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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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Police lawfully stopped Genous's car.

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

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

Genous argues that "[s]hort-term contact in a car does not create reasonable suspicion" because it is unreasonable "to assume that every individual who has short-term contact with another person in a car is engaged in a drug deal." (Genous's Br. 16, 17–18.) 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). This case involves Genous's short-term contact in a car, late at night, in a high drug-trafficking area, with a person whom Officer Stikl reasonably thought was a known drug user. The question is whether short-term contact with a car *helps contribute* to reasonable suspicion and whether the totality of these facts created reasonable suspicion. The answer is yes.

Genous relies on *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997), in arguing that his short-term contact in his car was not suspicious. (Genous's Br. 16–17, 20.) *Young* is distinguishable because that case involved a short-term contact between two people on a sidewalk during the daytime, not short-term contact in a vehicle late at night. (State's Br. 16.) The court in *State v. Allen* 226 Wis. 2d 66, 74–75, 593 N.W.2d 504 (Ct. App. 1999), distinguished *Young* for the same reasons.

Genous's attempt to distinguish *Allen* fails. Genous argues that, unlike the defendant in *Allen*, he "was not

hanging out on a street corner, and he did not get inside a random car that pulled up to the curb. He also did not hang around the area afterwards, with no apparent lawful reason for being there." (Genous's Br. 20.) These differences are immaterial. Genous has not explained why he thinks it matters that someone got into Genous's car, rather than Genous getting into someone else's car. Either scenario involves short contact in a car. Here, a woman who fit a known drug user's physical description got "inside a random car that pulled up to the curb." As the State has explained, Genous appeared to be selling drugs from his car, consistent with other drug dealing in that city. (State's Br. 14.) The defendant in *Allen* appeared to be selling drugs to people in their cars. Genous and the defendant in *Allen* each appeared to be dealing drugs during a short contact in a car.

Genous notes that "police in *Allen* had placed a two-block area under surveillance after receiving numerous complaints about drug activity, gangs, and gunshots." (Genous's Br. 19.) If Genous is suggesting that police can help create reasonable suspicion by choosing to surveil a neighborhood, he has not adequately developed that argument. Perhaps Genous is implying that the high-crime-area factor was stronger in *Allen* than it was here due to the complaints in *Allen*. Even so, Genous's case involves two suspicious facts that were lacking in *Allen*: "suspicious headlights activity [and] an interaction with a known drug user." (State's Br. 15.)

Genous's reliance on an unpublished decision is misplaced because police in that case simply observed two men sitting in a car, not a third party's short contact with someone in a car. (*See* Genous's Br. 18–19.) To the extent that unpublished decision might be inconsistent with *Allen*, *Allen* controls because "stare decisis applies to the published

decisions of the court of appeals." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405.

Finally, Genous posits innocent reasons to explain his brief contact in his car. (Genous's Br. 18.) But "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729 (citation omitted). The law "accepts the risk that officers may stop innocent people." *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). Genous seems to recognize that his innocent explanations do not matter if Officer Stikl had a reasonable inference of unlawful conduct. (Genous's Br. 18.) Stikl could draw such an inference. (State's Br. 13–18.)

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

Wisconsin (and foreign) case law considers time of night a relevant factor in a reasonable-suspicion analysis. (State's Br. 8.) Genous urges this Court to follow a 41-year-old California case instead by giving this factor "minimal weight." (Genous's Br. 22.) Genous, however, has not presented a "compelling reason" to overturn Wisconsin precedent. *Wenke*, 274 Wis. 2d 220, ¶ 21.

Genous argues that "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." (Genous's Br. 20.) Of course, testimony to this effect would have bolstered the case for reasonable suspicion. But the lack of such testimony does not mean that the time of night is irrelevant. Genous has not cited any case law supporting that notion.

Genous cites *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), and *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, to support his

argument that nighttime is an essentially irrelevant fact in a reasonable-suspicion analysis. But the court in those two cases did not hold that nighttime is irrelevant. The court in each case simply held that the totality of the facts, including time of night, did not create reasonable suspicion. Genous relies on certain language in *Betow* (Genous's Br. 21–22), but the State has already explained why that language does not support his argument (State's Br. 17).

Genous's case has more suspicious facts than *Betow* and *Gammons*. Unlike the defendants in those two cases, Genous was not pulled over while he was innocently driving. Officer Stikl saw Genous engage in brief contact in his car with a known drug user. Neither *Betow* nor *Gammons* involved brief contact with a vehicle.

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

Genous argues that his act of turning off his headlights adds nothing to the reasonable-suspicion analysis. Tellingly, however, he cites no case law advancing that position. He instead just cites an unpublished case stating that a car's "interior light" turning on and off "appear[ed] to add nothing to the analysis." (Genous's Br. 23–24.)

Genous argues that the headlights cases cited by the State are inapplicable because those cases involved suspicious activity besides turning off headlights. (Genous's Br. 25–26 & n.6.) But so does Genous's case: brief contact with a known drug user late at night in a high drug-trafficking area. At most, Genous's attempt to distinguish this case law supports the undisputed notion that turning off headlights *by itself* does not create reasonable suspicion. The

question here is whether Genous's act of turning off his headlights is a relevant factor in the analysis. It is.

Genous disagrees because, according to him, it would have been "absurd" for him to engage in a drug deal despite knowing that Officer Stikl was parked behind him. (Genous's Br. 24.) But drug dealers often do absurd things, like voluntarily allowing police officers to search their luggage containing drugs. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194 (2002). And it would not have been absurd for Genous to think that Officer Stikl was unable to see into his car from half a block away at night, especially with Genous's headlights turned off. Genous, moreover, has failed to address the State's argument that "[o]ne reasonable inference is that he was trying to avoid detection and reduce the visibility into his car in case *anyone* was watching him." (State's Br. 10 (emphasis added).) Genous's act of turning off his headlights reasonably added to Officer Stikl's suspicion even if Genous did not specifically know that Stikl was watching him.

Genous offers an innocent explanation for why he turned off his headlights right before engaging in a suspected drug transaction. (Genous's Br. 24.) But the question is whether Officer Stikl drew a reasonable inference of illegal conduct, not whether he could have drawn innocent inferences. *See Young*, 294 Wis. 2d 1, ¶ 21.

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

Genous argues that "a person's prior drug history or criminal record does not create reasonable suspicion of criminal activity." (Genous's Br. 26.) True, Kayla Sienko's drug history, "standing alone, might well be insufficient. But

that is not the test we apply. We look 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. Post*, 2007 WI 60, ¶ 16, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). Genous's argument once again employs an improper "divide-and-conquer analysis." *Wesby*, 138 S. Ct. at 588.[1]

The issue here is whether Sienko's drug history *contributes* to reasonable suspicion under the totality of the circumstances, not whether this fact *alone creates* reasonable suspicion. A person's drug history and drug activity are relevant factors. *See State v. Sanders*, 2007 WI App 174, ¶ 15, 304 Wis. 2d 159, 737 N.W.2d 44 (finding no probable cause because, *inter alia*, police "had no prior history with Sanders and no knowledge of any previous participation in drug-related activity"), *aff'd on other grounds*, 2008 WI 85, 311 Wis. 2d 257, 752 N.W.2d 713. Genous seemingly does not argue otherwise.

Instead, Genous argues that the significance of Sienko's drug history is "weaken[ed]" because Officer Stikl "did not know for certain that the woman Mr. Genous met with was actually Ms. Sienko." (Genous's Br. 27.) True, the case for reasonable suspicion would be stronger if additional facts helped prove that Sienko was the woman who briefly

[1] Genous repeatedly advances a divide-and-conquer argument when addressing the significance of Sienko's drug history. He argues that "the fact that the woman in this case matched the general description of Ms. Sienko did not create reasonable suspicion of criminal wrongdoing," (Genous's Br. 26); he defends "the court of appeals' conclusion that Ms. Sienko's drug history did not create reasonable suspicion" (Genous's Br. 27); and he asserts that "the court of appeals rightly concluded that Ms. Sienko's past drug history did not provide reasonable suspicion" (Genous's Br. 28).

entered Genous's car. But this inference is already strong because this woman matched Sienko's physical description and came from Sienko's house.

Genous seems to rely on the court of appeals' reasoning that Officer Stikl did not see an exchange in Genous's car. (Genous's Br. 27.) The State has already explained why that reasoning fails. (State's Br. 18.)

Genous argues that there were more suspicious facts in *State v. Kerr*, 181 Wis. 2d 372, 511 N.W.2d 586 (1994), than there were here. (Genous's Br. 28–29.) He might be right, but *Kerr* involved probable cause. Genous's case involves the lower standard of reasonable suspicion. That probable cause existed in *Kerr* does not mean that fewer suspicious facts would not amount to reasonable suspicion. It is "dubious logic" to argue "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it." *United States v. Knights*, 534 U.S. 112, 117 (2001). Here, the State cited *Kerr* simply to support its position that a defendant's associate's drug history is relevant under the Fourth Amendment. Genous does not seem to dispute this point.

5. An area's reputation can contribute to reasonable suspicion.

Officer Stikl testified that the suspected drug deal happened in "a high drug trafficking area." (R. 49:8.) He based that view on "[a]ssemblies, briefings, things like that." (R. 49:8.) The circuit court found that Genous was "in a high drug trafficking area." (R. 49:89.)

Genous argues that this finding is clearly erroneous because Stikl's testimony was "vague and unspecific." (Genous's Br. 31.) Genous alternatively argues that this Court should give this factor "minimal weight." (Genous's Br. 31.)

Genous is wrong. This finding mirrored Stikl's testimony and thus was not "against the great weight and clear preponderance of the evidence." *State v. Limon*, 2008 WI App 77, ¶ 16, 312 Wis. 2d 174, 751 N.W.2d 877 (citation omitted). The alleged vagueness does not make this finding clearly erroneous or insignificant. In another Fourth Amendment case, this Court relied on an officer's testimony that an area was "pretty active," despite the defendant's argument that this testimony was ambiguous and meaningless. *State v. Kyles*, 2004 WI 15, ¶¶ 62–67, 269 Wis. 2d 1, 675 N.W.2d 449. Stikl's testimony was clearer and more precise than the testimony in *Kyles*.

Genous further argues that "this location evidence did not justify a traffic stop." (Genous's Br. 29.) But the question is whether this location evidence contributes to reasonable suspicion, not whether it alone creates reasonable suspicion. *See Post*, 301 Wis. 2d 1, ¶ 16.

Genous urges this Court to use its superintending authority to provide "rules and guidance" regarding "the high-crime-area factor." (Genous's Br. 42.) A court may rely on "an officer's perception of an area as 'high-crime'" when deciding whether there was reasonable suspicion. *State v. Morgan*, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995). Genous's proposal would overrule that precedent and remove this factor from the reasonable-suspicion analysis in virtually all cases. In fact, Genous's proposal would seemingly adopt and go far beyond the single dissenting justice's opinion in *Morgan*. *See id.* at 219 (Abrahamson, J., dissenting) (advancing some of Genous's arguments).

This Court, however, does not use its superintending power "lightly." *State ex rel. Hass v. Wisconsin Court of Appeals*, 2001 WI 128, ¶ 11, 248 Wis. 2d 634, 636 N.W.2d 707. It should reject Genous's invitation because it would

create confusion and the law already provides adequate protection.

First, Genous's proposal would create more confusion than clarity and make it virtually impossible for a court to ever rely on this longstanding factor. Genous argues that this Court should permit a circuit court to make a high-crime-area finding only if (1) the State introduces "objective, verifiable data" into evidence; (2) the data show that the area in question "had a higher crime rate than other nearby areas"; (3) "the arresting officer was actually aware of this data at the time of the stop or arrest"; (4) the data are "no more than three months" old; (5) the type of crime suspected in a case is the same type of crime common in the area[2]; and (6) the area in question is no larger than a "cluster of street blocks" but smaller than "a neighborhood." (Genous's Br. 43–46.)

Those proposed rules have many problems. Genous has not explained the difference between a "neighborhood" and a "cluster of street blocks" or provided any guidance as to how courts and police departments should define these terms. Nor has Genous explained why an area's high crime rate should be irrelevant just because a nearby area has a *higher* rate. And police officers cannot possibly gather, document, and memorize crime rates for each "cluster of street blocks" within their jurisdiction every three months. This Court should reject Genous's proposal to effectively eliminate the high-crime-area factor.

Second, the law already provides adequate protections. Genous argues that the high-crime-area factor renders

[2] This proposed requirement is met here because Officer Stikl suspected Genous of engaging in drug activity in a high drug-trafficking area. (R. 49:8, 14.)

people in certain neighborhoods second-class citizens with less Fourth Amendment protection. (Genous's Br. 35–38.) This Court rejected a nearly identical argument in *Morgan*, 197 Wis. 2d at 212–13, reasoning that presence in a high-crime area is a relevant consideration but standing alone does not create reasonable suspicion. The court of appeals has likewise noted that a second-class-citizenship concern would arise if mere presence in a high-crime area at night were sufficient to justify a seizure, but it is not sufficient. *State v. Gordon*, 2014 WI App 44, ¶ 15, 353 Wis. 2d 468, 846 N.W.2d 483. "This rule amply protects law-abiding residents of high-crime neighborhoods from being searched solely because of their surroundings." *State v. Primous*, 394 P.3d 646, 651 (Ariz. 2017).

Adopting Genous's proposal would harm crime victims by hampering police protection for people who live in high-crime areas. Because "few live in these areas by choice," "[a] delicate balance must be struck between the right of the often-victimized innocent ghetto inhabitant to adequate, unhampered police protection and the rights guaranteed to him under the Fourth Amendment." *United States v. Davis*, 458 F.2d 819, 822 (D.C. Cir. 1972). "This balance can best be struck, as *Davis* suggests, by cautiously using the crime problem in the area only to give meaning to highly suspicious facts and circumstances." Wayne R. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment*, § 3.6(g) (6th ed.) (Sept. 2020 update). Genous's proposal would upend this balance by making areas' high-crime reputations irrelevant in virtually all cases, hurting police officers' ability to protect people who live in those areas.

True, the kind of statistical data and expert testimony that Genous proposes as requirements would bolster the case for reasonable suspicion. But they should not be required because they would impose an impossible burden

on police and prosecutors, create confusion, and inadequately allow police to protect communities from crime.

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

As explained above, Genous argues that each fact standing alone failed to establish reasonable suspicion to stop his car. But the correct analysis focuses on the totality of the facts and their cumulative effect, which here created reasonable suspicion. (State's Br. 13–18.)

CONCLUSION

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

Dated this 18th day of November 2020.

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 2991 words.

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 18th day of November 2020.

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