reasonable belief that Genous was selling drugs. That belief, in turn, supported the suspicion that he might be armed and dangerous.

Third, police saw Genous make a furtive reaching movement while he was in his car. "An unexplained reaching movement or a furtive gesture by a suspect during a traffic stop can be a factor in causing an officer to have reasonable suspicion that a suspect is dangerous and has access to weapons." *State v. Sumner*, 2008 WI 94, ¶ 26, 312 Wis. 2d 292, 752 N.W.2d 783. Such furtive gestures include a driver reaching under his or her seat. *See State v. Buchanan*, 2011 WI 49, ¶ 11, 334 Wis. 2d 379, 799 N.W.2d 775.

Here, police saw Genous "making several movements with his right shoulder—dipping his right shoulder down like

he was reaching for something underneath his seat or trying to place something underneath the seat." (R. 49:53.) A police officer was concerned that Genous "might be accessing a weapon to assault officers." (R. 49:54.) Police could not tell whether Genous was trying to place something under his seat or was retrieving something from under his seat. (R. 49:54.)

Police thus could reasonably think that Genous might be dangerous and in possession of a weapon. It was reasonable to think that Genous's downward reaching movement was an effort to hide a weapon in one of his shoes or socks. When police have reasonable suspicion to perform a protective search, they have the right to "an *effective*" one. *State v. Limon*, 2008 WI App 77, ¶ 38, 312 Wis. 2d 174, 751 N.W.2d 877 (citation omitted). "[W]here an effective pat[-]down is not possible, the officer may take other action reasonably necessary to discover a weapon." *Id.* (second alteration in original) (citation omitted). Small weapons like razor blades can be in unusual places. *See, e.g.*, *State v. Denk*, 2008 WI 130, ¶ 59, 315 Wis. 2d 5, 758 N.W.2d 775 (upholding the search of an eyeglasses case during a traffic stop because it "was capable of containing a small weapon, such as a knife or a razor blade"). It was reasonable for police to check Genous's shoes and socks for a small weapon like a knife or razor blade, especially given his reaching movement toward his feet while he was sitting in his car and the limited visibility at night.

This Court found reasonable suspicion for a protective search based on fewer suspicious facts in *Allen*. There, a pat-down was justified for the same reasons that permitted the investigatory stop itself: the defendant hung around in a neighborhood for several minutes after making brief contact with a car "in a high-crime area" late at night. *Allen*, 226 Wis. 2d at 77. The facts supporting the pat-down here are even stronger because Genous made a furtive movement and because police saw items associated with drug dealing in his car.

2. Further, the gun evidence should not be suppressed even if the search of Genous's socks and shoes was illegal.

In any event, even if the police illegally had Genous remove his socks and shoes, this illegal conduct would not entitle him to suppression of the gun that police found in his car. There is no causal link between the search of Genous's shoes and socks and the search of his car.

"[T]he exclusionary rule requires courts to suppress evidence obtained through the *exploitation* of an illegal search or seizure." *State v. Carroll*, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1 (emphasis added). "This rule applies not only to primary evidence seized *during* an unlawful search, but also to derivative evidence acquired *as a result* of the illegal search, unless the State shows sufficient attenuation from the original illegality to dissipate that taint." *Id.* (emphases added).[4]

But, "attenuation analysis may not be necessary in all cases." *State v. Hogan*, 2015 WI 76, ¶ 66, 364 Wis. 2d 167, 868 N.W.2d 124. "[A]ttenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.'" *Id.* (alteration in original) (quoting *New York v. Harris*, 495 U.S. 14, 19 (1990)). "If the unlawful police conduct was not a 'but-for' cause of the search, attenuation analysis is unnecessary because the [search] is not tainted by the unlawful conduct in such a case." *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 592 (2006)).

In other words, "but-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson*, 547 U.S. at 592. When but-for causality is shown, a defendant still is

[4] An attenuation analysis has a three-factor test. *State v. Hogan*, 2015 WI 76, ¶ 58, 364 Wis. 2d 167, 868 N.W.2d 124.

not entitled to suppression if the government proves that the illegal police conduct was "too attenuated to justify exclusion." *Id.*

Those principles defeat Genous's argument that the illegal search of his socks and shoes entitles him to suppression. Genous is trying to suppress a gun that police found in his car. Police did not find any evidence in his shoes and socks. (R. 49:43.) Nothing in the record suggests that the police would not have searched Genous's car and found his gun "but for" the search of his socks and shoes. Indeed, after briefly searching his socks and shoes, police continued to detain Genous for several minutes to question him about his possible drug dealing. (R. video at 4:10–4:50, 7:10–10:30.) A police officer found the gun in Genous's car several minutes after Genous put his shoes and socks back on. (R. video at 4:10–4:50, 10:30–45.) The search of Genous's socks and shoes did not cause police to find a gun in his car. Because but-for causation is lacking, Genous is missing this "necessary" condition for suppression. *Hudson*, 547 U.S. at 592. The State thus does not need to prove that the search of Genous's car was attenuated from the search of his shoes and socks.

In sum, the search of Genous's socks and shoes was lawful and, in any event, has no bearing on whether he is entitled to suppression of the gun that police found in his car.

B. Police lawfully saw a gun in Genous's car.

Genous makes one more alternative argument for suppression of the gun found in his car: police found the gun after unlawfully opening the driver-side door. (Genous's Br. 30–32.) [5] That argument fails because police found the gun in Genous's car *before* opening his driver-side door. And even if police found the gun after opening the car door, police had

[5] The State assumes for argument's sake that police searched Genous's car by opening his driver-side door.

both probable cause to search the car for illegal drugs and reasonable suspicion to search the car for weapons.

1. Police found the gun before opening a door on Genous's car.

Dash-cam video shows that police found a gun in Genous's car before opening his car door. One officer testified that he saw a gun under the driver's seat while looking through the windshield of Genous's car. (R. 49:55, 60.) The circuit court, however, found that police found the gun after opening the car door. (R. 49:65, 90–91.) That factual finding is clearly erroneous.[6] Dash-cam video clearly shows that an officer looked through the driver-side window of Genous's car while Genous was sitting on a curb, the officer ran over to Genous, and police then arrested Genous for possessing a firearm as a felon. (R. video at 10:12–11:15.) After Genous was arrested, the video clearly shows that an officer returned to Genous's car, opened the driver-side door, and began looking inside the car. (R. video at 11:25–28.) Police thus found the gun before opening Genous's car door.

Although Genous does not argue otherwise, the State notes that a police officer does not perform a "search" for Fourth Amendment purposes by looking through a vehicle window, even when using a flashlight. *See, e.g.*, *Texas v. Brown*, 460 U.S. 730, 739–40 (1983) (plurality opinion); *United States v. Ware*, 914 F.2d 997, 1000 (7th Cir. 1990) (collecting cases); *see also New York v. Class*, 475 U.S. 106,

[6] The standard of review for this factual finding is unclear. *Compare State v. Walli*, 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898 (applying "clear error" review of findings based on disputed testimony and a video), *with State v. Jimmie R.R.*, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196 (applying de novo review of findings based entirely on a video). The State here will argue the "clear error" standard of review because it most favors Genous. Even under that standard, the circuit court's finding cannot stand.

114 (1986) (holding that no Fourth Amendment search occurred when a police officer looked through a vehicle's transparent windshield).

In short, police did not find the gun in Genous's car during an unlawful search. An officer found the gun while looking through the driver-side window of Genous's car. Looking through the window was not a "search" within the meaning of the Fourth Amendment.

2. In any event, police had probable cause to search Genous's car for drugs before they found the gun.

Even if police first saw a gun in Genous's car *after* opening his driver-side door, he still is not entitled to suppression because police had probable cause to search his car for drugs.

"[L]aw enforcement officers may search an entire motor vehicle without a warrant if there is probable cause to believe that the vehicle contains contraband." *State v. Matejka*, 2001 WI 5, ¶ 23, 241 Wis. 2d 52, 621 N.W.2d 891. "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999) (citations omitted). This test for probable cause is lower than a "more likely than not" standard. *Id.* "Probable cause 'is not a high bar.'" *Wesby*, 138 S. Ct. at 586 (citation omitted).

In one helpful case, this Court found probable cause to search a car for drugs because (1) a police officer saw a sandwich bag in the defendant's car in plain view, (2) the officer knew from training and experience "that sandwich bags are often rolled up in that manner to conceal marijuana," and (3) "another packet of a kind often used to carry controlled substances was also found on the car seat." *State v. Pozo*, 198

Wis. 2d 705, 713, 544 N.W.2d 228 (Ct. App. 1995). The officer in *Pozo* had probable cause even though he could not see through the sandwich bag. *Id.*

The case for probable cause is even stronger here. As explained above, (1) a woman exited a house and entered Genous's car for about 10 to 15 seconds; (2) this woman matched the physical description of Kayla Sienko, who lived in that house; (3) Sienko was a known drug user; (4) Genous told police that the woman who had briefly entered his car was named "Kayla"; (5) the headlights on Genous's car turned off moments before this woman entered his car; (6) Genous's contact with this woman occurred around 3:30 in the morning in a high drug-trafficking neighborhood; (7) a police officer saw cigar wrappers, cell phones, and hand sanitizer in Genous's car through a window; and (8) the officer knew from training and experience that those items are associated with drug use and drug dealing. The police officers could reasonably infer that Sienko was the woman who briefly entered Genous's car because this woman matched Sienko's physical description, she came from Sienko's house, and Genous said that the woman's name was Kayla. Moreover, Genous's failure to provide police with Kayla's last name was suspicious because it suggested that Kayla was a casual acquaintance who bought drugs from Genous, rather than a close friend or relative. Few law-abiding people have brief contact in their car at 3:30 a.m. with a person whose last name they do not even know. The police had far more suspicious facts here than the rolled-up sandwich bag and piece of paper that created probable cause in *Pozo*.

Because the police officers had probable cause to search Genous's car for drugs, they could lawfully open his driver-side door before they saw a gun under the driver's seat.

3. Further, police had reasonable suspicion to search Genous's car for weapons before finding the gun.

Regardless of probable cause to search for drugs, police had reasonable suspicion to search Genous's car for weapons.

A protective search for weapons may include a suspect's person and vehicle. *State v. Moretto*, 144 Wis. 2d 171, 177–78, 423 N.W.2d 841 (1988). "Whether a law-enforcement officer may 'conduct a protective search' of a car is 'decide[d] on a case-by-case basis, evaluating the totality of the circumstances, whether an officer had reasonable suspicion to justify a protective search in a particular case.'" *State v. Sutton*, 2012 WI App 7, ¶ 7, 338 Wis. 2d 338, 808 N.W.2d 411 (alteration in original) (quoting *Buchanan*, 334 Wis. 2d 379, ¶ 9). "[T]here must be a balance between danger and privacy, and when law-enforcement officers make a traffic stop, the danger is significant." *Id.* The balance "especially" weighs in favor of a protective search of a vehicle when a suspect is "not under arrest and could freely return to the [vehicle]." *Id.* ¶ 8.

Here, police had reasonable suspicion to search Genous's car for weapons for the same reasons that they could lawfully search his shoes and socks for weapons. Specifically, police reasonably suspected Genous of selling drugs, drug dealers often carry weapons, the traffic stop occurred late at night in a high drug-trafficking neighborhood, and Genous made a furtive reaching movement as if he was placing something under his car seat. Police made a minimal intrusion by opening the driver-side door of Genous's car. Because Genous was not under arrest before police found his gun, he likely would have returned to his car had police not found his gun. Due to the significant concern that Genous could have retrieved a weapon from his car, when weighed against the minimal intrusion into his privacy, police were

justified in opening Genous's car door to look for a weapon under his seat.

In sum, a police officer lawfully saw a gun in Genous's car through the driver-side window. And even if the officer first saw the gun after opening the car door, he lawfully opened the door because he had both probable cause to search the car for drugs and reasonable suspicion to search the car for weapons.

CONCLUSION

This Court should affirm Genous's judgment of conviction.

Dated this 16th day of August 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 5748 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 16th day of August 2019.

_____
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