STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP797-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISAAC D. TAYLOR,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MARIA S. LAZAR, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 266-9594 (Fax)
blimlingja@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Other Authorities

ISSUE PRESENTED

Was the traffic stop that yielded evidence leading to Defendant-Appellant Isaac D. Taylor's conviction for operating while intoxicated supported by reasonable suspicion?

The circuit court denied Taylor's motion to dismiss, concluding that police had reasonable suspicion to stop Taylor for driving a vehicle with illegally tinted windows.

This Court should affirm on independent grounds, as the record reflects facts sufficient for police to form a reasonable suspicion that Taylor was engaged in illegal drug activity.[1]

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this case by applying settled legal principles to the facts.

INTRODUCTION

This case arises from a traffic stop on the evening of Christmas Day, 2017. After observing Taylor's vehicle parked outside of an apartment building known for its drug activity, Waukesha Police Officer Jacob Taylor followed Taylor for a short time. Taylor pulled into a private driveway, waited a couple of minutes, then backed out of the driveway and drove away from Officer Taylor. Officer Taylor then stopped Taylor

---

[1] "On appeal, [this Court] may affirm on different grounds than those relied on by the trial court." *State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755. A respondent may raise an argument for affirmance even though it was not raised in the circuit court. *State v. Ortiz*, 2001 WI App 215, ¶ 25, 247 Wis. 2d 836, 634 N.W.2d 860.

for excessive window tinting. During the stop, Officer Taylor discovered that Taylor was drunk and arrested him for his fifth OWI offense.

Taylor moved to suppress, arguing that Officer Taylor lacked reasonable suspicion to initiate the stop. The circuit court disagreed, concluding that the window tint violation was enough reasonable suspicion for Officer Taylor to stop Taylor. Taylor then pleaded no contest and appealed the denial of his motion to suppress.

This Court should affirm. While the record lacks sufficient information to establish Officer Taylor's training and experience with respect to window tinting under *Conaway*[2], the record does contain facts sufficient to allow this Court to affirm on independent grounds. The high crime area, Taylor's brief interaction with a pedestrian cut short by police presence, and Taylor's apparent attempts to evade Officer Taylor were facts sufficient to establish reasonable suspicion to stop Taylor to investigate potential drug activity.

STATEMENT OF THE CASE

Shortly before 9:00 p.m. on December 25, 2017, Officer Taylor was on patrol near North East Avenue in Waukesha when he noticed a van parked in front of an apartment complex known to Waukesha Police for drug trafficking activity. (R. 43:4–5, 7.) A woman was standing near the open driver's window of the van, apparently conversing with the driver. (R. 43:5, 9.) The woman looked at Officer Taylor, then turned and walked across the street and into the apartment building. (R. 43:5.)

---

[2] *State v. Conaway*, 2010 WI App 7, ¶ 9, 323 Wis. 2d 250, 779 N.W.2d 182 (an officer's training and experience must implicate "his ability to differentiate between legally and illegally tinted glass" to find reasonable suspicion for a window tint stop).

As Officer Taylor passed by the van, he noticed that its rear windows were tinted dark enough that he could not see into it. (R. 43:5.) Officer Taylor turned his squad around to follow the van, which had begun traveling south. (R. 43:5.) A short time later, the van pulled into a private driveway on South East Avenue. (R. 43:11.) Officer Taylor drove past the van, noting its license plate number. (R. 43:11.) He then parked about half a block away, facing the van, to watch it while he ran the plate. (R. 43:11–12.) The van sat for about two minutes; no one entered or exited it. (R. 43:12.) It then backed out of the driveway and went back the way from which it came, away from Officer Taylor. (R. 43:15.) Officer Taylor again followed the vehicle, and although he did not see it violate any other traffic laws, he initiated a stop based on the vehicle's excessive window tint. (R. 43:16.)

After approaching the driver of the van—Taylor—Officer Taylor detected an odor of alcohol and noticed that Taylor's speech was slow and slurred. (R. 2:2.) Officer Taylor had Taylor perform field sobriety tests, several of which he failed. (R. 2:2–3.) Officer Taylor administered a preliminary breath test, which registered above the legal limit. (R. 2:3.) An eventual blood test determined Taylor's blood alcohol content to be approximately .30g/100mL. (R. 15:1.) Later testing of the window tint led police to issue a citation to Taylor for excessive window tinting. (R. 18:1.)

The State charged Taylor with operating while intoxicated, fifth or sixth offense; operating while revoked; and operating with a prohibited alcohol concentration. (R. 21:1–2.) Taylor moved to suppress the results of the traffic stop, arguing that Officer Taylor lacked reasonable suspicion to stop him. (R. 16:1–4.) The Waukesha County Circuit Court, the Honorable Maria S. Lazar, presiding, held a suppression hearing, at which Officer Taylor testified to the events of the evening and his reasoning for stopping Taylor. (R. 43:3–8.) At the end of the hearing, the court denied Taylor's motion to

suppress. (R. 43:29.) It reasoned that Officer Taylor had "reasonable suspicion to believe that a crime had been committed, that there was a vehicle with excessive tint." (R. 43:31.)

After the denial of his motion to suppress, Taylor pleaded no contest to the OWI charge. (R. 44:7.) The court sentenced him to two and a half years of initial confinement and two and a half years of extended supervision. (R. 44:25–26.) Taylor now appeals.

STANDARD OF REVIEW

An appellate court reviewing the denial of a motion to suppress will uphold the circuit court's findings of fact unless clearly erroneous, but it reviews de novo whether those facts constitute reasonable suspicion. *State v. Young*, 2006 WI 98, ¶ 17, 294 Wis. 2d 1, 717 N.W.2d 729.

ARGUMENT

The facts in the record support a finding of reasonable suspicion.

A. Police may temporarily detain a suspect when they have a reasonable suspicion that crime is afoot.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Young*, 294 Wis. 2d 1, ¶ 18. Consistent with Fourth Amendment protections, law enforcement may conduct an investigatory or *Terry*[3] stop of an individual if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Id.* ¶ 20.

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

Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Id.* ¶ 21. What constitutes reasonable suspicion is a common-sense, totality-of-the-circumstances test that asks, under all the facts and circumstances present, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citing *State v. Anderson*, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990)). That suspicion cannot be inchoate, but rather must be particularized and articulable: "A mere hunch that a person . . . is . . . involved in criminal activity is insufficient." *Young*, 294 Wis. 2d 1, ¶ 21 (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

That said, a police officer has reasonable suspicion to stop a person when he or she observes acts that are individually lawful, but when taken together, allow that officer to objectively discern "a reasonable inference of unlawful conduct." *Waldner*, 206 Wis. 2d at 60. "The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts." *Id.* at 58. Moreover, police do not need "to rule out the possibility of innocent behavior before initiating a brief stop." *Id.* at 59 (citing *Anderson*, 155 Wis. 2d at 84). The facts in *Terry*, as discussed in *Waldner*, illustrate that principle.

In *Terry*, the Court upheld the legality of a police officer's investigative stop where the officer "observed the defendants repeatedly walk back and forth in front of a store window at 2:30 in the afternoon, and then confer with each other. The officer suspected the two of contemplating a robbery and stopped them to investigate further." *Waldner*, 206 Wis. 2d at 59.

Even though walking "back and forth in front of a store is perfectly legal behavior . . . reasonable inferences of criminal activity can be drawn from such behavior." *Id.* Indeed, "the suspects in *Terry* 'might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store.'" *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989) (quoting 3 Wayne R. LaFave, *Search and Seizure* § 9.2(c) at 357–58 (2d ed. 1987)). But the officer in *Terry* permissibly stopped the defendants because "Terry's conduct though lawful was suspicious" and "gave rise to a reasonable inference that criminal activity was afoot." *Waldner*, 206 Wis. 2d at 60.

In other words, the presence of ambiguity does not defeat reasonable suspicion. "Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity." *Id.* (citing *Anderson*, 155 Wis. 2d at 84). "Thus, when a police officer observes lawful but suspicious conduct," if that officer can objectively discern "a reasonable inference of unlawful conduct . . . , notwithstanding the existence of other innocent inferences . . . ," that officer may "temporarily detain the individual for the purpose of inquiry." *Id.*

Similarly, attempts to evade or flee police can contribute to an officer's reasonable suspicion that crime is afoot. *See Florida v. Rodriguez*, 469 U.S. 1, 6 (1984); *Anderson*, 155 Wis. 2d at 84. While flight or evasion alone might not constitute probable cause, they can certainly indicate "that all is not well" and justify a brief stop for further inquiry. *Anderson*, 155 Wis. 2d at 84.

B. The record contains facts sufficient to support a finding of reasonable suspicion that Taylor was engaged in illegal activity.

The circuit court denied Taylor's motion to suppress because it determined that Officer Taylor had reasonable suspicion to stop Taylor for a window tint violation. (R. 43:31.) At the suppression hearing where the circuit court made that determination, neither party raised this Court's holding in *Conaway*, which suggested that reasonable suspicion to stop a vehicle for a window tint violation must stem from a connection between the officer's training and experience and his or her "ability to differentiate between legally and illegally tinted glass." *State v. Conaway*, 2010 WI App 7, ¶ 9, 323 Wis. 2d 250, 779 N.W.2d 182. While it is entirely possible that Officer Taylor's training and experience were sufficient to establish this ability, the State notes that the record lacks the information necessary for this Court to affirm the circuit court's holding on that basis. Nevertheless, this Court can affirm the circuit court on alternate grounds. *See State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

The record created during the suppression hearing contains facts sufficient for this Court to conclude that it was reasonable for Officer Taylor to stop Taylor briefly in order to investigate his behavior. Multiple facts are relevant to this analysis. First, Officer Taylor first spotted Taylor's van parked in front of an apartment building known to police as a hub of drug trafficking activity. (R. 43:7.) Second, Officer Taylor observed a short interaction between a pedestrian and Taylor, and the pedestrian left the scene upon seeing Officer Taylor. (R. 43:5.) Third, after Officer Taylor turned to follow the van, it pulled into a private driveway, where it remained for about two minutes with no one entering or exiting the van. (R. 43:11–12.) Fourth, when the van left the private driveway, it drove back the way from which it came—away from

Officer Taylor. (R. 43:15.) Fifth and finally, the traffic stop happened around 9:00 p.m., and "the time of day is another factor in the totality of the circumstances equation." *State v. Allen*, 226 Wis. 2d 66, 74–75, 593 N.W.2d 504 (Ct. App. 1999).

The police department's familiarity with the apartment building as a drug trafficking hub is a permissible factor to use in establishing reasonable suspicion for a stop. *See, e.g.*, *State v. Morgan*, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995). Also relevant is a short contact between two people, which may be an indication of a drug deal. *Cf. State v. Charles Young*, 212 Wis. 2d 417, 422, 569 N.W.2d 84 (Ct. App. 1997) ("short-term contact" in a high-crime area, while not enough by itself to form reasonable suspicion, may indicate drug activity). Moreover, Taylor's near-two-minute stop in a private driveway with no activity and subsequent departure away from Officer Taylor suggest that he was trying to avoid Officer Taylor, which could have been an indication "that all [was] not well." *Anderson*, 155 Wis. 2d at 84.

Any one of these factors, by itself, might not be enough to form reasonable suspicion. And to be sure, one could think of an innocent explanation for all of them. But "the building blocks of fact accumulate," *Waldner*, 206 Wis. 2d at 58, and there comes a point when facts with otherwise innocent explanations aggregate to a level sufficient to warrant a brief stop for police to investigate further. *Anderson*, 155 Wis. 2d at 84. That was the case here. The totality of the circumstances made a brief stop of Taylor's van to investigate further a reasonable step for Officer Taylor to take.

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"; and (3) the defendant and the other man hung around "the neighborhood

for five to ten minutes" after the car drove away. *Allen*, 226 Wis. 2d at 74–75.

The facts are even stronger here than in *Allen*. Like in *Allen*, the officer here saw a person's brief contact with a vehicle at night in a high-crime area. Taylor's case, unlike *Allen*, involved several instances of evasive behavior: (1) the person who was talking to Taylor through his van window walked away right after seeing the officer; (2) Taylor pulled his van into a driveway for about two minutes in an apparent attempt to prevent the officer from following him; and (3) when Taylor left the driveway, he drove away from the officer. These evasive actions, combined with the same kind of facts that created reasonable suspicion in *Allen*, justified the stop of Taylor's van.

The circuit court, in line with the State's argument below, ruled only that Taylor's tinted windows provided reasonable suspicion for a traffic stop, so Taylor understandably focuses his argument on the window tint issue rather than any other basis for reasonable suspicion.[4] Nevertheless, his statement that "the window tint was the *only* potential basis for a traffic stop" is incorrect. (Taylor's Br. 9.) He emphasizes the perils of basing *Terry* stops solely on the presence of activity in high-crime areas, (Taylor's Br. 10–11) but as discussed above, there are more facts supporting reasonable suspicion in this case than the apartment building's well-known drug trafficking. Taylor's brief contact with a pedestrian and apparent attempts to

[4] To be clear, while the State acknowledges that the record is insufficient for this Court to affirm on the basis of the window tint alone, Officer Taylor very well may have had reasonable suspicion based on the window tint. The record's lack of information about Officer Taylor's training and experience with window tint violations does not mean that he actually lacks such training and experience, or that his training and experience are inadequate to identify tint violations.

avoid and evade Officer Taylor are important to the reasonable suspicion analysis, as well. The totality of the facts weighs in favor of a finding of reasonable suspicion.

CONCLUSION

For the reasons set forth above, the State requests that this Court affirm the circuit court.

Dated this 25th day of September 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 266-9594 (Fax)
blimlingja@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,565 words.

_____
JOHN A. BLIMLING
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 25th day of September, 2019.

_____
JOHN A. BLIMLING
Assistant Attorney General