FILED
10-15-2020
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JAMES TIMOTHY GENOUS,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, REVERSING A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 294-2907 (Fax)
rosenowse@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

ISSUE PRESENTED

Do the following facts contribute to reasonable suspicion of illegal drug activity: a brief encounter in a car between two or more people, a police officer's belief that one or more of those people is a known drug user, the time of day or night, and the car's headlights turning off right before the encounter and turning back on right afterward?

The State argued that each of these facts helped support a police officer's reasonable suspicion of drug activity. The circuit court agreed. But the court of appeals discounted these facts and found no reasonable suspicion.

This Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

INTRODUCTION

James Timothy 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. Shortly before the traffic stop, a police officer saw a woman enter Genous's parked 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 he turned the headlights back on seconds after the woman ran back into her house. The woman had the same residence and physical description as a known drug user. Based on his training and experience, the officer knew that illegal drug sales in this city often occurred in short interactions in vehicles outside of people's homes. The officer thought that he had witnessed an illegal drug transaction, so he pulled over Genous's car to investigate.

Genous filed a motion to suppress the gun evidence. The circuit court denied the motion and concluded that the traffic stop was lawful. The court of appeals disagreed and reversed.

This Court should reverse. The court of appeals seemingly gave no weight to the fact that the short encounter happened in a car or to the officer's belief that the woman who entered the car was a known drug user. And the court expressly stated that the time of night and Genous's turning his headlights off had no significance. This Court should make clear that each of those facts contributes to the reasonable-suspicion analysis. It should conclude that the officer had reasonable suspicion to stop Genous's car to investigate possible drug activity.

STATEMENT OF THE CASE

At 3:30 a.m., in a "high drug trafficking area," West Allis Police Officer Adam Stikl saw Genous's car parked but still running on the side of the road. (R. 49:6–7.) Officer Stikl parked his squad car about half a block behind Genous's car and turned off the squad car's headlights. (R. 49:7.) Immediately after Officer Stikl parked his car, Genous turned off his headlights but did not exit his car. (R. 49:7.)

A woman came outside of a nearby home "within a few seconds" of Genous's headlights turning off, and she got into Genous's car for about 10 to 15 seconds. (R. 49:9, 13–14.) 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.)

Officer Stikl looked up Genous's car's license plate and learned that it was registered to someone who lived in Milwaukee, although this brief meeting took place in West Allis. (R. 49:34–35.)

The woman who briefly entered Genous's car matched the physical description of Kayla Sienko, who lived in the house from which this woman came and went. (R. 49:10–11.) Officer Stikl knew from "other reports" that Sienko "has been arrested for drug offenses." (R. 49:11.) He had also learned that police knew from "prior contacts" with Sienko that she was "a heroin user," and she "still use[s]." (R. 49:12–13.)

Specifically, about two weeks before seeing Genous's car, Officer Stikl received an email from a detective saying that the police department should not work with Sienko anymore because of her continued drug use. (R. 49:11–13, 28–29.) After receiving that email, Officer Stikl "looked up her actual physicals in [the police department's] local system." (R. 49:29.) The woman who briefly entered Genous's car matched the description of Sienko that Officer Stikl had previously looked up. (R. 49:30.)

Officer 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.) Based on his "training and experience," Officer Stikl knew that "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." (R. 49:8.)

While speaking to Genous, Officer Stikl saw multiple cell phones and cigar wrappers 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 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.)[1]

Officer Stikl asked for and received Genous's driver's license. (R. 49:37–38.) He later asked Genous about the woman who had briefly been 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.) Officer Stikl 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 or retrieve something under his seat. (R. 49:54.)

Officer Stikl asked Genous for consent to search his car, but Genous refused. (R. 49:44–45.) An officer looked through the driver-side window of Genous's car. (R. video at 10:12–30.) The officer then handcuffed Genous (R. video at 10:30–45), telling Genous that he was under arrest as "a felony offender" for having a gun in his car. (R. video at 10:32–11:10, 11:13–15.)

[1] 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."

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 and ultimately 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 appealed his judgment of conviction. (R. 44.) The court of appeals reversed because it concluded that Officer Stikl lacked reasonable suspicion to stop Genous's car. (Pet-App. 108.)[2]

The State filed a petition for review, which this Court granted.

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.

---

[2] Genous raised two alternative arguments in favor of suppression of the gun: the police illegally searched his shoes and socks, and the police found the gun after illegally opening his driver-side car door. The court of appeals did not resolve these alternative arguments because it found the illegality of the stop dispositive. (Pet-App. 210 n.1.) The State did not present these issues in its petition for review. The State instead noted that, when this Court reverses in this type of situation, it often remands for the court of appeals to consider the unresolved issues. *State v. Wilson*, 2015 WI 48, ¶ 86 n.15, 362 Wis. 2d 193, 864 N.W.2d 52. The State thus does not address these alternative arguments further.

State v. Lonkoski, 2013 WI 30, ¶ 21, 346 Wis. 2d 523, 828 N.W.2d 552.

ARGUMENT

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).

B. The officer who stopped Genous's car was aware of suspicious facts that fall into four categories.

This case involves four categories of facts that together created reasonable suspicion of drug dealing: (1) location and duration, (2) time of night, (3) concealment, and (4) the officer's knowledge of a person he saw. This Court should hold that each of these facts contributes to the creation of reasonable suspicion of illegal drug activity.

1. Drug dealing commonly occurs during brief interactions in vehicles.

The court of appeals has found reasonable suspicion of illegal drug activity in a case where two men had brief contact with a car in "a high-crime area." *State v. Allen* 226 Wis. 2d 66, 74–75, 593 N.W.2d 504 (Ct. App. 1999). The court relied on a police officer's testimony that, "based on his training and experience, a person getting into a car for a short period of time was consistent with drug trafficking." *Id.* at 74.[3]

Here, these location and duration factors similarly exist because Officer Stikl saw a woman enter Genous's parked but running car for 10 to 15 seconds in a "high drug trafficking area." (R. 49:7–9, 13–14, 89.) Officer Stikl pulled over Genous's car because he thought that he had witnessed a possible drug transaction. (R. 49:14–15.) Based on his training and experience, Officer Stikl knew that drug sales in this city often occur in a vehicle outside the buyer's home. (R. 49:8.) "A reasonably prudent and experienced police officer would have recognized this behavior as consistent with the consummation of a drug deal." *United States v. Rabbia*, 699 F.3d 85, 90 (1st Cir. 2012) (collecting cases where a drug deal occurred during a brief interaction in a vehicle).

In short, the brief encounter in Genous's car in a high drug-trafficking neighborhood was consistent with an illegal drug transaction.

---

[3] Then-circuit judge Annette Kingsland Ziegler was a member of the three-judge panel in *Allen* pursuant to the Judicial Exchange Program.

2. A brief meeting in a vehicle is more suspicious if it occurs at night.

The time of night or day is a relevant factor in a reasonable-suspicion analysis. *State v. Morgan*, 197 Wis. 2d 200, 213, 539 N.W.2d 887 (1995) (frisk case). Nighttime supports reasonable suspicion to frisk a suspect, for example, because "an officer's visibility is reduced by darkness and there are fewer people on the street to observe the encounter." *State v. McGill*, 2000 WI 38, ¶ 32, 234 Wis. 2d 560, 609 N.W.2d 795.

Under that same rationale, nighttime contributes to reasonable suspicion of illegal drug activity. In other words, it is reasonable to assume that drug dealing on the street more often occurs at night than during the daytime because there are fewer eyewitnesses outside and their visibility is reduced at night.

Case law supports this conclusion. The *Allen* court found reasonable suspicion of drug dealing because, among other things, "[t]he contact between Allen, his companion and the car took place late at night; the time of day is another factor in the totality of the circumstances equation." *Allen*, 226 Wis. 2d at 74–75. Other jurisdictions have relied on nighttime as one factor that helped create reasonable suspicion of drug activity. *E.g., Rabbia*, 699 F.3d at 90; *United States v. Carr*, 674 F.3d 570, 575 (6th Cir. 2012); *United States v. Clarkson*, 551 F.3d 1196, 1202 (10th Cir. 2009); *United States v. Bayless*, 201 F.3d 116, 134 (2d Cir. 2000). Of course, nighttime alone does not create reasonable suspicion of a crime. Rather, the time of night or day is one of many "innocuous factors" that "take on added significance" when combined with other suspicious factors. *Bayless*, 201 F.3d at 134.

Here, Officer Stikl observed a possible drug transaction around 3:30 a.m. (R. 49:6.) The time of night reasonably added to his suspicion.

3. Concealment by turning off headlights right before activity consistent with drug dealing adds to the reasonable-suspicion analysis.

Many courts rely on headlights turning off or being off at night when finding reasonable suspicion of criminal activity. *See, e.g.*, *United States v. Salazar*, 609 F.3d 1059, 1069 (10th Cir. 2010); *United States v. McGuire*, 258 F. App'x 749, 752 (6th Cir. 2007); *United States v. Brown*, 63 F. App'x 655, 656 (4th Cir. 2003) (per curiam); *United States v. Watson*, 953 F.2d 895, 897 (5th Cir. 1992); *State v. Williams*, 789 S.E.2d 582, 592 (S.C. Ct. App. 2016); *Boyd v. State*, 442 S.W.3d 463, 469 (Tex. App. 2013); *State v. Resch*, No. 2010AP2321-CR, 2011 WL 1564008, ¶¶ 14–15 (Wis. Ct. App. Apr. 27, 2011) (unpublished) (Pet-App. 206); *State v. Herbert*, 155 Wash. App. 1003, 2010 WL 892214, at *3 (Wash. Ct. App. 2010); *State v. L.D.M.*, 420 So. 2d 899, 900 (Fla. Dist. Ct. App. 1982).[4]

Courts have found reasonable suspicion where, for instance,"[t]he defendant was sitting alone in an automobile

[4] Some of these cases are unpublished, but Wisconsin's rules of appellate procedure allow citations to unpublished decisions from other jurisdictions. *State v. Stenzel*, 2004 WI App 181, ¶ 18 n.6, 276 Wis. 2d 224, 688 N.W.2d 20. Pursuant to Wis. Stat. § (Rule) 809.23(3)(c), the State provides a copy of the unpublished *Resch* opinion. The State does not provide copies of the unpublished opinions from other jurisdictions because Rule 809.23(3) applies only to Wisconsin Court of Appeals decisions. *Predick v. O'Connor*, 2003 WI App 46, ¶ 12 n.7, 260 Wis. 2d 323, 660 N.W.2d 1.

in a high crime district late at night with the engine running and the headlights off." *Commonwealth v. Almeida*, 366 N.E.2d 756, 760 (Mass. 1977) (citation omitted). In another case, police had reasonable suspicion to stop the defendant because his vehicle was parked in a Post Office parking lot around midnight with the headlights off, and then the headlights turned on as the vehicle began to drive away. *United States v. Salcido*, 341 F. App'x 344, 345 (9th Cir. 2009). The court reasoned that the headlights being off supported the police officer's conclusion that the defendant was not innocently dropping off mail. *Id.*

Here, Genous turned his car's headlights off and back on during a suspected drug sale. Officer Stikl saw Genous's car parked on the roadside with its engine running and headlights on. (R. 49:6–7.) Officer Stikl parked his squad car about half a block behind Genous's car and turned off the squad car's headlights. (R. 49:7.) Immediately after Officer Stikl parked his car, Genous turned off his headlights but did not exit his car. (R. 49:7.) A woman came outside of a nearby home "within a few seconds" of Genous's headlights turning off, and she got into Genous's car for about 10 to 15 seconds. (R. 49:9, 13–14.) 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.)

Genous's headlights activity was suspicious. One reasonable inference is that he was trying to avoid detection and reduce the visibility into his car in case anyone was watching him. Because Genous turned off his headlights right after the squad car parked half a block behind his car, Officer Stikl could reasonably assume that Genous had spotted the squad car and was trying to avoid police detection. Genous's act of turning off his headlights was evasive or at least suspicious. His brief encounter in his car late at night was suspicious, and this "[s]uspicion was

further heightened by the headlights having been turned off." *People v. Simpson*, 29 N.E.3d 546, 555 (Ill. App. Ct. 2015).

4. An officer's knowledge that a person fits the description of a known drug user adds to reasonable suspicion of drug activity.

Reasonable suspicion or probable cause may be based in part on police's knowledge of a person with whom a suspect interacts. In *State v. Kerr*, police had probable cause to search the defendant's motel room because, among other facts, the defendant "was accompanied by a person with a record of arrest for drug dealing and with recent drug related ties to the state from which the defendant had just come." *State v. Kerr*, 181 Wis. 2d 372, 383, 511 N.W.2d 586 (1994). The travel companion's drug history included his prior admission to an undercover officer, stating that he got cocaine and heroin from Washington State, the defendant's state of origin. *Id.* at 377, 382–83. Police were unsure whether the defendant's travel companion had a conviction record. *Id.* at 377.

Here, similarly, Officer Stikl's knowledge of the likely identity of the woman (Kayla Sienko) who briefly interacted with Genous in a car with its headlights turned off at 3:30 a.m. added to reasonable suspicion because Sienko was a known drug user. As noted, a woman came outside of a nearby home "within a few seconds" of Genous's 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 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.) Like in *Kerr*, the police officer here could rely on his knowledge

about Genous's associate's drug history in deciding whether there was reasonable suspicion.

It is immaterial that Officer Stikl did not know for sure that Sienko was the woman who briefly entered Genous's car. After all, 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.)

Indeed, courts have found reasonable suspicion or probable cause based largely or entirely on a defendant's matching the physical description of a suspect. In *State v. Flynn*, 190 Wis. 2d 31, 42, 527 N.W.2d 343 (Ct. App. 1994), for example, police lawfully detained the defendant for investigation because he "matched the description of the armed robber given by one of the victims." And in *State v. Eckert*, 203 Wis. 2d 497, 518–21, 553 N.W.2d 539 (Ct. App. 1996), police had probable cause to arrest the defendant—a higher standard than reasonable suspicion—because he matched the description of a shooting suspect and he was present in the general area of the shooting. Police had probable cause in *Eckert* even though the defendant and shooting suspect had a two-inch height discrepancy, different hair colors, and had travelled in different directions from the shooting. *Id.*

Here, of course, the question is not whether police had reasonable suspicion to stop the woman who briefly entered Genous's car. Instead, the question is whether the inference

that this woman was Sienko contributed to the reasonable suspicion to stop Genous's car.

It did. *Flynn* and *Eckert* show that a matching physical description can be a significant factor in a reasonable-suspicion or probable-cause analysis. Here, Sienko's address and physical description strongly suggested that she was the woman who briefly interacted with Genous in his car. And *Kerr* shows that police may consider a suspect's associate's history of drug activity. It was reasonable for Officer Stikl to partly rely on Sienko's known drug history when he suspected that he had witnessed a drug transaction between Sienko and Genous.

C. Considering the relevant facts together, the officer had reasonable suspicion to stop Genous's car.

Having established that each of the individual facts discussed above was suspicious, the State now explains why they collectively created reasonable suspicion to stop Genous's car.

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. "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).

In one instructive case, the 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. *Allen* 226 Wis. 2d at 74–75. The court considered the "cumulative effect" of those facts, viewing the events "in sequence." *Id.* at 75 (citation omitted).

Police here likewise had reasonable suspicion to stop Genous. Like in *Allen*, here Officer Stikl saw 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 if Genous delivered drugs to Sienko, he likely would have had no reason to linger in the area after the transaction. Indeed, Officer Stikl testified that drug dealers in his city often sell drugs from their cars outside the buyers' homes and then leave. (R. 49:8.) Genous's actions fit that pattern.

And other facts made Genous's situation more suspicious than the one in *Allen*. Immediately after Officer Stikl parked his squad car half a block behind Genous's car, Genous turned off his headlights but did not exit his car. (R. 49:7.) A woman came outside of a nearby home "within a few seconds" of Genous's 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.) There was reasonable suspicion in *Allen* even though that case did not involve suspicious headlights activity or an interaction with a known drug user.

When viewed cumulatively and in sequence, the facts created reasonable suspicion to stop Genous's car to investigate possible drug activity. The brief interaction in Genous's car was consistent with drug dealing, especially given that it occurred late at night in a high drug-trafficking area and likely involved a known heroin user. That Genous turned off his headlights during this encounter made it more suspicious. Under *Allen*, Officer Stikl lawfully stopped Genous's car.

D. The court of appeals erred in finding no reasonable suspicion.

In concluding that Officer Stikl lacked reasonable suspicion, the court of appeals made four errors. It relied on inapposite case law and dismissed the significance of Genous's headlights, the time of night, and Sienko's drug history.

First, the court of appeals discounted the short encounter in a high drug-trafficking area by relying heavily on *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997) (Pet-App. 106–07), where 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 court of appeals concluded that Officer Stikl lacked reasonable

suspicion of drug activity under *Young* because "Stikl simply saw a woman enter Genous's vehicle, remain in there for about fifteen to twenty seconds, exit the vehicle, and go back into her house." (Pet-App. 107.)

Young is distinguishable from Genous's case. When the *Young* court found no reasonable suspicion of drug dealing, it twice referred to the "daytime" nature of the brief sidewalk encounter that police had observed. *Young*, 212 Wis. 2d at 429–30. Tellingly, the court distinguished a federal case where police had reasonable suspicion after observing a 20-second interaction in a vehicle late at night. *Id.* at 430–31 (citing *United States v. Trullo*, 809 F.2d 108, 112 (1st Cir. 1987)).

For similar reasons, the court in *Allen* "conclude[d] that *Young* is factually distinguishable." *Allen*, 226 Wis. 2d at 74. The court noted that, under *Young*, "stopping briefly on the street when meeting another person is an ordinary, everyday occurrence during daytime hours in a residential neighborhood." *Id.* (quoting *Young*, 212 Wis. 2d at 429). It distinguished *Young* because the defendant in *Allen* had brief contact in a car "late at night." *Id.* The court noted that the defendant's activity 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.* It cited a police officer's testimony that, based on his training and experience, "a person getting into a car for a short period of time was consistent with drug trafficking." *Id.*

So, the court of appeals here should have relied on *Allen*, not *Young*. Genous's case and *Allen* each involved the defendant's brief encounter in a car late at night, not a daytime encounter on a sidewalk like in *Young*. Yet the court below did not mention *Allen* even once, although the State had heavily relied on it.

Second, the court of appeals stated without explanation that "the fact that Genous was sitting in a running vehicle and turned the headlights off is inconsequential to our analysis." (Pet-App. 108.) Genous's act of turning off his headlights was suspicious for the reasons explained above in section B.3.

Third, the court of appeals concluded that "[t]he fact that Genous's encounter with [Kayla Sienko] took place early in the morning in a known drug trafficking neighborhood does not give rise to reasonable suspicion." (Pet-App. 216.) It reasoned that "[Officer] Stikl testified that drug transactions do not only occur at certain hours, and we have previously rejected the notion that drug transactions are more likely to occur in the middle of the night. *See State v. Betow*, 226 Wis. 2d 90, 96, 593 N.W.2d 499 (Ct. App. 1999)." (Pet-App. 108.)

But *Betow* did not reject that notion. Instead, the *Betow* court simply observed that "[t]he 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." *Betow*, 226 Wis. 2d at 96 (emphasis added). In *Betow*, the State was unable to cite *Allen* for that proposition because *Allen* was decided just one day before *Betow* was decided. As explained above in section B.2., the time of night added to the suspicion that Genous had consummated a drug deal in his car.

Fourth, the court of appeals downplayed the significance of Sienko's known drug use, apparently because Officer Stikl did not know for sure whether Sienko was the woman who had briefly entered Genous's car. The court stated, "At the time of the stop, Stikl was dependent upon a police department email containing a physical description of [Sienko]. Stikl had neither seen a picture of [Sienko], nor was he aware of whether [Sienko] was the only resident of

that home." (Pet-App. 107.)[5] The court further noted that Officer Stikl did not see an exchange or see anything in Sienko's hands. (Pet-App. 107.)

That reasoning is not persuasive. As explained above in section B.4., Officer Stikl could rationally infer that Sienko was the woman who was briefly in Genous's car. And Officer Stikl could reasonably assume that a drug transaction had occurred even though he did not see one, given that he was parked half a block away, it was dark outside, and the suspected exchange occurred in Genous's car while its headlights were off. Those same facts—and the possibility that Sienko put money or drugs into a pocket on her clothing—explain why Officer Stikl did not see anything in her hands. To be sure, seeing an object in Sienko's hand or seeing something exchange hands likely would have added to the reasonable suspicion. But Officer Stikl had reasonable suspicion without seeing those things. Indeed, there was reasonable suspicion in the similar *Allen* case even though a police officer "could not see into the car, and he did not see any exchanges that may have happened inside the car." *Allen*, 226 Wis. 2d at 68.

In short, the court of appeals incorrectly discounted the suspicious facts and relied on distinguishable case law. It should have concluded that Officer Stikl had reasonable suspicion to stop Genous's car to investigate possible drug activity.

[5] The court of appeals possibly misstated the facts here. Officer Stikl learned of Sienko's physical description by looking her up in the police department's "local system," not from an email. (R. 49:29.)

CONCLUSION

This Court should reverse the court of appeals' decision and remand for that court to address Genous's unresolved arguments.

Dated this 15th day of October 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 294-2907 (Fax)
rosenowse@doj.state.wi.us

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 5013 words.

SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 15th day of October 2020.

SOCTT E. ROSENOW
Assistant Attorney General