STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP000797-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISAAC D. TAYLOR,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Waukesha County,
The Honorable Maria S. Lazar Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the testimony at a suppression hearing support a finding of reasonable suspicion to perform a traffic stop based on excessive window tint, where the officer did not testify to any training in estimating window tint or give any testimony regarding his ability to do so accurately?

Circuit court answer: Yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. This is a fact-specific case requiring the application of well-established legal principles.

STATEMENT OF THE CASE AND FACTS

The State charged Mr. Taylor in a criminal complaint with one count of operating a motor vehicle while intoxicated as a fifth or sixth offense and one count of operating after revocation. (2). The charges arose out of a traffic stop by a City of Waukesha police officer for excessive window tint. (2). Mr. Taylor filed a motion to suppress evidence arguing that the traffic stop was unconstitutional. (16). The circuit court conducted an evidentiary hearing. (43).

Motion Hearing Testimony:

Officer Jacob Taylor[1] testified that he initially noticed Mr. Taylor's vehicle at 8:53 p.m. parked in front of an apartment complex that was known to the police department for drug trafficking. (43: 5, 7; App 105-107). A female was standing outside the driver's side door. (43: 5; App. 105). The female looked toward the officer and walked back into the apartment complex. Mr. Taylor's vehicle proceeded southbound. (43: 5, 9; App. 105, 109). The officer testified that he did not recognize the female and that it "appeared to [him] based upon [his] training and experience, there was a short time contact at the front window." (43: 7; App. 107). He testified based upon his training and experience, this "usually means some sort of illegal activity such as a drug deal." (43: 8; App. 108).

On cross-examination, the officer indicated that when he first saw the vehicle, it was pulled over to the curb, and the female was standing there appearing to talk to the driver. He did not see her approach the window and actually did not know how long she was there. He admitted that when he described the contact as short, he did not actually know that. (43: 8-9; App. 108-109).

As the officer passed Mr. Taylor's vehicle, he noticed that the rear windows were "excessively tinted." The officer testified that he could not see into

[1] Officer Taylor will hereinafter be referred to as "the officer" to avoid confusion with the defendant-appellant, Isaac Taylor.

the car. (43: 5; App. 105). The officer turned his squad car around, intending to catch up to the vehicle to run its license plate. (43: 5; App. 105). The vehicle turned into a private driveway. (43: 5; App. 105). The vehicle then backed out and proceeded in the opposite direction. (43: 15; App. 115).The officer followed a very short distance and then performed a traffic stop and identified the driver as Mr. Taylor. (43: 6, 15; App. 106, 115).

The officer testified that he had previously stopped drivers for excessive window tint. (43: 6; App. 106). The officer testified that he believed that the rule for window tint required that "the rear windows need to be 35 transparent or over that, over 35." (43: 18; App. 118).

The officer ultimately arrested Mr. Taylor for OWI. He forgot to measure the tint. As he was transporting Mr. Taylor in his squad, he called another officer who had remained on scene and asked him to measure the window tint. (43: 6-7, 19; App. 106-107, 119). He testified that the level of tint was "illegal," although he failed to mention that in his police report. (43: 7; App. 107). The officer issued a citation for excessive window tint. (43: 7; App. 107).

The officer testified that the other officer tested the window tint and found that it was illegal. However, the testifying officer was unable to recall what the test result was. That information was not contained in his police report. (43: 21; App. 121).

Circuit Court Ruling:

The circuit court denied the motion to suppress. The court reasoned:

> In this case, Police Officer Taylor observed the vehicle in a location where there was known criminal activity. He observed that there was an individual talking to the vehicle, he does not know how long the woman was talking to the vehicle, but he did see she subsequently left shortly after viewing his squad car. That would be a basis to have some suspicion. I don't know if it had risen at that point to any reasonable suspicion to believe that a crime had been committed or was about to be committed, but add to that the fact that Officer Taylor observed that the back windows, the rear windows and the back of the van were excessively tinted in his mind. So, when Officer Sanford -- when Officer Taylor observed that he was there -- he therefore had a reasonable suspicion to believe that a crime had been committed, that there was a vehicle with excessive tint. He was correctly able to, therefore, follow that vehicle and then to conduct an investigatory Terry stop, which is what he did.

(43: 30-31; App. 130-131).

Plea and Sentencing:

Mr. Taylor entered a guilty plea to the OWI charge, and the Honorable Maria Lazar sentenced him to five years prison divided equally between

initial confinement and extended supervision. (26). He now appeals. (33).[2]

ARGUMENT

I. The traffic stop was not justified by a reasonable suspicion of criminal activity.

A. Standard of review and general legal principles.

Both the United States and Wisconsin constitutions guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11. "The Fourth Amendment to the United States Constitution is the securing anchor of the right of persons to their privacy against government intrusion." *State v. Gordon*, 2014 WI App 44, ¶11, 353 Wis.2d 468, 846 N.W.2d 483. It is the State's burden to show a traffic stop complied with constitutional standards. *See State v. Nesbit*, 2017 WI App 58, ¶6, 378 Wis. 2d 65, 902 N.W.2d 266.

This Court applies a two-part test when reviewing the denial of a motion to suppress. *State v. Popp*, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471. A circuit court's findings of fact are upheld unless clearly erroneous, but the application

[2] Wis. Stat. §971.31(10) allows Mr. Taylor to challenge the circuit court's denial of his suppression motion on appeal despite his plea of guilty.

of constitutional principles to the facts are reviewed de novo. *Id*.

Where an unlawful search or seizure occurs, the remedy is to suppress the evidence produced. *State v. Carroll*, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

B. The officer's testimony that he suspected that the windows of Mr. Taylor's vehicle were illegally tinted was insufficient to support a reasonable suspicion to conduct a traffic stop.

Here, the officer testified that he stopped Mr. Taylor's vehicle based on his perception that the windows were "excessively tinted." (43: 5; App. 105). Although he testified briefly about his training with regard to OWI arrests, he did not testify to any training in the detection of illegal levels of window tint. The result in this case is entirely governed by this Court's decision in *State v. Conaway*, 2010 WI App 7, 323 Wis. 2d 250, 779 N.W.2d 182.

In *Conaway*, as here, a police officer conducted a traffic stop based on a suspected window tint violation. The officer testified that he had more than thirteen years of experience as a state trooper, including training in the use of a tint meter. He testified that he was aware of the 35% rear window requirement. And he had stopped between ten and one hundred vehicles for illegal window tint. *Id*., at ¶8. This Court held that the record did not contain a

basis for a reasonable suspicion on the part of the officer that the window tint exceeded legal limits.

The Court recognized that it was not necessary that the officer be able to ascertain with certainty that there was a window tint violation before performing a traffic stop based on reasonable suspicion. *Id.*, at ¶ 7. However, the Court found the testimony presented by the State in support of the stop to be lacking. The Court began as follows:

> First, although an officer's experience is often relevant in a reasonable suspicion analysis, here the officer made no connection between his longevity or his tint meter training and his ability to differentiate between legally and illegally tinted glass. He did not, for example, say that he had experience in correctly identifying windows that failed the tinting limitation.

Id., at ¶9. The same is true of the testimony in this case. In fact, the officer in this case did not even testify that he had training in the use of a tint-meter.

This Court in *Conaway* also found that the officer's knowledge of the standard for illegal window tint was not sufficient to establish that he had the ability to form a reasonable suspicion that a particular window was excessively tinted by observing it with a naked eye. The Court said:

> Second, the fact that the officer knew that a tinted rear window must allow at least 35% of light to pass through does not show that he had

> the ability to look at a particular window and estimate whether it might fail the standard.

Id., at ¶10. Again, the same is true here.

This Court was similarly unimpressed in *Conaway* by testimony that the officer had performed numerous traffic stops based on window tint violations. The Court said:

> Third, the fact that the officer had stopped numerous other vehicles for suspected window tint violations adds nothing. The officer did not testify whether his prior suspicions were ever verified by subsequent testing. So far as this record discloses, the officer might have a very poor track record.
>
> Fourth, undoubtedly the officer stopped the defendants' car because the rear window appeared to him to have "dark window tint," but, as with his thirteen years of experience, this statement says nothing about the officer's ability to distinguish between legal tinting and tinting that comes anywhere close to violating the code.

Id., at ¶11

Similarly, here we know that the officer had "pulled over people before for having excessive tint." (43: 6; App. 106). We do not know how many times. And, as in *Conaway*, there was no testimony about the accuracy of the officer's prior estimates.

In *Conaway*, this Court concluded:

> In short, nothing in the officer's testimony provides a basis for a finding that the officer had the ability to judge whether a tinted rear window came close to or failed to meet the 35%-light-pass-through requirement. The reasonable suspicion standard was not met.

Id., at ¶ 13.

All of this Court's criticism of the testimony in *Conaway* applies equally, if not more forcibly, to this case. Here, although the officer testified that he believed that the window tint was excessive, the State offered no testimony from which the circuit court could conclude that the officer had any ability to gauge that by observation alone. He did not even testify that he had any particular training to do so.

The officer's testimony that he believed that the tint was excessive was worth absolutely nothing absent any testimony at all tending to indicate that his belief was reasonably likely to be accurate. *Conaway* compels the conclusion that the officer's belief that the windows were excessively tinted was not a sufficient basis for the traffic stop.

C. The woman standing outside the vehicle and talking to the occupants added nothing to the reasonable suspicion analysis.

It is important to note that the officer's belief about the window tint was the *only* potential basis for a traffic stop here. The fact that the vehicle was parked near an apartment complex known for drug

activity, and the officer observed a woman standing by the vehicle talking to the occupants added nothing. The officer did not rely on this observation as a justification for the traffic stop. The circuit court relied on it to the extent that the court believed it "would be a basis to have some suspicion." (43: 30; App. 130). The circuit court was wrong *See*, e.g., *State v. Young,* 212 Wis.2d 417, 569 N.W.2d 84 (Ct.App.1997) ("We concluded the fact that two individuals met briefly on a sidewalk during daytime hours in a residential neighborhood known for high drug trafficking did not give rise to a reasonable suspicion that the individuals were engaging in a drug transaction.").

The time of day — 8:53 p.m.— was not an unusual time for people to be out and about. (43: 5; App. 105). There was no indication of any hand-to-hand contact. Not even the duration of the contact was suspicious. Although the officer initially testified to a "short time contact," he was forced to admit under cross examination that he actually had no idea how long or short the contact was because he did not know how long the woman had been standing there before he first noticed the vehicle. (43: 7-9; App. 107-109).

As this court noted in *State v. Gordon*, 2014 WI App 44, 353 Wis. 2d 468, 846 N.W.2d 483:

> …sadly, many, many folks, innocent of any crime, are by circumstances forced to live in areas that are not safe – either for themselves or their loved ones. Thus, the routine mantra of

> "high crime area" has the tendency to condemn a whole population to police intrusion that, with the same additional facts, would not happen in other parts of our community. "An individual's presence in an area of expected criminal activity, standing along, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."

Id. ¶ 15 (citing *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)); *see also State v. Morgan*, 197 Wis. 2d 200, 212-13, 539 N.W.2d 887 (1995) ("We recognize . . . that many persons 'are forced to live in areas that have 'high crime' rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas.' Furthermore, Professor LaFave warns that 'simply being about in a high-crime area should not by itself ever be viewed as a sufficient basis to make an investigative stop.'").

Likewise, here, Mr. Taylor's conversation of unknown duration with a pedestrian while legally parked added nothing to the reasonable suspicion calculus, and cannot provide reasonable suspicion to support this stop

CONCLUSION

The police stop of Mr. Taylor's vehicle was unreasonable and unconstitutional. Therefore, Mr. Taylor respectfully requests that this Court reverse the judgment and order of the circuit court, order the evidence obtained as a result of the unlawful stop to be suppressed, and remand the case to the circuit court for further proceedings consistent with this Court's opinion.

Dated this 23rd day of July, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,390 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 23rd day of July, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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