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

REPLY BRIEF OF DEFENDANT-APPELLANT

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

The State concedes, as it must, that the record is insufficient to support the circuit court's ruling that the officer was justified in stopping Mr. Taylor for a suspected window tine violation. (Response Brief at 7). Therefore, the State attempts to cobble together the officer's remaining observations to arrive at a reasonable suspicion of criminal drug activity to justify the stop. That attempt requires an unwarranted stretching of both the law and the facts and ultimately fails.

The State relies on *State v. Allen*, 226 Wis. 2d 66, 74–75, 593 N.W.2d 504 (Ct. App. 1999), in which this Court found a reasonable suspicion of criminal drug activity where: (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 remained in the neighborhood for five to ten minutes after the car drove away. *Id.*, at 74–75.

The State attempts to liken this case to *Allen* and goes so far as to say that the "facts are even stronger here" than in *Allen*. (Response Brief at 9). The State is correct that in this case, as in *Allen*, the activity the officer observed occurred in an area known for drug activity. However, that is where the similarity ends.

In *Allen*, the activity the officers observed occurred "late at night." 226 Wis. 2d at 74. The State points out that the Court in *Allen* said that the time of day was a factor to be considered in the reasonable suspicion analysis. 226 Wis. 2d at 74-75. The State notes that here the officer was observing activity at around 9:00 in the evening. But the State does not say what is the least bit suspicious about people being out at that time. Nine o'clock is hardly "late at night." It is "prime time" for television shows. It is worth noting that date of the stop was *Christmas day*. (43: 4). There is nothing even unusual, let alone suspicious, about people moving about at 9:00 at night as they come and go from Christmas festivities.

In *Allen*, the defendant and his companion had brief contact with a person in a car, involving the defendant's companion entering the car for approximately one minute. This was a suspicious fact in *Allen* because a person getting into a car for a short period of time is consistent with a drug transaction. 226 Wis. 2d at 74. In an attempt to align this case factually with *Allen*, the State describes what occurred here as a "short term contact," "brief contact with a vehicle," or Mr. Taylor's "brief contact with a pedestrian." (Response Brief at 8, 9). This is not an accurate characterization of the facts.

As Mr. Taylor pointed out in his initial brief, although the officer initially described what he saw as 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 the woman was already standing by the car talking to the driver when the officer first noticed them. The officer did not

see the woman approach the car and did not know how long she had been standing there before he first noticed the vehicle. (43: 7-9; App. 107-109). For all this officer knew, the woman could have been talking to Mr. Allen for an hour. Or, Mr. Allen could have been in her home (perhaps celebrating Christmas), and the two walked out to the car *together* and were completing their goodbyes as the officer approached. All the officer knew was that when he first looked, she was standing there. This case is nothing like *Allen*.

Finally, the State introduces notions of "flight" and "evasion," invoking *Florida v. Rodriguez*, 469 U.S. 1, (1984), and *State v. Anderson*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990).

In *Rodriguez*, the three suspects drew the attention of detectives while they were at the National Airlines ticket counter at the Miami Airport. The detectives followed the suspects as they went toward the airport concourse. As the three men stood on the escalator, one looked at the detectives, and spoke in a low voice to another who turned around to look at the detectives and turned his head back very quickly. As the three men left the escalator, one of them said to another, "Let's get out of here," and then repeated in a much lower voice, "Get out of here." Rodriguez turned and looked at the detectives and began moving away, pumping his legs very fast as if he was running, but not covering much ground. *Id*., at 3.

In *Anderson*, when the defendant saw the squad car he turned south into an adjoining alley,

and then turned onto city streets, increasing his speed to thirty miles per hour. In an attempt to avoid police. 155 Wis. 2d at 80.

The State finds support in those cases for characterizing the facts here as involving "several instances of evasive behavior." (Response Brief at 9). The first example the State cites is when the woman who was speaking to Mr. Taylor looked at the police car and walked away. (Response Brief at 9). There is nothing suspicious about the woman noticing a squad car. Even the officer explained "there was no traffic on the road, so as I was approaching, she turned to look at me. . ." (43: 10). Nor was there anything suspicious about her walking (not running or even quickly walking) back into the apartment complex. Even if some inference could be drawn from the timing alone that she did not wish to have contact with police, there is nothing suspicious about that. An individual has the right to decline a police encounter, *see Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382 (1991) (noting that refusal to cooperate alone cannot justify detention); *Florida. v. Royer*, 460 U.S. 491, 497–98, 103 S.Ct. 1319 (1983) (plurality opinion) (recognizing that individual has right to ignore police and go about his business), and walking away from police can be an implicit exercise of that right, *see United States v. Patterson*, 340 F.3d 368, 371 (6th Cir.2003). There is nothing at all surprising about a person electing to keep her head down and avoid interactions with police.

The other instance of claimed flight or evasion the State relies upon is Mr. Taylor's act of pulling into a driveway, sitting for "maybe two minutes" and

then pulling out and proceeding back in the direction from which he had come. (43: 12). If this was an attempt to evade police, it was a laughable one. Mr. Taylor pulled into a driveway. The testimony does not say how far or indicate that he positioned himself in any way so as to conceal his car from passers-by. He sat there, fully visible to the officer. He did not speed away or take a circuitous route. He did not detour down an alley, emerge onto the street and increase his speed like the defendant in *Anderson*. When he pulled out of the driveway, he proceeded in the direction away from the officer, but, again, there is no indication that he did so quickly, or attempted to avoid the officer by taking a circuitous route. The most reasonable inference from these facts is that Mr. Taylor was unsure of his direction, turned into the driveway, got his bearings, and turned around. The officer here had the option of continuing to watch and follow Mr. Taylor, but this act alone did not furnish the officer with reasonable suspicion for a stop when everything else he had observed was *wholly innocuous*.

It may have been possible for the prosecutor to elicit sufficient testimony at the motion hearing to justify the stop based on the possible window tint violation, but the prosecutor failed to do so. This Court should not let the State unreasonably stretch the other facts — facts the officer did not even claim to have relied upon to justify the stop — in order to rescue the State from what may have been poor performance by the prosecutor at the motion hearing. For this Court to draw unwarranted inferences from innocuous facts would have real human consequences. "[M]any, many folks, innocent of any

crime, are by circumstances forced to live in areas that are not safe." *State v. Gordon*, 2014 WI App 44, ¶ 15, 353 Wis. 2d 468, 846 N.W.2d 483. To label the observations this officer made of ordinary activity "suspicious" would be to sanction routine police harassment of those people as they go about their daily lives.

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 18th day of October, 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 1,526 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 18th day of October, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender