STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP447-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER JAN VANBEEK,

Defendant-Appellant-Petitioner.

ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT II, ON APPEAL FROM A JUDGMENT OF CONVIICTION ENTERED IN SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE KENT R. HOFFMANN, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Heather Jan 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 parties dispute when VanBeek was seized and whether the seizure was legal. This Court should affirm because police developed reasonable suspicion before seizing VanBeek. The police officers also had reasonable suspicion 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.

ISSUES PRESENTED

1. A police officer spoke to VanBeek while VanBeek was sitting in her parked truck on the roadside around midnight. VanBeek handed her driver's license to the officer upon request. The officer then took the license to his squad car for a few minutes to run a record check. Did the officer seize VanBeek for Fourth Amendment purposes by taking her license to his squad car?

The circuit court concluded that the officer lawfully seized VanBeek. The court of appeals certified this issue.

This Court should conclude that the officer did not seize VanBeek by briefly taking her license to the squad car to run a record check.

2. If the officer seized VanBeek by taking her license to his squad car to run a record check, was the seizure lawful?

The circuit court concluded that the officer lawfully seized VanBeek because he had reasonable suspicion and was acting as a community caretaker. In its certification, the court of appeals stated that the officer developed reasonable

suspicion after he returned to VanBeek's truck, after running the record check.

If this Court concludes that the record check was a seizure, it should hold that the seizure was lawful because the officer had reasonable suspicion before he obtained VanBeek's license or because he was acting as a community caretaker.

3. Did the officer lawfully extend the investigatory stop for a drug-sniffing dog to smell outside VanBeek's truck?

The circuit court concluded that the officer lawfully seized VanBeek. The court of appeals certified this case.

This Court should conclude that the extension of the seizure was lawful because police had reasonable suspicion of illegal drug activity.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

Factual background

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, a residential neighborhood. (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.) VanBeek said that she was from Cascade and did not know this area very well. (R. 20 at 1:08–1:12.)

Officer Oetzel asked if Sitzberger was VanBeek's boyfriend and if she was "just waiting," and she nodded and said, "Yeah." (R. 20 at 1:11–1:13.) Officer Oetzel said, "Sounds legit." (R. 20 at 1:14.)

Officer Oetzel asked VanBeek and Sitzberger, "Could I get your guys' information for my report so that I can just get out of here?" (R. 20 at 1:14–1:17.) Sitzberger asked if he should just write his information down or if Oetzel wanted his identification. (R. 20 at 1:17–1:19.) Officer Oetzel responded, "Yeah, if I could have your photo ID so I could

[1] The State cites the video file titled "Drugs-file 2" by using the media player run times, not the video's time stamps. The video starts with a run time of 0:00 and a time stamp of 23:56.

actually compare faces." (R. 20 at 1:19–1:25.) As VanBeek and Sitzberger looked for their identification cards, Officer Oetzel asked them, "What are you guys up to tonight?" (R. 20 at 1:36.) Sitzberger replied, "She's picking me up and we're going back to Cascade." (R. 20 at 1:37–1:39.) After VanBeek and Sitzberger handed their driver's licenses to Officer Oetzel, Oetzel said, "I'll be right back," and headed to his squad car. (R. 20 at 1:50–55.) VanBeek, Sitzberger, or both said, "All right." (R. 20 at 1:54.)

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.)

Procedural history

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

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.)[2]

VanBeek appealed her judgment of conviction. (R. 97.) The court of appeals certified the following issue: "whether a consensual encounter becomes an unconstitutional seizure under the Fourth Amendment when an officer requests and takes an individual's driver's license to the officer's squad car without reasonable suspicion." (A-App. 116.)[3] This Court granted the certification.

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.

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

[3] The certification incorrectly states that the State "conced[ed] [the community caretaker doctrine] would not apply after the officer spoke with VanBeek." (A-App. 120 n.2.) The State only conceded that the community caretaker doctrine did not justify a seizure "several minutes after" Oetzel first spoke to VanBeek. (State's Ct. App. Br. 9–10 n.5.) The certification further states that "[t]he State agrees that there was no reasonable suspicion" when Officer Oetzel ran a record check with VanBeek's license. (A-App. 120.) The State made no such concession. It simply argued that there was reasonable suspicion after the record check.

ARGUMENT

I. The officer did not seize VanBeek by taking her driver's license to his squad car to run a record check.

Under the totality of the circumstances, Officer Oetzel's encounter with VanBeek remained consensual while Oetzel briefly ran a record check in his squad car. A contrary conclusion would amount to an inappropriate *per se* rule, in conflict with Wisconsin and U.S. Supreme Court precedent.

A. A consensual encounter with police is not a seizure.

"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). "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.*

"When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence," a court applies a reasonable person test to decide whether a seizure has occurred. *Brendlin v. California*, 551 U.S. 249, 255 (2007).[4] There are different versions of this test, and the circumstances of a given police encounter determine which test applies.

Under one version of the test, "a seizure occurs when a reasonable person would believe that he or she is not 'free to leave.'" *Bostick*, 501 U.S. at 435. "When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking." *Id.*

But that test does not apply to every police-citizen encounter. In *Bostick*, for example, the Supreme Court held that "the 'free to leave' analysis on which [the defendant] relies is inapplicable." *Bostick*, 501 U.S. at 436. In a drug interdiction effort, two police officers boarded a bus and asked the defendant for consent to search his luggage. *Id.* at 431–32. In deciding whether the officers seized the defendant by approaching and questioning him, the Court noted that his "movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it

[4] Examples of an unambiguous intent to restrain include physically detaining and handcuffing a person, *see State v. Young*, 2006 WI 98, ¶ 24, 294 Wis. 2d 1, 717 N.W.2d 729, and grabbing a person as he tries to walk away, *see State v. Pugh*, 2013 WI App 12, ¶ 10, 345 Wis. 2d 832, 826 N.W.2d 418.

says nothing about whether or not the police conduct at issue was coercive." *Id.* at 436.

The *Bostick* Court relied on *INS v. Delgado*, 466 U.S. 210 (1984), where it had held that factory workers were not seized when immigration agents entered a factory and began questioning them. *Bostick*, 501 U.S. at 436. Although the factory workers in *Delgado* were not free to leave, this restriction stemmed from their voluntary obligation to their employer, not from the actions of law enforcement officials. *See id.* Finding *Delgado* "analytically indistinguishable," the *Bostick* Court held that "the appropriate inquiry" for a bus passenger being questioned by police "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.*

Ultimately, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

B. VanBeek's encounter with the officer was consensual before and during the record check.

As VanBeek rightly concedes, Officer Oetzel did not seize her by parking his squad car behind her truck, approaching the truck, and briefly talking with her. (VanBeek's Br. 14–15, 28.) *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).[5]

VanBeek also correctly does not argue that Officer Oetzel seized her by asking to see her driver's license. "[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. 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.

Officer Oetzel's request to see VanBeek's identification was not a seizure. 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 did not convey that compliance with this request was mandatory. VanBeek does not argue otherwise.

The issue before this Court is whether VanBeek was seized when Officer Oetzel returned to his squad car with VanBeek's license to run a record check. VanBeek was not seized then. "Examples of circumstances that might indicate a seizure would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Kramar*, 149 Wis. 2d

[5] VanBeek disputes whether Officer Oetzel had lawful authority as a community caretaker to briefly seize her to see why she was sitting in a parked truck. (VanBeek's Br. 27.) This dispute does not matter because VanBeek concedes that Officer Oetzel did not seize her before she handed over her license. (VanBeek's Br. 14–15, 28.)

767, 781–82, 440 N.W.2d 317 (1989). The presence of other civilians supports the notion that a police-citizen encounter was consensual, not a seizure. *See Drayton*, 536 U.S. at 204. If an officer does not draw a weapon, then his or her uniform, badge, and weapon belt have "little weight" in the analysis. *See id.* at 204–05. The general factors discussed in this paragraph heavily weigh in favor of finding no seizure while Oetzel ran a record check.

So do five additional points specific to Oetzel's possession of VanBeek's license: (1) VanBeek was free to express a desire to leave when Oetzel asked for her identification; (2) Oetzel did not restrict VanBeek's movement during the record check; (3) a reasonable person would think that VanBeek had consented to Oetzel taking her license to the squad car for a few minutes; (4) Oetzel did not retain VanBeek's license for an unduly long time during the record check; and (5) VanBeek was free to ask for her license back when Oetzel returned to her truck.

First, the interaction right before Officer Oetzel walked away with VanBeek's license shows that Oetzel was not seizing VanBeek. VanBeek "could have refused to cooperate when Officer [Oetzel] asked [her] for [her] identification." *United States v. Weaver*, 282 F.3d 302, 312 (4th Cir. 2002). When Officer Oetzel asked VanBeek for identification, in other words, she was "free to express an alternative wish to go on [her] way." *Lightbourne v. State*, 438 So. 2d 380, 388 (Fla. 1983). During that initial conversation, VanBeek never "sought to leave or otherwise refused to communicate with [Officer Oetzel] or indicated a desire to terminate the encounter." *State v. Mitchell*, 638 So. 2d 1015, 1016 (Fla. Dist. Ct. App. 1994).

Instead, VanBeek freely handed her license to Officer Oetzel upon request, and she did not object when Oetzel said that he would be right back and began to walk back to his

squad car. Specifically, after receiving licenses from VanBeek and Sitzberger, Oetzel told them, "I'll be right back. Okay?" (R. 20 at 1:52–1:53.) VanBeek or Sitzberger responded, "All right." (R. 20 at 1:53.)

Second, while Officer Oetzel ran a record check in his squad car, he "did not otherwise restrict [VanBeek's] movement." *United States v. Ford*, 548 F.3d 1, 6 (1st Cir. 2008). VanBeek, for example, "was not removed from the street to a confined space while [Oetzel] ran the background check." *Id.* Oetzel never "ordered [VanBeek] to remain in [her] vehicle while he checked [her] license, nor did [Oetzel] in any other way give [VanBeek] the impression [she] was not free to leave at that point." *People v. Graves*, 553 N.E.2d 810, 813 (Ill. App. Ct. 1990) (citation omitted). Courts have found seizures where, in contrast to VanBeek's case, police officers instructed defendants to wait in or near their vehicles while the officers ran record checks with the defendants' identification cards. *United States v. Lopez*, 443 F.3d 1280, 1286 (10th Cir. 2006); *State v. Strom*, 333 P.3d 218, 221 (Mont. 2014).

Third, a reasonable person in VanBeek's position would understand that she was consenting to allow Officer Oetzel to spend a few minutes running a record check in his squad car. When a person voluntarily hands his driver's license to a police officer, a person could reasonably construe that act as consent for the officer to return to his squad car for a few minutes to examine the license. *See United States v. Carpenter*, 462 F.3d 981, 985–86 (8th Cir. 2006). This point is significant because a police "encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Bostick*, 501 U.S. at 434. Stated differently, an encounter becomes a seizure when an officer's "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). A reasonable person would not construe Officer Oetzel's act of briefly returning to his squad car with VanBeek's license as an order restricting VanBeek's movement. A reasonable person would instead view VanBeek's act of voluntarily handing over her license as consent to part with her license for a few minutes. *See Carpenter*, 462 F.3d at 985–86.[6] After all, Oetzel asked for VanBeek's identification "for [his] report." (R. 20 at 1:14–1:17.) It would be unreasonable to think that Oetzel would memorize all the information on VanBeek's license. VanBeek should have reasonably thought that Oetzel would take her license back to his squad car for a few minutes.

Fourth, Officer Oetzel did not spend too much time running a record check in his squad car. Courts have held that "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) (emphasis added). According to one court, "undue retention of an individual's driver's license during a traffic stop renders the encounter nonconsensual." *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995). In *Lambert*, for example, the court held that "the thirty minute retention of the license exceeded the permissible length of time to determine if Mr. Lambert was wanted for any crimes." *Id.* at 1068 n.3. The court reasoned that federal agents requested Lambert's driver's license to

[6] Although the *Carpenter* court framed the seizure issue as what the deputy would reasonably think, the proper focus is on what a reasonable person in the defendant's position would think. *See United States v. Lopez*, 443 F.3d 1280, 1283–84 (10th Cir. 2006).

verify his identity, which they were able to do almost immediately after receiving it. *Id.*

Here, unlike in *Lambert*, Officer Oetzel did not retain VanBeek's license before or during the record check for an unduly long time. Again, Oetzel asked for identification "for [his] report." (R. 20 at 1:14–1:17.) Verifying the accuracy of VanBeek's license and copying its information for Oetzel's report would take longer than a few seconds. Oetzel resumed talking to VanBeek less than six minutes after she handed her license to him. (R. 20 at 1:40–7:28.) This amount of time is not too long for examining a license in a squad car during a consensual encounter. *See Carpenter*, 462 F.3d at 985–86 (finding four or five-minute examination of defendant's license in squad car reasonable and not a seizure). And VanBeek's license was not "held in the police cruiser after the necessary check was completed." *Weaver*, 282 F.3d at 312. VanBeek's license was visibly in Oetzel's hands when he resumed talking to VanBeek at her truck after running the record check. (R. 20 at 7:37–7:38.) The record "check did not take so long that a reasonable person, having surrendered [her] identification in the first place to the police for inspection, would understand that [she] was no longer free to end the small talk and go about [her] business." *State v. Martin*, 79 So. 3d 951, 959 (La. 2011).

Fifth and finally, VanBeek's interaction with Officer Oetzel upon his return to her truck shows that Oetzel did not seize her by previously taking her license to his squad car. When Oetzel returned to VanBeek's truck with her license in hand, VanBeek "was free at this point to request that [her] license be returned to [her] so that [she] could end the encounter." *Weaver*, 282 F.3d at 312. "For whatever reason," though, VanBeek "chose not to do this." *Id.* at 313. She instead "chose to stay and have a dialogue with Officer

[Oetzel]." *Id.* These facts suggest that their encounter was voluntary up to this point. *See id.*

At bottom, "the crucial test is whether" a reasonable person in VanBeek's position would have felt free "to ignore the police presence and go about [her] business.'" *Bostick*, 501 U.S. at 437 (quoting *Chesternut*, 486 U.S. at 569). In applying this test, a court should "focus on what the person's immediate 'business' is, in order to decide if the police retention of his papers would likely impede his freedom to proceed with it." *United States v. Jordan*, 958 F.2d 1085, 1088 (D.C. Cir. 1992). When Officer Oetzel began speaking with VanBeek and Sitzberger, their immediate business was sitting in VanBeek's truck, and they had plans to go to Cascade. When Oetzel asked for VanBeek's identification, she was free to decline the request and express a desire to leave. While Oetzel used VanBeek's license to run a record check for a few minutes, VanBeek was "unrestrained from going about [her] 'ordinary business' of sitting in the [truck], while [Oetzel] held [VanBeek's license]." *United States v. Savage*, 889 F.2d 1113, 1117 n.3 (D.C. Cir. 1989). And then, when Oetzel returned to VanBeek's truck with her license, she was free to ask for her license back so she could leave.

True, VanBeek could not legally drive away, or practically walk away, without her license during the record check. But "the mere fact that [VanBeek] did not feel free to leave . . . does not mean that the police seized [her]." *Bostick*, 501 U.S. at 436. Her "movements were 'confined' in a sense, but this was the natural result of [her] decision to [give her license to Officer Oetzel]; it says nothing about whether or not the police conduct at issue was coercive." *Id.* Officer Oetzel's request for VanBeek's identification and his brief record check were not coercive.

In short, Oetzel did not seize VanBeek until sometime after he returned to her truck, after running a record check.

C. This Court should reject VanBeek's proposed bright-line rule that the officer seized her by using her license to run a record check.

Courts have held that police officers did *not* seize defendants when officers took the defendants' driver's licenses to their squad cars to run record checks. *See, e.g.*, *State v. Chang*, 668 So. 2d 207, 208–09 (Fla. Dist. Ct. App. 1996); *State v. Mitchell*, 638 So. 2d 1015, 1015–16 (Fla. Dist. Ct. App. 1994); *Graves*, 553 N.E.2d at 813. These courts instead held that a seizure began when the officers kept the licenses after returning to the defendants' vehicles. *Mitchell*, 638 So. 2d at 1015; *Graves*, 553 N.E.2d at 813; *see also Finger v. State*, 799 N.E.2d 528, 533 (Ind. 2003) ("[W]hen [the officer] returned to Finger's car after running license checks and did not return his identification, what arguably began as a consensual encounter evolved into an investigative stop.").[7]

Yet some courts have held, often with no analysis, that a police officer seizes a person whenever an officer takes a person's identification to a squad car to run a record check. *Keller v. State*, 169 P.3d 867, 870 (Wyo. 2007); *State v. Daniel*, 12 S.W.3d 420, 427 (Tenn. 2000); *State v. Thomas*, 955 P.2d 420, 423 (Wash. Ct. App. 1998). And one court has seemingly adopted a more extreme rule, holding that an officer effects a seizure the moment the officer takes

[7] The court of appeals' certification incorrectly lists *Finger* as a case holding that a seizure occurred when a police officer took the defendant's driver's license to a squad car to run a record check. (A-App. 130.)

possession of a person's driver's license. *United States v. Guerrero*, 472 F.3d 784, 786–87 (10th Cir. 2007).

This Court should decline to adopt either of those bright-line rules. The United States Supreme Court has "consistently eschewed bright-line rules" when applying the Fourth Amendment standard of reasonableness. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). As a general matter, the Supreme Court in *Bostick* "made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context." *Drayton*, 536 U.S. at 201. When the specific issue is "whether police conduct amounts to a seizure implicating the Fourth Amendment," the Supreme Court's "clear direction" is that a court "must take into account 'all of the circumstances surrounding the incident' in each individual case." *Chesternut*, 486 U.S. at 572 (citation omitted).

Given that clear direction, several courts have correctly declined to adopt a bright-line rule regarding police retention of a person's driver's license. *See, e.g.*, *Ford*, 548 F.3d at 6; *Weaver*, 282 F.3d at 313; *Martin*, 79 So. 3d at 957–58; *Graves*, 553 N.E.2d at 813. Those bright-line approaches "are contrary to the Supreme Court's teachings in *Bostick* because they elevate one factor above all others in determining whether a seizure has occurred." *Weaver*, 282 F.3d at 313; *accord Martin*, 79 So. 3d at 957 (relying on *Bostick*). Those approaches mistakenly draw "heavily on the Supreme Court's decision in [*Florida v. Royer*, 460 U.S. 491 (1983)]." *Martin*, 79 So. 3d at 957. The plurality opinion in *Royer* considered the totality of the circumstances in finding a seizure, rather than applying a bright-line rule. *Robinette*, 519 U.S. at 39 (noting *Royer* "expressly disavowed" a *per se* rule). In *United States v. Mendenhall*, the plurality opinion also relied on the totality of the circumstances in concluding that no seizure occurred when the defendant handed her

driver's license and airline ticket to federal narcotics agents upon request. *See United States v. Mendenhall*, 446 U.S. 544, 555 (1980).

VanBeek is thus wrong to rely on *Royer* in arguing for a bright-line rule. (*See* VanBeek's Br. 12–13, 15.) Besides, VanBeek has not explained why the plurality opinion in *Royer* is binding, given that a plurality opinion is precedential only if it "is a logical subset" of a concurring opinion. *State v. Griep*, 2015 WI 40, ¶ 36, 361 Wis. 2d 657, 863 N.W.2d 567.

Significantly, Wisconsin courts have not used a bright-line rule regarding police retention of identification cards. In *State v. Floyd*, 2017 WI 78, ¶¶ 31–32, 377 Wis. 2d 394, 898 N.W.2d 560, this Court made two points about a police officer's retention of a person's identification card. First, such retention is a "useful" or "help[ful]" factor in "decid[ing] whether the person was seized." *Id.* ¶ 31. Second, a person may voluntarily consent to a search while an officer retains the person's identification card during a traffic stop. *Id.* ¶ 32. Regarding the first point, this Court stated that an officer's retention of an identification card "can be useful in determining" whether a person is "seized" when an officer requests consent to search. *Id.* ¶ 31. This Court further noted, "If 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 us decide whether the person was seized*." *Id.* (emphasis added). So, an officer's retention of a person's identification card is merely a useful, not a dispositive, factor in deciding whether a person is seized. *See id.*

The court of appeals also eschewed a bright-line rule in *State v. Luebeck*, 2006 WI App 87, ¶¶ 16–17, 292 Wis. 2d 748, 715 N.W.2d 639. There, the court addressed "a traffic stop context, where the test is whether a reasonable person

would feel free to 'disregard the police and go about his [or her] business.'" *Id.* ¶ 16 (alteration in original) (quoting *Bostick*, 501 U.S. at 434). It 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." *Id.* The court considered "the totality of the circumstances" to decide whether the defendant was seized when he consented to a search. *Id.* ¶ 17. The court noted—but did not adopt—the Tenth Circuit's bright-line rule that "a motorist's consent to search his or her vehicle is invalid where a deputy does not return documents relating to the initial traffic stop prior to asking for consent to search the vehicle." *Id.* ¶ 16. Indeed, that bright-line rule conflicts with this Court's holding in *Floyd*, 377 Wis. 2d 394, ¶ 32.

In short, *Floyd* and *Luebeck* did not treat police retention of a person's identification card as a dispositive factor in the seizure analysis. *Luebeck* viewed it as a "key" factor in deciding whether a traffic stop has ended, and *Floyd* viewed it as a "useful" factor in deciding whether a person was seized. *Luebeck* expressly applied a totality-of-the-circumstances analysis.

Adopting a bright-line rule here would require this Court to overrule *Floyd* and *Luebeck*, but there is no sound reason to do so. "This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law." *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592. VanBeek has not explained why this Court should disregard stare decisis here. She instead seems to mistakenly think that *Luebeck* and *Floyd* adopted the bright-line rule that she proposes.

The totality-of-the-circumstances approach under *Floyd* and *Luebeck* is better public policy than a *per se* rule. Under this bright-line rule, for example, a police officer

would seize a crime witness by taking her driver's license to a squad car to write down the witness's contact information. That seizure would perhaps be illegal (and potentially expose the officer to civil liability) if the officer did not have reasonable suspicion to think that the witness was guilty of a crime. Under the totality-of-the-circumstances approach, this hypothetical encounter would not be a seizure.

Consistent with *Floyd*, *Luebeck*, and United States Supreme Court precedent, this Court should decline to adopt a *per se* rule that a police officer seizes a person by taking her driver's license to the officer's squad car to run a brief record check. This Court instead should reiterate that whether such conduct amounts to a seizure depends on the totality of the circumstances. Under this contextual analysis, Officer Oetzel did not seize VanBeek when he spent a few minutes running a record check.

II. If this Court concludes that the officer seized VanBeek by acquiring her driver's license, the seizure was still lawful.

Even if this Court determines that Officer Oetzel seized VanBeek when she handed her driver's license to him, this Court should still affirm for two independent reasons. First, Officer Oetzel had reasonable suspicion to perform a *Terry* stop[8] when VanBeek gave her driver's license to him. Second, the community caretaker doctrine allowed Officer Oetzel to take VanBeek's driver's license to the squad car to run a record check.[9]

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

[9] If this Court agrees with either of these arguments, it need not decide exactly when the seizure began. This Court should consider these two arguments although the State did not raise them in the court of appeals and that court did not certify

(continued on next page)

A. The officer had reasonable suspicion to perform an investigatory stop when VanBeek handed her driver's license to him.

An investigatory detention, or *Terry* stop, is a seizure and "is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *Young*, 294 Wis. 2d 1, ¶ 20. 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.

"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

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them. "When this court grants direct review upon certification, it acquires jurisdiction of the appeal, which includes all issues, not merely the issues certified or the issue for which the court accepts certification." *State v. Mitchell*, 167 Wis. 2d 672, 677–78, 482 N.W.2d 364 (1992) (citation omitted). In the court of appeals, the State did not advance these alternative arguments because it instead argued that VanBeek's bright-line seizure argument conflicted with two Wisconsin cases, *Floyd* and *Luebeck*. Unlike the court of appeals, this Court has the power to overrule *Floyd* and *Luebeck* and adopt a bright-line seizure rule. *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). The State thus presents these alternative arguments to this Court.

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"; (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).

Here, Officer Oetzel knew the following five facts before VanBeek handed her driver's license to him. These facts together created reasonable suspicion that VanBeek was engaged in illegal drug activity, justifying a *Terry* stop. 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, Sitzberger said that they had been sitting in her truck for ten minutes. (R. 20 at 00:58–1:01.)

Second, Officer Oetzel did not receive a satisfactory explanation for that behavior. 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.) But VanBeek did not say why she sat there 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 together in her parked truck for ten minutes for no apparent reason.

Third, 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.) Other jurisdictions have relied on nighttime as one factor that helped create reasonable suspicion of drug activity. *E.g., United States v. Rabbia*, 699 F.3d at 90 (1st Cir. 2012); *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). 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.

Fourth, an anonymous caller had reported that two people were sitting in a truck for an hour. (R. 20 at 00:56–58.) 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 reasonable suspicion exists. *See State v. Colstad*, 2003 WI App 25, ¶ 14, 260 Wis. 2d 406, 659 N.W.2d 394. The possibility that they were sitting in the parked truck for one hour is significant.

Fifth, like in *Allen*, someone here made brief contact with a vehicle. The concerned caller told police 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"). Indeed, "[a] reasonably prudent and experienced police officer would have recognized this behavior as consistent with the consummation of a drug deal." *Rabbia*, 699 F.3d at 90 (collecting cases where a drug deal occurred during a brief interaction in a vehicle).

B. VanBeek's arguments against reasonable suspicion are not persuasive.

VanBeek argues that this Court may not rely on the anonymous tip at all. (VanBeek's Br. 24–25.) She is wrong because the anonymous identity of the concerned caller simply goes to the weight of the tip. A court's lack of knowledge about a tip's source of information "is a question of the weight we give [the tip] in our analysis, not of whether we exclude [the tip] from our analysis completely." *State v. Anderson*, 2019 WI 97, ¶ 46, 389 Wis. 2d 106, 935 N.W.2d 285. This Court will not entirely discount an anonymous tip if it was corroborated. *See id.* Here, Officer Oetzel corroborated the tip.

"[P]olice corroboration of innocent, although significant, details of an informant's tip lend reliability to the informant's allegations of criminal activity." *State v. Robinson*, 2010 WI 80, ¶ 27, 327 Wis. 2d 302, 786 N.W.2d 463. "Because an informant is right about some things, he is more probably right about other facts." *Id.* (citation omitted). In one case, this Court concluded that "[t]he reliability of the anonymous tip . . . was furthered bolstered by the police corroboration of innocent, although significant, details of the tip." *State v. Williams*, 2001 WI 21, ¶ 39, 241 Wis. 2d 631, 623 N.W.2d 106 (lead opinion). "The caller correctly identified that there was more than one person in the vehicle. She also accurately described the location of the vehicle, the general description of the vehicle, and the

relative layout of the surroundings, the alley/driveway and adjacent empty lot." *Id.*

Similar corroboration exists here. Officer Oetzel verified the concerned caller's report that a vehicle was parked on the roadside, the vehicle was a truck, it was at a specific location, and two people were sitting inside it. Officer Oetzel could thus reasonably assume that the caller was also correct about the two occupants sitting in the truck for one hour and about a person with a backpack briefly contacting the truck. It is highly unlikely that the concerned caller was pulling a prank, given that the caller did not accuse the truck's occupants of criminal activity. Because Officer Oetzel corroborated "innocent, although significant, details of the tip," *Williams*, 241 Wis. 2d 631, ¶ 39, this Court should consider it.

Of course, the anonymous tip by itself would not create reasonable suspicion. 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). Stated differently, 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)). Here, however, the anonymous tip was not the sole basis for the *Terry* stop. The police knew more suspicious facts than the tip alone.

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. 30–32.) In both of those cases, the court of appeals determined that police lacked reasonable suspicion to extend a traffic stop for a drug-sniffing dog to arrive. In each case, police stopped the defendant when he was driving a car at night.

VanBeek's case is distinguishable from *Betow* and *Gammons* because it has more suspicious facts. Unlike the defendants in those two cases, VanBeek was not pulled over while she was innocently driving. Instead, Officer Oetzel responded to VanBeek's parked truck because a concerned caller said that two people had been sitting in the truck for an hour and that a person with a backpack had come and gone from the truck. *Betow* and *Gammons* did not involve an unknown person's brief nighttime contact with a parked truck or a defendant sitting in the parked truck for a long time for no apparent reason.

Citing *Betow*, VanBeek argues that the time of night is not relevant to the reasonable-suspicion analysis. (VanBeek's Br. 31.) She is wrong. 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*, 226 Wis. 2d at 74–75, for that proposition because *Allen* was decided just one day before *Betow* was decided. As explained above, the time of night added to the suspicion that VanBeek had engaged in drug activity in her parked truck.

In sum, Officer Oetzel had reasonable suspicion to seize VanBeek before running the record check.

C. Under the community caretaker doctrine, the officer lawfully took VanBeek's driver's license back to his squad car.

This Court should still affirm if it determines that Officer Oetzel seized VanBeek when he obtained her license and that he lacked reasonable suspicion then. The community caretaker doctrine allowed Oetzel to take VanBeek's license to his squad car to run a record check.

"A community caretaker action is not an investigative *Terry* stop and thus does not have to be based on a reasonable suspicion of criminal activity." *State v. Ellenbecker*, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990). "In a community caretaker case, reasonableness is determined by balancing the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen." *Id.*

If a seizure occurred, this Court considers "whether the police conduct was bona fide community caretaker activity" and, "if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual." *State v. Kramer*, 2009 WI 14, ¶ 21, 315 Wis. 2d 414, 759 N.W.2d 598 (citation omitted). Both requirements are satisfied here.

In a case highly analogous to VanBeek's, the court of appeals found a reasonable exercise of the community caretaker function. There, a Wisconsin State Patrol inspector pulled behind a parked car that had its hood open, asked the defendant for his license, and called dispatch to run a status check. *Ellenbecker*, 159 Wis. 2d at 93–94. The court of appeals "doubt[ed]" but nevertheless "assume[d]" that the inspector seized the defendant by requesting the defendant's license. *Id.* at 95. It concluded that the inspector lawfully seized the defendant to run a status check.

The court first concluded that "the seizure was reasonable because there is a public interest in permitting police to request a driver's license from a motorist with a disabled vehicle and in running a status check on the license." *Ellenbecker*, 159 Wis. 2d at 96–97. It determined that "[t]he request for Ellenbecker's license was reasonable" because his "car was already stopped when the inspector offered help." *Id.* at 97.

The court concluded that "[t]here is also a public interest in permitting a police officer to run a status check on a license." *Ellenbecker*, 159 Wis. 2d at 97–98. It explained that a status check helps ensure that the person is safe to drive. *Id.* at 98.

The court next determined that "[t]he public interest in asking for the license and conducting a status check outweighs the minimal intrusion involved." *Ellenbecker*, 159 Wis. 2d at 98. It noted that "[r]equesting a license and conducting a status check after a lawful contact is but a momentary occurrence. The intrusion is minimal at best." *Id.* It further noted that "[t]his is especially so in Ellenbecker's case where the car was stopped and disabled during the status check of the license. Thus, the inspector's action did not intrude on Ellenbecker's freedom to leave." *Id.*

Here, similarly, Officer Oetzel performed a bona fide community caretaker function by requesting VanBeek's driver's license and running a record check. There are non-law-enforcement-related reasons for an officer to request identification and run a record check when speaking with someone in a parked vehicle. *Ellenbecker*, 159 Wis. 2d at 96–98. These reasons include obtaining people's names so the officer can write a report about the police-citizen encounter, writing down people's contact information so the officer can follow-up with them if needed, and ensuring that someone in the vehicle can legally and safely drive away. *Id.*; *see also*

Griffith, 236 Wis. 2d 48, ¶ 47. Officer Oetzel's record check performed these community caretaker functions.

Because Officer Oetzel performed a bona fide community caretaker function, the next question is "whether the public need and interest outweigh the intrusion upon the privacy of the individual." *Kramer*, 315 Wis. 2d 414, ¶ 21 (citation omitted). A court considers four factors when conducting this balancing test: (1) "the degree of the public interest and the exigency of the situation"; (2) "the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed"; (3) "whether an automobile is involved"; and (4) "the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." *Id.* ¶ 41 (citation omitted).

Turning to the first factor, the public interest and exigency of the situation supported the record check. Oetzel responded to a concerned call about two people sitting in a parked truck for an hour. Once there, Oetzel's observations corroborated the caller's information. The public has an interest in Oetzel's ensuring the welfare of the truck's occupants. The public interest also supported Oetzel's request to see VanBeek's license, "since a license is a statement that the driver can be expected to comply with the state's requirements for safe driving." *Ellenbecker*, 159 Wis. 2d at 98. Oetzel's possession of VanBeek's license helped ensure that his record check was accurate, rather than trying to rely on his memory of the information on VanBeek's license. The public has an interest in ensuring that Oetzel accurately obtained VanBeek's contact information for his report. *See id.* at 97.

Under the second factor, the attendant circumstances supported Officer Oetzel's record check. Like the defendant's car in *Ellenbecker*, VanBeek's truck was already parked on

the roadside when Oetzel approached it. Oetzel had a short and non-confrontational conversation with VanBeek before he requested her license. Oetzel did not raise his voice, draw a weapon, or otherwise compel VanBeek to give her license to him. When Oetzel asked for VanBeek's identification, she did not say that she wanted to leave instead. The record check did not take very long: Oetzel returned to VanBeek's truck with her license less than six minutes after she gave her license to him. Oetzel did not order VanBeek to stay in her truck or anywhere else during the record check. He did not, for example, handcuff VanBeek or place her in the back of his squad car during the record check. Their interaction occurred outside on a public street. Because it was nighttime and dark outside, it was especially reasonable for Oetzel to run a record check to learn who he was dealing with.

To be clear, the State is not arguing that Officer Oetzel's community caretaking role authorized him to *order* VanBeek to hand over her license. Instead, the State is arguing that this role allowed Oetzel to briefly seize VanBeek to run a record check after she freely handed over her license. The consensual nature of her sharing her license is a significant factor in this community caretaker analysis.

Because VanBeek was "in a vehicle" during the record check, the third factor "weighs in favor of the conclusion that the officer reasonably performed a community caretaker function." *State v. Blatterman*, 2015 WI 46, ¶ 56, 362 Wis. 2d 138, 864 N.W.2d 26.

The fourth factor supports the reasonableness of the record check or at least is neutral. Officer Oetzel did not appear to have alternative methods of running a record check without possessing VanBeek's license. Again, trying to memorize the information on VanBeek's license would have been impractical.

In short, Officer Oetzel reasonably performed a community caretaker function when he used VanBeek's license for less than six minutes to run a record check. So, if Oetzel seized VanBeek during the record check, the seizure was lawful.

III. The officer lawfully extended the stop for a drug-sniffing dog to arrive.

The State has explained above why the seizure was lawful whenever it began. The next issue is whether the officer lawfully extended the seizure.

"After a justifiable stop is made, the officer may expand the scope of the inquiry only to investigate 'additional suspicious factors [that] come to the officer's attention.'" *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124 (alteration in original) (citation omitted). "An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion." *Id.*

A law enforcement officer may not prolong a *Terry* stop for a dog sniff, "absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez v. United States*, 575 U.S. 348, 355 (2015). In other words, a dog sniff requires reasonable suspicion if it measurably extends the duration of a stop. *Id.* at 355–56. Reasonable suspicion for a dog sniff is not required if it does not measurably extend the length of the stop. *See State v. Wright*, 2019 WI 45, ¶¶ 40, 43, 386 Wis. 2d 495, 926 N.W.2d 157.

When Officer Oetzel returned to VanBeek's truck after running the record check, he talked to VanBeek about her license and then talked to Sitzberger about his license. This conversation yielded more suspicious facts. VanBeek argues

that this conversation between her and Officer Oetzel was an unlawful extension of the *Terry* stop because Oetzel lacked reasonable suspicion to prolong the stop for a drug-sniffing dog to arrive. (VanBeek's Br. 29–35.)

VanBeek's argument fails at the outset because she was not seized when she talked to Officer Oetzel about her license. Citing *Luebeck*, *Floyd*, and *Royer*, VanBeek argues that Officer Oetzel was seizing her then because he still possessed her license. (VanBeek's Br. 29–30.) But the State has already explained why this Court should reject VanBeek's proposed bright-line rule that a police officer always seizes a person by possessing the person's license. VanBeek was not seized when Officer Oetzel returned to her truck because a reasonable person in her position would have felt free to ask for her license back and terminate the encounter. *See* Argument Section I, *supra*.

If VanBeek was seized when Officer Oetzel returned to her truck, he lawfully prolonged the stop for two separate reasons. First, even without reasonable suspicion to wait for a drug dog, Officer Oetzel's inquiry into VanBeek's license was an ordinary inquiry incident to the stop and lasted a reasonable amount of time. Second, upon returning to VanBeek's truck, Officer Oetzel had lawful authority to prolong the stop until a drug dog arrived because he had reasonable suspicion of illegal drug activity.

A. The officer's questions about the driver's licenses took a reasonable amount of time.

Officer Oetzel's questions about VanBeek's and Sitzberger's licenses did not unreasonably extend the alleged seizure, even if Oetzel lacked reasonable suspicion to justify waiting for a drug dog. A police officer may check a person's identification during a traffic stop, even without reasonable suspicion to do so. *See State v. Smith*, 2018 WI 2, ¶ 2, 379 Wis. 2d 86, 905 N.W.2d 353. Checking a person's identification is an ordinary inquiry incident to a stop. *Id.* ¶ 10. Such ordinary inquiries "must be executed within the time it should have reasonably taken to complete them." *Id.* ¶ 2. An identification check does not unlawfully prolong a stop if the officer performed the check "in a reasonable manner and within a reasonable amount of time." *Id.* ¶ 22.

Here, Officer Oetzel reasonably confirmed the address on VanBeek's license after returning to her truck. Oetzel wanted VanBeek 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.) It was reasonable for Officer Oetzel to ask VanBeek to state her address as he wrote it down even though she said that her license was accurate. VanBeek indicated to Officer Oetzel that she still had an "older ID" in case she lost her newer one, suggesting that she might have given her outdated license to Oetzel. (R. 20 at 7:49–8:04.) VanBeek could have been mistaken about whether the information on her license in Oetzel's possession was accurate, or she could have been lying to him. A person with false information on a driver's license is unlikely to be able to recite the false information from memory. To confirm the accuracy of

VanBeek's license, it was reasonable for Officer Oetzel to ask her to recite her address.

It was also reasonable for Officer Oetzel to ask Sitzberger to recite his address. Sitzberger told Officer Oetzel a different address than the one listed on his driver's license. (R. 102:14; 107:31.) And Sitzberger suggested that one of two different addresses could be listed on his license. (R. 20 at 9:34–9:38.) Because Officer Oetzel confirmed the accuracy of VanBeek's and Sitzberger's licenses "in a reasonable manner and within a reasonable amount of time," the stop was "not unlawfully prolonged." *Smith*, 379 Wis. 2d 86, ¶ 22.

B. After the record check, the officer had reasonable suspicion to seize VanBeek until a drug dog arrived.

If a dog sniff occurs after the purpose of a stop has or should have been completed, it is lawful if supported by reasonable suspicion. *See Smith*, 379 Wis. 2d 86, ¶ 10 n.9. Officer Oetzel had reasonable suspicion to prolong the alleged stop for a dog sniff when he returned to VanBeek's truck, even if he took longer than necessary for confirming VanBeek's and Sitzberger's addresses.

Before running the record check, Officer Oetzel knew that (1) VanBeek and Sitzberger had been sitting in her parked truck for ten minutes and maybe an hour, around midnight, for no apparent reason; (2) this behavior was consistent with narcotic use; and (3) someone with a backpack had reportedly approached the truck and then left. *See* Argument Section II.A., *supra*.

During the record check, Officer Oetzel learned that VanBeek had a drug overdose earlier in the year and that Sitzberger was on probation or parole. (R. 102:11–12; 107:66, 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; *see also Hogan*, 364 Wis. 2d 167, ¶ 52. And 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).

The facts in the two preceding paragraphs justified extending the stop for a dog sniff, and Officer Oetzel knew those facts before the record check ended. It is immaterial whether Officer Oetzel took longer than necessary to confirm VanBeek's and Sitzberger's addresses during his follow-up questioning. Because Officer Oetzel had reasonable suspicion of drug activity after running the record check, he had lawful authority to order VanBeek to wait until the drug dog arrived.

At the very least, Officer Oetzel had reasonable suspicion to ask VanBeek and Sitzberger follow-up questions after the record check, even if he lacked reasonable suspicion to extend the alleged stop to wait for the drug dog. The circuit court found that the drug dog arrived while Officer Oetzel was talking to VanBeek and Sitzberger after the record check. (R. 107:69.) It also found that Officer Oetzel did not extend the stop for the purpose of waiting for the drug dog. (R. 107:69.) Because Officer Oetzel extended the alleged stop to ask follow-up questions after running the record check, the issue is whether reasonable suspicion justified asking these questions. It did.

Right after Sitzberger recited his address during this follow-up questioning, he provided more information that added to Officer Oetzel's suspicion. After hearing Sitzberger say his address, Oetzel said to Sitzberger, "I thought you said you lived here." (R. 20 at 10:31.) Sitzberger responded 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.) 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 confirmed that he was on probation. (R. 20 at 11:51.) 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.

Sitzberger also suspiciously 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.) 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.

VanBeek also bolstered the case for an extension of the stop. During this follow-up questioning, 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.) This behavior was suspicious because Officer Oetzel knew from training and experience that people "are usually utilizing narcotics" if

they are sitting in a parked vehicle for a long period of time. (R. 107:26.)

These facts about "Jake" and about how long VanBeek had truly been sitting in her truck bolstered Officer Oetzel's reasonable suspicion of drug activity. Oetzel was justified in prolonging the *Terry* stop for a dog sniff after he learned those facts, if he was not already justified in doing so.[10]

In sum, Officer Oetzel reasonably extended the *Terry* stop even if it began before or shortly after the record check. From the record check, Oetzel learned that VanBeek had a recent drug overdose and that Sitzberger was on parole or probation. These two facts, combined with the other suspicious facts that Oetzel already knew, justified follow-up questions about their addresses and their reason for being in the area late at night. These follow-up questions yielded suspicious answers about Sitzberger's casual acquaintance "Jake" and about how long VanBeek had really been sitting in her truck. These answers, together with the other suspicious facts that Oetzel already knew, justified extending the stop for a dog sniff.

[10] VanBeek challenges some of the circuit court's findings and inferences. (VanBeek's Br. 33–34.) The State does not rely on them.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 9th 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 10,880 words.

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

I hereby certify that:

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

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Dated this 9th day of November 2020.

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