STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP447-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER JAN VANBEEK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVIICTION AND AN ORDER DENYING SUPPRESSION, BOTH ENTERED IN SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE KENT HOFFMAN, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did police have reasonable suspicion to briefly seize Defendant-Appellant Heather Jan VanBeek before searching her truck?

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

VanBeek seeks suppression of methamphetamine that police found in her truck. She argues that the drug evidence should be suppressed because she was illegally seized when police searched her truck. The State agrees that VanBeek was seized pursuant to an investigatory stop before police searched her truck. But the seizure occurred later than VanBeek thinks it did. By that time, police had reasonable suspicion to seize VanBeek and to extend the investigatory stop for a drug-sniffing dog to smell her truck. Because VanBeek was lawfully seized, the circuit court correctly denied her suppression motion.

STATEMENT OF THE CASE

I. Statement of facts

Around 12:16 a.m. one night in November 2017, an anonymous person called police and said that two people had been sitting in a truck for about one hour. (R. 102:16, 20.) The

concerned caller said that a man with a backpack had come to the truck and then left. (R. 102:5–6; 107:5, 18.) The caller said that the truck was located at North Sixth Street and Superior Avenue in Sheboygan. (R. 102:5.)

Sheboygan police officer Sung Oetzel was dispatched to that location to investigate. (R. 102:5.) He saw one truck parked where the caller said it was parked, and there were no other vehicles in the area. (R. 102:6.)

He parked his squad car behind the truck, turned on his spotlight, and approached the truck on foot. (R. 20 at 00:30–40.)[1] The truck window was rolled down, and Officer Oetzel said, "How you doing?" (R. 20 at 00:40.) VanBeek was in the driver's seat, and a man named Branden Sitzberger was in the passenger's seat. (R. 102:6; 107:4.)

Officer Oetzel identified himself and said that someone had "called in" to say that two people were "just sitting here." (R. 20 at 00:48.) VanBeek said that she had been waiting for Sitzberger. (R. 20 at 00:51.) Officer Oetzel said that the anonymous caller had reported that two people were sitting here for "an hour." (R. 20 at 00:56–58.) After VanBeek disagreed, Sitzberger said, "Ten minutes." (R. 20 at 00:58–1:01.)

Officer Oetzel asked VanBeek and Sitzberger, "Could I get your guys' information for my report so that I can just get out of here? . . . [I]f I could have your photo ID . . . ." (R. 20 at 1:14–22.) Officer Oetzel took their driver's licenses, said, "I'll be right back," and headed to his squad car. (R. 20 at 1:50–55.)

[1] The State and VanBeek cite the same video from Officer Oetzel's bodycam using the same citation conventions in their appellate briefs. (*See* VanBeek's Br. 2 n.1.)

Officer Oetzel used VanBeek's license to "run [her] information" in his squad car. (R. 102:11.) He learned that VanBeek had a valid driver's license, no warrants, and a drug overdose earlier in the year. (R. 102:11–12; 107:10–11.) Officer Oetzel further learned that Sitzberger was "on some type of supervision," either probation or parole. (R. 107:66; *see also* 102:11–12.) Officer Oetzel called a canine officer to ask him to come to the scene. (R. 102:12–13.)

Officer Oetzel returned to VanBeek's truck and asked her to confirm whether the information on her driver's license was correct. (R. 102:13–14.) He wanted her to confirm this information because people sometimes move without updating their driver's license, some people fabricate their addresses, and he wanted to ensure that police records had VanBeek's correct address in case he had to contact her again. (R. 102:14; 107:13, 20, 31.)

Sitzberger told Officer Oetzel a different address than the one listed on his driver's license. (R. 102:14; 107:31.) The officer said, "I thought you said you lived here." (R. 20 at 10:31.) Sitzberger said that he had come from his friend "Jake's" house. (R. 20 at 10:34–42.) Sitzberger said that he did not know Jake's last name and that he had known Jake for only five or six months. (R. 20 at 11:10–13, 14:10–12.) Sitzberger confirmed that he was on probation. (R. 20 at 11:51.)

When Officer Oetzel asked Sitzberger how he knew Jake, Sitzberger paused for several seconds and then said that one of his female friends used to date Jake. (R. 20 at 14:15–40.) Officer Oetzel found it "kind of weird that [Sitzberger] didn't really know his friend, Jake." (R. 107:21.)

Sitzberger told Officer Oetzel that Jake lived at "Eighth and Superior" but then corrected himself seconds later, saying "Seventh and Superior." (R. 20 at 10:47–54.) Officer Oetzel found that address "funny" and "kind of weird" because

VanBeek and Sitzberger were sitting in a truck parked one or two blocks away, on North Sixth Street and Superior Avenue. (R. 102:14–15; *see also* 107:68.)

Officer Oetzel asked VanBeek how long she had been sitting in her truck. (R. 20 at 14:50–55.) VanBeek said that she had been sitting in her truck for about one hour total, for about one half-hour before Officer Oetzel arrived, and for a while before Sitzberger got to her truck. (R. 20 at 14:55–15:27.) Based on his training and experience, Officer Oetzel thought that people "are usually utilizing narcotics" if they are sitting in a parked vehicle for a long period of time. (R. 107:26.)

Officer Oetzel asked VanBeek and Sitzberger, "Could you guys step out of the vehicle?" (R. 20 at 16:48–52.) They complied, and VanBeek asked, "What did I do wrong?" (R. 20 at 16:52–55.) Officer Oetzel said, "I'll explain it to you if you come over here." (R. 20 at 16:58–60.) VanBeek and Sitzberger went and stood on a sidewalk with police officers while a drug-sniffing dog smelled the outside of VanBeek's truck. (R. 20 at 16:57–18:02.) The dog "alerted" while outside the truck, so two police officers searched the inside of the truck. (R. 1:2.) They found a pipe and a white crystal substance that tested positive for methamphetamine. (R. 1:2.)

Officer Oetzel later interviewed VanBeek while she was in custody at the Sheboygan Police Department. (R. 107:15–16.) She was uncooperative at first but eventually admitted that she had gone to the location where she was arrested to obtain drugs from Sitzberger. (R. 107:16.) VanBeek allowed Officer Oetzel to search her cell phone, which had messages between her and Sitzberger about buying drugs from him. (R. 17:16.)

II. Procedural history

The State charged VanBeek with one count of possession of methamphetamine and one count of possession of drug paraphernalia. (R. 1:1.)[2]

VanBeek filed a motion to suppress the evidence found in her truck and her later statements to police. (R. 17.) The circuit court held two hearings where Officer Oetzel testified, and his bodycam video was introduced into evidence. (R. 102; 107.) The circuit court denied the suppression motion. (R. 51; 107:71.) The court determined that Officer Oetzel was lawfully acting as a community caretaker when he approached VanBeek's truck. (R. 107:63–75.) It further concluded that Officer Oetzel lawfully extended the investigatory stop because he was still lawfully acting as a community caretaker and because he had reasonable suspicion of illegal drug activity. (R. 107:69–75.)

VanBeek pled no contest to the methamphetamine charge. (R. 113:4.) The court accepted her plea and convicted her. (R. 113:11–12.) The court honored the parties' plea agreement by dismissing the paraphernalia charge and reading it in for sentencing purposes. (R. 113:12.) The court sentenced VanBeek to one-and-a-half years of initial confinement and one-and-a-half years of extended supervision, found her eligible for two early release programs, stayed the prison sentence, and placed her on probation for three years. (R. 113:32.) The court imposed several conditions of probation aimed at preventing drug abuse. (R. 113:32–33, 35.)[3]

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[2] Online court records indicate that Sitzberger is not pursuing postconviction relief in his companion case, Sheboygan County case number 2017-CF-746.

[3] VanBeek tested positive for methamphetamine four times while released on a signature bond. (R. 105:4.)

VanBeek appeals her judgment of conviction. (R. 97.)

SUMMARY OF ARGUMENT

Officer Oetzel seized VanBeek when he asked her to exit her truck. At the earliest, he seized her when he retained her driver's license during his second interaction with her, after he ran her information in his squad car. Either way, Officer Oetzel had reasonable suspicion to seize VanBeek and to extend the investigatory stop for a police dog to sniff her truck. Because VanBeek was lawfully seized, she is not entitled to suppression of any evidence.

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

VanBeek was lawfully seized before police searched her truck.

A. Police may briefly seize a person if they have reasonable suspicion.

"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). An investigatory detention, or *Terry* stop,[4] is a seizure and "is constitutional if the police have reasonable suspicion that a crime has been

[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

committed, is being committed, or is about to be committed." *Id.* ¶ 20.

Evidence generally must be suppressed at trial if it was "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. VanBeek argues that the drug evidence that police found in her truck must be suppressed because she was illegally seized during the search of her truck. She contends that the police lacked reasonable suspicion to seize her before they searched her truck.

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 (emphasis added).

So, to determine whether the police lawfully seized VanBeek, this Court must first decide when the seizure occurred.

For the following reasons, this Court should conclude that Officer Oetzel first seized VanBeek when he asked her to exit her truck right before the dog sniff occurred. At the earliest, VanBeek was seized during her second interaction with the officer, shortly before she exited her truck. This Court should further conclude that the police had reasonable suspicion to seize VanBeek at either point in time and to extend the investigatory stop for a dog sniff of her truck.

B. Pursuant to *State v. Floyd*, Officer Oetzel seized VanBeek when he asked her to exit her truck right before the dog sniff occurred.

1. A person is seized when police use force or a show of authority such that a reasonable person would not feel free to leave.

Police conduct amounts to a seizure only if the police engage in "either physical force or a show of authority sufficient to give rise to a belief in a reasonable person that he was not free to leave." *Young*, 294 Wis. 2d 1, ¶ 34. Physical force includes handcuffing a person, *id.* ¶ 24, or grabbing a person's arm, *State v. Pugh*, 2013 WI App 12, ¶ 10, 345 Wis. 2d 832, 826 N.W.2d 418. An officer makes a show of authority when his or her "words and actions would have conveyed . . . to a reasonable person" that the person "was being ordered to restrict his [or her] movement." *Young*, 294 Wis. 2d 1, ¶ 39 (citation omitted).

Under those principles, Officer Oetzel seized VanBeek when he asked her to exit her truck right before the dog sniff occurred. A reasonable person could have arguably construed the request to exit the truck as an order restricting VanBeek's movement.

2. VanBeek rightly concedes that she was not seized when Officer Oetzel began speaking with her and asked for identification.

VanBeek concedes that she was not seized when Officer Oetzel parked his squad car behind her truck and approached the truck. (VanBeek's Br. 14.) That concession is correct. Police do not seize a person in a parked car simply by stopping behind it and approaching it. *See, e.g.*, *Cty. of Grant v. Vogt*, 2014 WI 76, ¶ 53, 356 Wis. 2d 343, 850 N.W.2d 253 (finding

no seizure when an officer approached a parked car and knocked on its window); *see also Young*, 294 Wis. 2d 1, ¶¶ 65–69 (noting that police do not necessarily seize a parked car by stopping behind it and shining a spotlight at it).

VanBeek is also correct to concede that she was not seized during her first conversation with Officer Oetzel. (VanBeek's Br. 14.) "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200 (2002) (citations omitted). "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Id.* at 205 (citation omitted).

"Because not all police-citizen contacts constitute a seizure, . . . many such contacts do not fall within the safeguards afforded by the Fourth Amendment." *Young*, 294 Wis. 2d 1, ¶ 18. During a voluntary police-citizen encounter, "there is no seizure and the Fourth Amendment does not apply." *Id.* In other words, "no reasonable suspicion is required" if "the encounter is consensual." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Id.* Officer Oetzel thus did not need reasonable suspicion to approach VanBeek in her truck and have a consensual discussion with her.[5]

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[5] Although VanBeek concedes that she was not seized when Officer Oetzel approached her truck, the State notes that Officer Oetzel had lawful authority as a community caretaker to seize VanBeek to see why she was sitting in a parked truck on the side of the road at night. *See, e.g.*, *State v. Kramer*, 2009 WI 14, ¶¶ 37–46, 315 Wis. 2d 414, 759 N.W.2d 598 (finding a lawful community

(continued on next page)

Although VanBeek does not argue otherwise, the State notes that Officer Oetzel did not seize VanBeek by asking to see her identification during their first interaction. "[N]o seizure occurs when police . . . ask to examine the individual's identification . . . so long as the officers do not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 437; *see also I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984) ("[A] request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."). Police officers thus may ask to see a person's identification even if they do not have reasonable suspicion. *Drayton*, 536 U.S. at 201; *State v. Griffith*, 2000 WI 72, ¶ 39, 236 Wis. 2d 48, 613 N.W.2d 72. A person who is not driving a vehicle is free to decline an officer's request to see identification. *See Griffith*, 236 Wis. 2d 48, ¶ 65.

Here, Officer Oetzel simply asked VanBeek and Sitzberger, "Could I get your guys' information for my report so that I can just get out of here? . . . [I]f I could have your photo ID . . . ." (R. 20 at 1:14–22.) Officer Oetzel did not convey that compliance with this request was mandatory. VanBeek does not argue otherwise.

3. VanBeek was not seized until police asked her to exit her truck.

VanBeek instead argues that the consensual encounter turned into a seizure "when Officer Oetzel took her driver's license back to his squad vehicle." (VanBeek's Br. 14.) She is wrong.

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caretaker function on similar facts); *State v. Truax*, 2009 WI App 60, ¶¶ 11–21, 318 Wis. 2d 113, 767 N.W.2d 369 (same). The State, however, does not advance a community caretaker argument because Officer Oetzel did not reasonably think that VanBeek needed help when he seized her several minutes after first speaking with her.

Police retention of a driver's license does not amount to a seizure, though it is a relevant factor. In *State v. Floyd*, the defendant consented to a search of his person during a traffic stop, and a police officer found illegal drugs. *State v. Floyd*, 2017 WI 78, ¶ 5, 377 Wis. 2d 394, 898 N.W.2d 560. The supreme court determined that the defendant's consent was voluntary even though the police officer had the defendant's driver's license when the consent was given. *Id.* ¶¶ 32–34. As the court explained, "[i]f an officer withholds a person's documents, there is good reason to believe the person was not 'free to leave' at that time. That, in turn, helps [a court] decide whether the person was seized." *Id.* ¶ 31. But police retention of a driver's license does not render consent involuntary. As the *Floyd* court explained, "[t]he routine act of retaining an identification card or driver's license during a traffic stop, without more, is insufficient evidence of the type of duress or coercion capable of making consent something less than voluntary." *Id.* ¶ 32.

That holding applies here even though *Floyd* involved a defendant's consent to search during a traffic stop. VanBeek's case still involves an issue of Fourth Amendment consent: whether her interaction with police was consensual. Whether a search was consensual and whether a police encounter was consensual are related concepts. *See, e.g.*, *State v. Jones*, 2005 WI App 26, ¶¶ 21–23, 278 Wis. 2d 774, 693 N.W.2d 104 (analyzing these two consent issues together).

Ignoring *Floyd*, VanBeek instead relies on *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Lambert*, 46 F.3d 1064 (10th Cir. 1995); and *State v. Luebeck*, 2006 WI App 87, 292 Wis. 2d 748, 715 N.W.2d 639, to support her argument that Officer Oetzel seized her when he went to his squad car with her driver's license. (VanBeek's Br. 10–14.) VanBeek's reliance on those cases is misplaced.

Royer does not help VanBeek for three reasons. First, *Royer* is a plurality opinion, 460 U.S. at 493, and a plurality opinion is precedential only if it is narrower than the concurrence. *Marks v. United States*, 430 U.S. 188, 193 (1977). VanBeek has not explained why the plurality opinion in *Royer* is precedential.

Second, the *Royer* plurality noted that "[a]sking for and examining [the defendant's airplane] ticket and his driver's license were no doubt permissible in themselves." *Royer*, 460 U.S. at 501. So, even if the plurality opinion in *Royer* is precedential, it undercuts VanBeek's argument that she was seized when Officer Oetzel took her driver's license to his squad car.

Third, *Royer* is factually distinguishable from VanBeek's case. The *Royer* plurality determined that the defendant was seized at an airport when "the officers identified themselves as narcotics agents, told [the defendant] that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart." *Royer*, 460 U.S. at 501.

Here, by contrast, Officer Oetzel did not accuse VanBeek of transporting narcotics or ask her to accompany him to a police room, nor was she at an airport where her movement would be naturally restricted. Officer Oetzel simply asked for and received her driver's license. As the Seventh Circuit has explained, a "mere request for and voluntary production of [driver's licenses and airplane tickets] does not constitute a seizure," though "the lengthy retention of documents such as identification and airline tickets is a factor in determining whether a stop has occurred." *United States v. Rodriguez*, 69 F.3d 136, 142 (7th Cir. 1995) (alteration in original) (citation omitted); *accord Floyd*, 377 Wis. 2d 394, ¶¶ 31–32. Officer Oetzel did not seize VanBeek

when he asked for her driver's license and she voluntarily produced it.

Luebeck also does not support VanBeek's argument. This Court in *Luebeck* held that "the fact that the person's driver's license or other official documents are retained by the officer is a key factor in assessing whether the person is 'seized' and, therefore, whether consent is voluntary." *Luebeck*, 292 Wis. 2d 748, ¶ 16. The supreme court in *Floyd* made a similar point. *Floyd*, 377 Wis. 2d 394, ¶ 21. But the *Floyd* court further held that police retention of a driver's license, by itself, does not render consent involuntary. *Id.* ¶ 22. That holding controls to the extent that it might conflict with *Luebeck*, because this Court "must resolve any conflict between [its] past decisions and a supreme court opinion in favor of the supreme court opinion." *Sukala v. Heritage Mut. Ins. Co.*, 2000 WI App 266, ¶ 20, 240 Wis. 2d 65, 622 N.W.2d 457.

Lambert also does not help VanBeek. The Tenth Circuit in *Lambert* held that "when law enforcement officials retain an individual's driver's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the encounter." *Lambert*, 46 F.3d at 1068. This Court in *Luebeck*, however, noted but did not adopt this bright-line rule from *Lambert*. *Luebeck*, 292 Wis. 2d 748, ¶ 16. Further, this bright-line rule from *Lambert* conflicts with the supreme court's holding in *Floyd*, 377 Wis. 2d 394, ¶ 32, that police retention of a driver's license does not render consent involuntary. This holding in *Floyd* controls here. Federal circuit court precedent is not binding on state courts. *State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993). Rather, this Court is bound by the Wisconsin Supreme Court's decisions. *State v. Clark*, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993). This Court is thus bound by *Floyd*, not *Lambert*.

Besides relying on inapposite case law, VanBeek argues that she was seized when Officer Oetzel took her driver's license to his squad car because she could not legally drive away at that point. (VanBeek's Br. 14.) Of course, "[u]nder Wis. Stat. § 343.18(1), persons operating motor vehicles are required to have their licenses with them." *State v. Williams*, 2002 WI App 306, ¶ 22, 258 Wis. 2d 395, 655 N.W.2d 462. But VanBeek was not seized just because she was unable to legally drive away.

"The test used to determine if a person is being seized is whether, considering the totality of the circumstances, a reasonable person would have believed he or she was free to leave *or otherwise terminate the encounter*." *Luebeck*, 292 Wis. 2d 748, ¶ 7 (emphasis added). For example, a bus passenger is not necessarily seized when police ask for consent to search his or her luggage. *Drayton*, 536 U.S. at 201–02. The *Drayton* Court noted that "[a] passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard. A bus rider's movements are confined in this sense, but this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive." *Id.* The Court explained that "[t]he proper inquiry 'is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" *Id.* at 202 (citation omitted).

Here, similarly, VanBeek's movement was confined in the sense that she could not legally drive away without her driver's license, but that restriction was the natural result of her choosing to give her license to Officer Oetzel. Despite this restriction on VanBeek's movement, her encounter with Officer Oetzel was consensual while he had her driver's license. A reasonable person in VanBeek's situation would have felt free to terminate the encounter—i.e., tell the officer that she wanted to leave and ask for her driver's license back. A contrary conclusion would run afoul of the supreme court's

holding that police retention of a person's driver's license does not render his or her consent involuntary. *Floyd*, 377 Wis. 2d 394, ¶ 32.

Given that holding in *Floyd*, Officer Oetzel did not seize VanBeek simply by holding onto her driver's license during their consensual interactions. *See id.* He instead seized VanBeek when he asked her to exit her truck shortly before the dog sniff of her truck occurred. He did not attempt to restrict her movement before that point. So, when this Court determines whether police had reasonable suspicion to seize VanBeek, it may consider all the facts known to police before Officer Oetzel asked VanBeek to exit her truck. *See Wortman*, 378 Wis. 2d 105, ¶ 6 (noting that a reasonable-suspicion analysis considers the facts known to police before the seizure occurred). As explained in section I.D. below, police had reasonable suspicion to seize VanBeek at that time so they could have a drug-sniffing dog smell her truck.

C. If *State v. Floyd* does not control here, VanBeek was seized during her second conversation with Officer Oetzel while she was in her truck.

As just explained, this Court should follow *Floyd* and hold that Officer Oetzel did not seize VanBeek by retaining her driver's license during his two consensual encounters with VanBeek while she was in her truck. It should hold that he seized VanBeek when he asked her to exit her truck right before the dog sniff occurred.

But even if this Court concludes that *Floyd* does not apply here, the reasonable-suspicion analysis will not change much. Under *Lambert*, "the *undue* retention of an individual's driver's license during a traffic stop renders the encounter nonconsensual." *Lambert*, 46 F.3d at 1068 (emphasis added); *cf. United States v. Black*, 675 F.2d 129, 136 (7th Cir. 1982) (noting that "the retaining of [a driver's license and airline

ticket] beyond the interval required for the appropriate brief scrutiny, may constitute a 'watershed point' in the seizure question").

Here, Officer Oetzel properly retained VanBeek's driver's license while he was in his squad car. The officer used VanBeek's license to "run [her] information" in his squad car. (R. 102:11.) He learned that VanBeek had a valid driver's license, no warrants, and a drug overdose earlier in the year. (R. 102:11–12; 107:10–11.) He did not unduly retain her driver's license while running her information.

Officer Oetzel also properly retained VanBeek's driver's license during the first part of his next conversation with her. After leaving his squad car, Officer Oetzel returned to VanBeek's truck and asked her to confirm whether the information on her driver's license was correct. (R. 102:13–14.) He wanted her to confirm this information because people sometimes move without updating their driver's license, some people fabricate their addresses, and he wanted to ensure that police records had VanBeek's correct address in case he had to contact her again to issue her a citation. (R. 102:14; 107:13, 20, 31.) Sitzberger told the officer a different address than the one listed on his driver's license. (R. 102:14; 107:31.) The officer thus did not unduly retain the driver's licenses while asking VanBeek and Sitzberger questions about them.

Officer Oetzel might have unduly retained the driver's licenses after he stopped inquiring about them. After Sitzberger confirmed his address, the officer said to Sitzberger, "I thought you said you lived here." (R. 20 at 10:31.) Sitzberger then said that he had been at a friend's nearby house. (R. 20 at 10:32–36.) Officer Oetzel then asked Sitzberger questions about his friend and asked VanBeek how long she had been sitting in her truck. (R. 20 at 10:37–15:27.)

So, at the earliest, Officer Oetzel *unduly* retained VanBeek's driver's license right after she verified the information on her license. Under *Lambert*, Officer Oetzel seized her at that time. In other words, the seizure of VanBeek occurred earlier under *Lambert* than it did under *Floyd*.

But this difference ultimately does not matter because, as explained below, police had reasonable suspicion to seize VanBeek for questioning after Officer Oetzel ran her information in his squad car. Based on the information that VanBeek and Sitzberger provided during their second interaction with Officer Oetzel, police had reasonable suspicion to extend the *Terry* stop for a dog sniff of VanBeek's truck.

The State will now explain why police had reasonable suspicion before the seizure occurred at either point in time.

D. Police had reasonable suspicion to briefly seize VanBeek before the dog sniff of her truck.

"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).

1. Officer Oetzel had reasonable suspicion when he seized VanBeek by asking her to exit her truck.

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"; (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).

Again, a reasonable-suspicion analysis considers all the facts known to police before the seizure occurred. *Wortman*, 378 Wis. 2d 105, ¶ 6.

Here, Officer Oetzel knew the following nine facts before he seized VanBeek by asking her to exit her truck. These facts together created reasonable suspicion that VanBeek was engaged in illegal drug activity. Indeed, VanBeek's case has even more suspicious facts than *Allen*.

First, like the defendant and his companion in *Allen*, VanBeek and Sitzberger were hanging around a neighborhood for at least several minutes. When Officer Oetzel first spoke to VanBeek and Sitzberger, the officer said that an anonymous caller had reported that two people were sitting in a truck for an hour. (R. 20 at 00:56–58.) After VanBeek disagreed, Sitzberger said, "Ten minutes." (R. 20 at 00:58–1:01.) VanBeek does *not* construe Sitzberger's statement to mean that he had just arrived at the truck and that VanBeek had been waiting there for him for only ten minutes.[6] Rather, VanBeek interprets Sitzberger's statement

[6] This alternative interpretation of Sitzberger's statement—that VanBeek had been sitting alone in her truck for ten minutes—would conflict with VanBeek's subsequent statement that she had

(continued on next page)

to mean that "*they* had been there ten minutes." (VanBeek's Br. 24 (emphasis added).) VanBeek similarly argued in the circuit court that Sitzberger "said he had been there about ten minutes." (R. 107:53.) The State shares VanBeek's interpretation of Sitzberger's statement: Sitzberger meant that both he and VanBeek had been sitting together in VanBeek's truck for ten minutes before Officer Oetzel arrived. By hanging around the neighborhood for ten minutes, VanBeek and Sitzberger behaved suspiciously under *Allen*.

Second, Officer Oetzel did not receive an explanation for why VanBeek and Sitzberger had been sitting in her truck for ten minutes. VanBeek simply told Officer Oetzel that she had been sitting in her truck while waiting to pick up Sitzberger. (R. 102:11; 107:7, 8, 33; 20 at 00:52–54.) That explanation was suspicious because it did not say why VanBeek sat on the side of the road for ten more minutes *after* Sitzberger got into her truck. Reasonable suspicion can be partly based on a person's unconvincing explanation for why he was sitting in a parked car. *See State v. Amos*, 220 Wis. 2d 793, 800, 584 N.W.2d 170 (Ct. App. 1998). VanBeek and Sitzberger behaved suspiciously by sitting in her parked truck on the side of a road for ten minutes for no apparent reason.

Third, the possibility that VanBeek and Sitzberger were sitting in her truck for one hour is significant. Based on his training and experience, Officer Oetzel thought that people "are usually utilizing narcotics" if they are sitting in a parked vehicle for a long period of time. (R. 107:26.) Although Sitzberger said that he and VanBeek had been sitting in her truck for only ten minutes, police are not required to believe a suspect's explanation when determining whether

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been sitting in her truck for about one half-hour before Officer Oetzel arrived. VanBeek avoids that inconsistency by viewing Sitzberger's statement to mean that they had been sitting *together* for ten minutes. (VanBeek's Br. 24–25.)

reasonable suspicion exists. *See State v. Colstad*, 2003 WI App 25, ¶ 14, 260 Wis. 2d 406, 659 N.W.2d 394.

Fourth, like in *Allen*, the suspicious behavior here occurred late at night: Officer Oetzel began speaking to VanBeek and Sitzberger around 12:22 a.m. (R. 102:16; 107:35.) Sitting in a parked truck for ten minutes around midnight is not behavior that law-abiding people do every day. This conduct added to the low threshold of reasonable suspicion.

Fifth, like in *Allen*, someone here made brief contact with a vehicle. A concerned caller told police that two people had been sitting in a truck on the side of the road for about one hour, and that someone with a backpack had come to the truck and then left. (R. 102:5–6; 107:5, 18.) Brief contact with a car is consistent with drug trafficking. *See Allen*, 226 Wis. 2d at 74 (relying on a police officer's testimony that "a person getting into a car for a short period of time was consistent with drug trafficking").

Sixth, when Officer Oetzel returned to his squad car after his first conversation with VanBeek and Sitzberger, he learned suspicious facts about them. He learned that VanBeek had a drug overdose earlier in the year. (R. 102:11–12; 107:69.) A person's drug history can contribute to reasonable suspicion of illegal drug activity. *See State v. Buchanan*, 2011 WI 49, ¶ 13, 334 Wis. 2d 379, 799 N.W.2d 775 (relying partly on the defendant's past arrests for drug delivery in finding reasonable suspicion); *see also State v. Hogan*, 2015 WI 76, ¶ 52, 364 Wis. 2d 167, 868 N.W.2d 124 (noting that police knowledge of the defendant's criminal record, including a drug conviction and his probationary status, would have "greatly strengthened" "the case for reasonable suspicion").

Officer Oetzel further learned that Sitzberger was "on some type of supervision," either probation or parole. (R. 107:66; *see also* 102:11–12.) Being on community supervision adds to reasonable suspicion. *See State v. Malone*, 2004 WI 108, ¶ 44, 274 Wis. 2d 540, 683 N.W.2d 1 (probation); *Wortman*, 378 Wis. 2d 105, ¶ 11 (extended supervision).

Seventh, during the subsequent conversation with Officer Oetzel, Sitzberger gave a suspicious explanation for where he had just been. Sitzberger said that he had come from his friend Jake's house. (R. 20 at 10:34–42.) Yet Sitzberger said that he did not know Jake's last name and had known him for only five or six months. (R. 20 at 11:10–13, 14:10–12.) When the officer asked Sitzberger how he knew Jake, Sitzberger paused for several seconds and then said that one of his female friends used to date Jake. (R. 20 at 14:15–40.) Officer Oetzel found it "kind of weird that [Sitzberger] didn't really know his friend, Jake." (R. 107:21.) Sitzberger's tenuous connection with "Jake" was suspicious, especially considering that Sitzberger was at Jake's house late at night. Most law-abiding people do not hang out at their friend's ex-boyfriend's house late at night, especially if they have known the person for only a few months.

Eighth, Jake's address was suspicious. Sitzberger told Officer Oetzel that Jake lived at "Eighth and Superior" but then corrected himself seconds later, saying "Seventh and Superior." (R. 20 at 10:47–54.) Officer Oetzer found that address "funny" and "kind of weird" because VanBeek and Sitzberger were sitting in a truck parked one or two blocks away, on North Sixth Street and Superior Avenue. (R. 102:14–15; *see also* 107:68.) VanBeek's and Sitzberger's uncertainty over Jake's address suggested that Jake could have been more of a casual drug buyer or supplier than a close friend.

Ninth, VanBeek said that she had been sitting in her truck for about one hour total, for about one half-hour before Officer Oetzel arrived, and for a while before Sitzberger got to her truck. (R. 20 at 14:55–15:27.) So, either VanBeek was waiting for Sitzberger for a long time, or they were sitting together in her truck for longer than ten minutes as Sitzberger had claimed. Either way, their behavior was suspicious. One possible explanation is that Sitzberger took a long time to leave Jake's house because he was engaging in a drug transaction there. Another plausible explanation is that VanBeek and Sitzberger was sitting in her truck for a while because they were dealing or using drugs.

These nine facts together created reasonable suspicion to perform a *Terry* stop to investigate possible drug activity by VanBeek and Sitzberger. Because VanBeek was lawfully seized before police searched her truck, she is not entitled to suppression of any evidence.

2. Alternatively, if Officer Oetzel seized VanBeek minutes before asking her to exit her truck, he still had reasonable suspicion to detain her and extend the stop for a dog sniff.

As noted above in Argument section I.C., the reasonable-suspicion analysis would not change much if this Court were to conclude that VanBeek was seized when she spoke to Officer Oetzel a second time while she sat in her truck. If police officers have reasonable suspicion to do so, they may extend a stop for a drug-sniffing dog to smell a vehicle. *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015).

Here, police learned the first six facts discussed above *before* Officer Oetzel's second conversation with VanBeek. Specifically, before arguably seizing VanBeek during his second interaction with her, Officer Oetzel learned that

(1) VanBeek and Sitzberger had been sitting in her parked truck for ten minutes, possibly one hour, around midnight for no apparent reason; (2) a person with a backpack had come to the truck and then left; (3) VanBeek had a drug overdose earlier in the year; and (4) Sitzberger was on probation. Those facts created reasonable suspicion to detain VanBeek and Sitzberger pursuant to an investigatory stop. Officer Oetzel could thus lawfully seize VanBeek and Sitzberger to ask Sitzberger about his whereabouts that night and to inquire further into how long VanBeek had been sitting in her truck.

And those facts, combined with the facts that Officer Oetzel learned during his second interaction with VanBeek, created reasonable suspicion to extend the *Terry* stop for a dog sniff. After arguably detaining VanBeek during their second conversation, Officer Oetzel learned that (1) VanBeek had been sitting in her truck for one half-hour before the officer arrived; (2) Sitzberger had come from his friend Jake's house; (3) Sitzberger had a tenuous connection to Jake and did not even know his last name; and (4) Sitzberger gave two different addresses for Jake's house, which was one or two blocks away from VanBeek's truck. So, even if Officer Oetzel seized VanBeek during their second interaction, the seizure was lawful and so was the extension of the stop for a dog sniff.

In short, police only needed reasonable suspicion to briefly detain VanBeek for a dog sniff of her truck. That low threshold was met.

VanBeek argues that police illegally prolonged her stop for a dog sniff of her truck. (VanBeek's Br. 20–26.) That argument fails because, as just explained, police had reasonable suspicion to seize VanBeek and extend the stop for a dog sniff. The State will now address VanBeek's specific arguments.

E. VanBeek's arguments against reasonable suspicion are unpersuasive.

The State briefly notes what VanBeek does not argue. She does not dispute that police had probable cause to search her truck. An alert by a drug-sniffing dog can create probable cause. *See State v. Miller*, 2002 WI App 150, ¶¶ 12–14, 256 Wis. 2d 80, 647 N.W.2d 348; *see also Florida v. Harris*, 568 U.S. 237, 248 (2013) ("If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause."). The suspicious facts discussed above in Argument section I.D., combined with the drug-sniffing dog's alert, created probable cause to search VanBeek's truck. She does not argue otherwise.

VanBeek also does not contend that police needed a search warrant to search her truck. Such an argument would fail because "law 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.

VanBeek instead argues that the search of her truck was invalid because she was illegally seized before the search occurred. Her arguments are unavailing.

First, VanBeek relies on *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, and *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), to support her argument that police lacked reasonable suspicion to seize her. (VanBeek's Br. 21–23.) Those cases are distinguishable from VanBeek's.

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 *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997). *Betow*, 226 Wis. 2d at 98. 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.

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.

VanBeek's case is unlike *Betow* and *Gammons* because it did not involve a traffic stop. It instead involved an unknown person's brief nighttime contact with a parked truck and the defendant sitting in the truck for a while for no apparent reason. Those facts, and other suspicious ones discussed above, were absent from both *Betow* and *Gammons*.

This case is far more analogous to *Allen* and *Amos*, both of which found reasonable suspicion of drug activity and distinguished *Young*, on which *Betow* relied. The State has discussed *Allen* above and explained why VanBeek's case has even more suspicious facts.

VanBeek's conduct was also more suspicious than the defendant's behavior in *Amos*. There, the defendant parked his car in a parking lot with a no-trespassing sign, he was parked "in an area where drug sales were commonly made from parked cars," he sat in his car for a brief period, and another person approached the car but then walked away after appearing to recognize that police were nearby. *Amos*,

220 Wis. 2d a 799–800. The case for reasonable suspicion is even stronger here because police learned that (1) a man with a backpack made contact with VanBeek's truck, (2) the time was about midnight, (3) VanBeek had a drug overdose earlier in the year, (4) her passenger was on probation, (5) her passenger claimed to have come from a friend's house but did not even know the friend's last name, and (6) VanBeek admitted to sitting in her truck for one half-hour before police arrived.

VanBeek seems to argue that the nighttime factor has no relevance here. She claims that the *Betow* court "stated that the fact that it was night time was not an important factor because drugs could be found in the day as well as the night." (VanBeek's Br. 23.) Actually, the *Betow* court merely noted 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. *Allen*, which was decided one day before *Betow*, stands for the proposition that drug dealing is more common at night. This Court in *Allen* found reasonable suspicion of drug dealing because, among other facts, "[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.

Second, VanBeek argues that she had engaged in "behavior that ordinary citizens engage in every day," citing a Supreme Court case where police illegally stopped a pedestrian. (VanBeek's Br. 15.) She is wrong. Her conduct is not analogous to walking down a sidewalk. To the contrary, remaining in a neighborhood for ten minutes after brief contact with a car "is 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." *Allen*, 226 Wis. 2d at 74 (distinguishing *Young*, where a person was illegally seized while walking down a sidewalk);

see also Amos, 220 Wis. 2d at 799–800 (distinguishing *Young* and noting that "walking is the principal activity for which sidewalks were designed, whereas waiting in a car for a friend is only a secondary activity in a parking lot").

Third, VanBeek argues that "the information received from [the anonymous] tip has no value in the reasonable suspicion calculus" and it "should not have been considered at all" because it "provided no predictive information that indicated that the informer had inside information." (VanBeek's Br. 16–17, 23.) She is wrong again. "The less reliable the tip, the more the necessity for additional information to establish reasonable suspicion." *State v. Patton*, 2006 WI App 235, ¶ 10, 297 Wis. 2d 415, 724 N.W.2d 347. If a tip "provided virtually no indication of the informant's veracity or basis of knowledge," then "'something more' than the tip was required" to create reasonable suspicion. *State v. Rutzinski*, 2001 WI 22, ¶ 23, 241 Wis. 2d 729, 623 N.W.2d 516 (quoting *White*, 496 U.S. at 329).

The anonymous tip here did not create reasonable suspicion *by itself*, but the police knew far more suspicious facts than the tip alone. To be sure, there are "some limits on using an anonymous tip that is accompanied by minimal police corroboration as the *sole basis* for reasonable suspicion for an investigatory stop, where the tip lacked detail and future predictions." *State v. Miller*, 2012 WI 61, ¶ 42, 341 Wis. 2d 307, 815 N.W.2d 349 (emphasis added) (citing *Florida v. J.L.*, 529 U.S. 266 (2000)). But the tip here was not the sole basis for the *Terry* stop.

Fourth, VanBeek seems to argue that her Fourth Amendment rights were violated because Officer Oetzel tried to delay until the drug dog arrived after he became suspicious of VanBeek. (VanBeek's Br. 25–26.) VanBeek has not explained how Officer Oetzel's subjective motivations matter. Indeed, she concedes that "reasonable suspicion is determined using an objective test." (VanBeek's Br. 15.) Further, Officer

Oetzel could lawfully detain VanBeek until the drug dog arrived because he had reasonable suspicion to perform an investigatory stop.

Fifth and finally, VanBeek argues that three of the circuit court's factual findings were clearly erroneous. The State does not rely on these purported findings because Officer Oetzel had reasonable suspicion without them.

VanBeek first argues that the circuit court erred by finding that Officer Oetzel received inconsistent information about how long VanBeek and Sitzberger had been sitting in VanBeek's truck. (VanBeek's Br. 24–25.) The State agrees with VanBeek that she told Officer Oetzel that she had been sitting in her truck for one half-hour before the officer arrived, that VanBeek waited in her truck for a while before Sitzberger joined her, and that VanBeek and Sitzberger sat in her truck together for ten minutes. Despite being consistent, VanBeek's and Sitzberger's admissions to sitting in her truck late at night for no apparent reason were suspicious as explained above.

VanBeek next alleges that the circuit court clearly erred by finding that Sitzberger gave Officer Oetzel conflicting information about which side of the street Jake's house was on. (VanBeek's Br. 24–25.) The State does not rely on this alleged inconsistency. Plenty of facts created reasonable suspicion without it.

VanBeek also challenges the circuit court's finding regarding Sitzberger's inconsistency over whether Jake lived on North Seventh Street or North Eighth Street. VanBeek argues that Sitzberger's inconsistency did not reveal an intent "to be deceptive." (VanBeek's Br. 25.) But the circuit court did not seem to find Sitzberger's inconsistency deceptive, and neither does the State. But that inconsistency still contributed to reasonable suspicion because Sitzberger's

uncertainty over Jake's address suggested that Jake was a casual drug supplier rather than a close friend.

In short, VanBeek is not entitled to suppression of the drug evidence because she was lawfully seized before police officers searched her truck.

CONCLUSION

This Court should affirm VanBeek's judgment of conviction.

Dated this 24th day of July 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8327 words.

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

I hereby certify that:

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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 24th day of July 2019.

_____
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