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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP000797-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISAAC D. TAYLOR,

Defendant-Appellant-Petitioner.

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# PETITION FOR REVIEW

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## ISSUE PRESENTED

1. Where a traffic stop was based on excessive window tint, and where the officer did not believe other innocuous observations provided reasonable suspicion, and the State argued for the first time on appeal that the stop was justified by those innocuous observations, did the court of appeals properly address that argument and uphold the stop based on a cumulation of innocent observations?

## CRITERIA FOR REVIEW

A police officer stopped Mr. Taylor for having excessively tinted windows. (43: 6, 8; App. 24, 26). Mr. Taylor filed a motion to suppress, arguing that the stop was unconstitutional. (16). The State argued only that the stop was valid based on the window tint violation. (43: 26-27; App. 44-45). The circuit court upheld the stop solely on that basis. (43: 29-31: App. 47-49). On appeal, the State conceded (properly) that there was not sufficient evidence presented at the suppression hearing to justify the stop based on the window tint violation. Instead, the State advanced a new theory, cobbling together the officer's other observations of Mr. Taylor's activity, which were mentioned incidentally at the hearing, and arguing that they provided a reasonable suspicion of criminal drug activity to justify the stop.

Over a dissent by Judge Davis, the court of appeals upheld the stop based on this new theory. The

court decided that there was a reasonable suspicion for the traffic stop based on the following facts:

> To recap, at around 9 p.m., the officer observed Taylor parked across from an apartment complex "known for its drug trafficking." Taylor appeared to be engaging with a female at his driver's side window, but when she saw the officer approaching in his squad car, she left Taylor and went into the complex, and Taylor drove away from the area. When the officer turned his squad car around, followed Taylor, and eventually caught up to him, Taylor turned into a private driveway. When the officer passed by, turned around, parked and watched Taylor from a short distance away, Taylor just sat in the driveway for "maybe two minutes," neither exiting his vehicle nor conducting any sort of business at that address, before backing out and driving in the opposite direction, away from the officer.

(Slip op., ¶8; App. 6).

To reach this conclusion required an unwarranted stretching of both the law and the facts. Review is appropriate in this case because it presents a real and significant question of federal constitutional law. Wis. Stat. §809.62(1r)1.

This case stands at the confluence of a number of tensions that exist in the law regarding reasonable suspicion. For example, it is well understood that the presence of the defendant in a "high-crime area" can be a factor contributing to a reasonable suspicion. *State v. Allen*, 226 Wis. 2d 66, 74–75, 593 N.W.2d 504 (Ct. App. 1999). There is a tension between that principle and the undeniable fact that "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." *State v. Gordon*, 2014 WI App 44, ¶ 15, 353 Wis. 2d 468, 846 N.W.2d 483.

Similarly, it is clear that flight from police can give rise to reasonable suspicion. *State v. Anderson*, 155 Wis. 2d 77, 82, 454 N.W.2d 763 (1990). This principle is in tension with the well-settled principle that a person 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).

Fundamentally, the tension exists between two ideas: (1) the basic principle that a person must not be subjected to a stop absent reasonable suspicion; and (2) the recognition that a reasonable suspicion can be based on innocent conduct. *See, State v. Young*, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729 "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Young*, 294 Wis. 2d 1, ¶21 (citation omitted); *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989) ("[I]f any reasonable suspicion of past, present, or future criminal conduct can be drawn from the

circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.").

All of these tensions are at play in this case, and the court of appeals stretched the law past the breaking point in each area to uphold the stop. For example, the court relied on its own decision in *Allen*, in which it based reasonable suspicion in part on the fact that the defendant was observed in a high-crime area. (Slip op., ¶9; App. 7). In *Allen* there were "numerous citizen and aldermanic complaints about drug activity, gangs, weapon violations and gunshots" and "numerous complaints about drug activity" in the area where the stop occurred. *Id*., at 68, 69. Here, the court stretched that holding to apply to Mr. Taylor's activity at an apartment complex which the officer off-handedly mentioned was known for some kind of "drug trafficking," with no testimony about the nature, frequency, or recency of the activity.

The court of appeals also relied on *Allen* for the proposition that activity may be suspicious because it occurs "late at night." (Slip op., ¶9; App. 7). But Mr. Taylor was observed conversing with a woman through his car window at shortly before 9:00 at night on Christmas day. This led the court of appeals to go from finding in *Allen* that activity could be suspicious because it occurred "late at night" to holding in this case that Mr. Taylor's conversation with a woman was suspicious merely because it occurred after dark "instead of in the light of day." (Slip op., ¶9; App. 7).

Thus, the court repeatedly pushed the boundaries of its own holding in *Allen*—a decision that *itself* pushed the boundaries in finding reasonable suspicion based on a collection of innocuous observations.

The court of appeals similarly stretched the holding of the United States Supreme Court in *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). In *Wardlow* the Court found reasonable suspicion based on what it characterized as "headlong flight" where Wardlow saw officers patrolling an area known for "heavy narcotics trafficking" and fled, running through a gangway and an alley. *Wardlow*, 528 U.S. at 122. The Court declared its holding to be consistent with the decision in *Florida v. Royer, supra,* at 498, that an individual, when approached, has a right to ignore the police and go about his business. The Court reasoned that the Wardlow's unprovoked flight was "the exact opposite of 'going about one's business.'" *Id.*, at 120.

Here, the court of appeals stretched this reasoning to cover Mr. Taylor's acts of ending his conversation and driving away as police approached and pulling into a driveway and turning around, all with no increase in speed. (Slip op., ¶9; App. 7). As Judge Davis aptly put it in dissent, "This is not 'flight' of the sort that our jurisprudence has established constitutes reasonable suspicion." (Slip op., ¶24; App. 17, citing *State v. Anderson*, 155 Wis. 2d 77, 82, 454 N.W.2d 763 (1990)).

The court of appeals relied on cases with facts at the outer limit of reasonable suspicion and extended those decisions still further in an attempt to wrap

them around the facts of this case. Having done that, the court was then able to rest on this Court's declaration in *State v. Jackson* that if any reasonable suspicion of criminal conduct can be drawn from the circumstances, officers have the right to conduct a stop despite the existence of innocent inferences that could be drawn. (Slip op., ¶11; App. 9, quoting *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989)).

The end result is that the court upheld the stop based on a collection of wholly innocuous facts, and because of the unduly broad interpretation it gave to precedent, this decision strayed well beyond what has been previously allowed. The decision marks a troubling creep in the reasonable suspicion standard. This Court should grant review in order to clarify and develop the law as it relates to reasonable suspicion based on the cobbling together of unremarkable facts. Questions in this area are likely to recur, given the sheer number of cases in which the question of reasonable suspicion is analyzed. Wis. Stat. §809.62(1r)2.

The court of appeals' finding of reasonable suspicion based on such innocuous facts is even more troubling in light of the fact that there is nothing in the record to suggest that the officer *himself* saw those facts as a basis for reasonable suspicion. Neither did the circuit court. In fact, neither did the State at the circuit court level.

In his dissenting opinion, Judge Davis opined that the facts of record did not support a finding of reasonable suspicion. (Slip op., ¶15; App. 12). But he

was also troubled by the manner in which the court exercised its authority here to uphold the stop.

While he acknowledged that the court of appeals could affirm based on a theory different from the one relied upon by the circuit court, he questioned whether the court should do so under the facts of this case. (Slip op., ¶12; App. 11). As discussed more fully below, Judge Davis was concerned that allowing the State to prevail based on its new theory would be "to allow the State to sandbag the defense with an entire fact-intensive case theory that is argued for the first time on appeal—effectively turning [the court of appeals] into fact finders in the process." (Slip op., ¶12; App. 11).

More fundamentally, Judge Davis was concerned that "an exercise in which any court—circuit or appellate—repurposes facts in this manner subverts the reasonable suspicion analysis, turning it into an exercise in speculation divorced from that officer's actual encounter with that defendant." (Slip op., ¶22; App. 15).

A stop may be upheld based on a collection of innocuous facts if the totality of the circumstances points to a reasonable suspicion of criminal activity. However, that is because "[t]his process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750–51 (internal quote and citation omitted). Here, in the absence of any testimony that the officer saw

reasonable suspicion in the totality of the circumstances or any testimony about how his training and experience lent significance to his observations, the court of appeals substituted its own judgment that a collection of innocuous events it did not observe was suspicious based on a sparse record.

That is not what decisions like *Jackson* contemplate. This Court should grant review to clarify that. Wis. Stat. §809.62(1r)2. This Court should set forth a rule that if reasonable suspicion is to be found from the cumulation of innocent observations, that finding must rest on testimony by a police officer that the totality of the circumstances led him to be suspicious or testimony about the significance of those observations in light of an officer's training and experience that would explain why an objective hypothetical police officer would be suspicious.

## STATEMENT OF 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 23-25). A "female" was standing outside the driver's side door. (43: 5; App. 23). The female looked toward the officer and walked back into the apartment complex. Mr. Taylor's vehicle proceeded southbound. (43: 5, 9; App. 23, 27). 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. 25). He testified based upon his training and experience, this "usually means some sort of illegal activity such as a drug deal." (43: 8; App. 26).

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 how long or short it was. (43: 8-9; App. 26-27).

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 the car. (43: 5; App. 23). The officer turned his squad

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

car around, intending to catch up to the vehicle to run its license plate. (43: 5; App. 23). The vehicle turned into a private driveway. (43: 5; App. 23). The vehicle then backed out and proceeded in the opposite direction. (43: 15; App. 33). The officer followed a very short distance and then performed a traffic stop and identified the driver as Mr. Taylor. (43: 6, 15; App. 24, 33).

The officer testified that he had previously stopped drivers for excessive window tint. (43: 6; App. 24). 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. 36).

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. 24-25, 37). He testified that the level of tint was "illegal," although he failed to mention that in his police report. (43: 7; App. 25). The officer issued a citation for excessive window tint. (43: 7; App. 25).

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. 39).

**The State's Argument and Circuit Court Ruling**:

The State argued that the officer's observation of the excessive window tint provided reasonable

suspicion to stop Mr. Taylor for a window tint violation (43: 27; App 45). The State did not argue that the officer had a reasonable suspicion of any other criminal activity that would have justified the traffic stop.

The circuit court denied the motion to suppress based on the window tint violation. (43: 30-31; App. 48-49).

**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.[2] (26). He appealed. (33).[3]

**The Appeal**

For the first time on appeal, the State abandoned the window tint as the basis for the stop. The State conceded that the record did not contain sufficient information to sustain the circuit court's decision on that basis. However, the State asked the court to affirm the circuit court's ruling on other grounds. (State's Brief at 7). The State argued that the officer's other observations furnished a reasonable

[2] Mr. Taylor has served the initial confinement portion of his sentence and is on extended supervision.

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

suspicion of criminal activity. Two court of appeals judges[4] agreed.

Judge Jeffrey Davis dissented. He acknowledged the general rule that the court could affirm a circuit court's order based on grounds different than those relied on by the circuit court. However, he asserted that it was inappropriate for the court to do so where, as here, the decision was based on a fact-intensive theory that the State argued for the first time on appeal and that was "dubious even had it been the subject of proper proof and argument." ((Slip op., ¶12; App. 11).

## 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.

[4] Chief Judge Lisa Neubauer and Judge Mark D. Gundrum, who authored the opinion.

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

B. The officer's other observations do not add up to reasonable suspicion for the traffic stop.

Having properly conceded that the stop could not be upheld based on the window tint violation, the State, on appeal, cobbled together the officer's remaining observations and argued that they provided a reasonable suspicion of criminal drug activity to justify the stop. The additional observations were incidental to the officer's testimony, and he did not rely on them as a basis for the stop or claim that his stop was justified based on a reasonable suspicion of criminal activity. The State did not argue this theory in the circuit court, and the circuit court did not find the stop to be justified on that basis. Nonetheless, the State urged the court of appeals to affirm the circuit court's denial of the suppression motion on that theory.

The court of appeals accepted that invitation. The court decided that there was a reasonable suspicion for the traffic stop based on the following facts:

> To recap, at around 9 p.m., the officer observed Taylor parked across from an apartment complex "known for its drug trafficking." Taylor appeared

> to be engaging with a female at his driver's side window, but when she saw the officer approaching in his squad car, she left Taylor and went into the complex, and Taylor drove away from the area. When the officer turned his squad car around, followed Taylor, and eventually caught up to him, Taylor turned into a private driveway. When the officer passed by, turned around, parked and watched Taylor from a short distance away, Taylor just sat in the driveway for "maybe two minutes," neither exiting his vehicle nor conducting any sort of business at that address, before backing out and driving in the opposite direction, away from the officer.

(Slip op., ¶8; App. 6). To reach this conclusion required an unwarranted stretching of both the law and the facts.

1. Suspicious location and time.

The record tells us only that the apartment complex where Mr. Taylor was observed was "a known apartment complex to [the police] department" that was "known for its drug trafficking." (43: 5, 7; App. 23, 25). There was no testimony about the nature of the drug dealing activity that had been observed there, its frequency, or its recency. The officer observed Mr. Taylor in his car talking with a woman at his driver's side window shortly before 9:00 p.m. (43: 9; App. 27).

The court of appeals concluded that these facts were significant to the question of reasonable suspicion. (Slip op., ¶9; App. 7). The court relied largely on its previous decision in *State v. Allen*, 226 Wis. 2d 66, 74–75, 593 N.W.2d 504 (Ct. App. 1999), in which it 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 court stretched the holding of *Allen*—a decision that itself pushed the boundaries in finding reasonable suspicion based on a collection of innocuous observations.

Here, unlike in *Allen*, there was no testimony that the apartment complex where Mr. Taylor was observed was a "high-crime area." In *Allen* there had been "numerous citizen and aldermanic complaints about drug activity, gangs, weapon violations and gunshots" and "numerous complaints about drug activity" in the area where the stop occurred. *Id*., at 68, 69. Here, there was only testimony that the complex was known to police for some kind of "drug trafficking." It is unknown what the nature of the trafficking was and whether it even happened more than once. As Judge Davis pointed out in dissent:

> I fail to see how merely being in the vicinity of a "known apartment complex" could be probative in most contexts, but here, we do not even know what that phrase means. What kind of drug activity occurs in this building, to what extent, by how many suspected drug dealers, etc.?

(Slip op., ¶158; App. 19).

The court of appeals' use of the time of day when the stop occurred as a suspicious factor was even

flimsier. The court noted that in *Allen*, the court said that the time of day was a factor in the reasonable suspicion analysis. (Slip op., ¶9; App. 105). In *Allen*, the court found it significant that the stop occurred "late at night." *Id.*, at 74. Here, the officer was observing activity shortly before 9:00 in the evening, which is not "late at night" by any reasonable definition. Nine o'clock is "prime time" for television shows. It is worth noting that date of the stop was *Christmas day*. (43: 4; App. 22). 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.

Nonetheless, the court of appeals used *Allen* as a jumping-off point to make the following rather Victorian declaration: "The fact that Taylor was engaging with this female at this particular location at night, instead of in the light of day, adds to the suspicion." (Slip op., ¶9; App. 7). Neither *Allen* nor any other precedent supports the notion that people reasonably court suspicion whenever they interact out of doors after dark.

Furthermore, the conduct observed by police in *Allen* was suspicious apart from the time of day and the high-crime nature of the area. 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. *Id,* at 74.

Here, 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. 125-127). For all this officer knew, the woman could have been talking to Mr. Allen for an hour. This case is nothing like *Allen*.

As judge Davis put in in his dissent, "The notion that people are not free to talk to one another on the street (even a street in front of a "suspicious" building), or end conversations they see fit, without thereby providing grounds for a temporary stop, is ludicrous." (Slip op., ¶16; App. 12-13).

2. Evasion.

The court of appeals found it suspicious that the conversation between Mr. Taylor and the woman ended when police approached. The court said:

> Suspicion would have begun for a reasonable officer when Taylor, who was in his van and faced in the direction of the oncoming officer, and the woman meeting with him in front of this apartment complex "known for its drug trafficking" broke off their meeting and both departed the area just as the officer approached their location in his squad car.

(Slip op., ¶9; App. 7). The officer testified that the woman who was speaking to Mr. Taylor looked at the

police car and walked inside. 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; App. 28). Nor was there anything suspicious about her walking (not running or even quickly walking) back into the apartment complex.

The court of appeals found that it was a reasonable inference that the woman and Mr. Taylor "broke off their meeting *because* the officer was approaching and they wanted to make themselves unavailable for interaction with him." (Slip op., ¶9; App. 7, emphasis in original). Even if some inference could be drawn from the timing alone that Mr. Taylor and the woman 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 avoid interactions with police. Moreover, as Judge Davis pointed out in dissent, there was no testimony as to whether Mr. Taylor even appeared to notice the officer, much less that he hurried away. (Slip op., ¶19; App. 14). It is hardly surprising that he departed when the woman walked away from his car.

The other instance of claimed evasion the court of appeals relied upon was 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; App. 30). The court of appeals declared that "[s]uspicion would have increased for a reasonable officer" at that point. (Slip op., ¶10; App. 8). To conclude that the increased suspicion flowing from this justified the stop, the court invoked *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), which the court cited for the proposition that "[E]vasive behavior is a pertinent factor in determining reasonable suspicion."

But *Wardlow* involved what the Supreme Court characterized as "headlong flight." 528 U.S. at 124. In that case, when police patrolled an area known for "heavy narcotics trafficking," Wardlow looked at officers and fled, running through a gangway and an alley. *Wardlow*, 528 U.S. at 122. Such flight was properly a part of the reasonable suspicion analysis because it was "the exact opposite of going about one's business." *Id.*, at 120.

In contrast, 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. 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. This case is nothing like *Wardlow*. The officer here had the option of continuing to watch and follow

Mr. Taylor, but the driving the officer observed did not furnish a reasonable suspicion for a stop when everything else he had observed was *wholly innocuous*.

As judge Davis put it in his dissent:

> Unlike the Majority, I do not necessarily think that Taylor was attempting to avoid the police—we simply have no fact-finding on that point, and there are a variety of reasonable explanations as to why someone might pull into a driveway (or park on the street) for a short time before turning around. But even if we put the most damning gloss on these facts, we reach a pretty unremarkable conclusion: Taylor was trying to avoid this officer through an unobjectionable, and perfectly legal, driving maneuver. This is not "flight" of the sort that our jurisprudence has established constitutes reasonable suspicion. *See State v. Anderson,* 155 Wis. 2d 77, 82, 454 N.W.2d 763 (1990). And to the extent this driving maneuver might conceivably be deemed "evasive behavior," we have no testimony that a reasonable officer with this officer's training and experience would view it that way. *State v. Fields*, 2000 WI App 218, ¶¶6, 22, 239 Wis. 2d 38, 619 N.W.2d 279 (noting officer's testimony as to why his experience with drivers seeking to evade contact with police caused him to suspect driver's conduct in stopping at intersection for unusually long period, while still finding reasonable suspicion lacking).

(Slip op., ¶24; App. 17).

The court of appeals relied on cases whose facts were at the outer edges of what has been held to constitute reasonable suspicion and extended those

decisions still further in an attempt to fit them to the facts of this case. The court combined this stretching of precedent with this Court's declaration in *State v. Jackson* that if any reasonable suspicion of criminal conduct can be drawn from the circumstances, officers have the right conduct a stop despite the existence of innocent inferences that could be drawn. (Slip op., ¶11; App. 9, quoting *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989)).

The end result is that the court upheld the stop based on a collection of wholly innocuous facts, and because of the unduly broad interpretation it gave to precedent, this decision strayed well beyond what has been previously allowed. This Court should grant review to address the troubling creep in the reasonable suspicion standard that this case represents. Wis. Stat. §809.62(1r)2.

## II. In cobbling together facts that the officer did not rely on to justify the stop, the court of appeals subverted the reasonable suspicion analysis.

In his dissenting opinion, Judge Davis found "two problems with picking out random, untethered facts from an officer's description of the scene and using these as building blocks in the reasonable suspicion analysis." (Slip op., ¶19; App. 14). First, he identified the practical problem: that there has been no real examination of the officer on points that even he believed were tangential.

The second, and to Judge Davis the more fundamental problem was this:

> an exercise in which any court— circuit or appellate—repurposes facts in this manner subverts the reasonable suspicion analysis, turning it into an exercise in speculation divorced from that officer's actual encounter with that defendant. Although this analysis is an objective one, the inquiry being whether the facts would cause a reasonable officer to reasonably suspect criminal activity, the objective standard developed to protect the defendant, the idea being that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). Of course, this principle may also work in the prosecution's favor, in that an officer's intent is irrelevant so long as his or her actions are objectively lawful. *Whren v. United States*, 517 U.S. 806, 811-13 (1996). The point, however, is to have a yardstick by which to measure the reasonableness of the officer's beliefs and actions. The objective standard does not mean—it cannot mean—that the court may cobble together facts the officer himself thought irrelevant or did not even describe so as to create an artificial construct: reasonable suspicion for the hypothetical officer.

(Slip op., ¶22; App. 15).

The court of appeals' reliance on untethered facts that the officer did not rely upon is particularly problematic where, as here, the facts were all unremarkable. The court of appeals ultimately relied on this Court's oft-quoted pronouncement that if any reasonable suspicion can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to

temporarily freeze the situation in order to investigate further. (Slip op., ¶11; App. 9, quoting *Jackson*, 147 Wis. 2d at 835). However, it is one thing to say that officers who reasonably draw suspicious inferences from their observations are entitled to act upon those suspicion, even if innocent inferences could also be drawn. It is quite another thing to say that even though the officer viewed a set of unremarkable facts and did *not* draw any suspicious inferences, the court will draw them in hindsight based on incomplete facts, notwithstanding the innocent inferences that can just as easily be drawn.

Judge Davis pointed out that the decisions of this Court assess reasonable suspicion based on the level of training and experience that the officer who actually conducted the stop had in addressing the situation at hand. (Slip op., ¶22; App. 7, citing *Jackson*, 147 Wis. 2d at 834 (question is "what would a reasonable police officer reasonably suspect in light of his or her training and experience?")). He further observed: "A close reading of the case law, including that relied upon by the Majority, supports the point that a proper 'reasonable suspicion' inquiry rests on the officer's identification and appreciation of specific facts he or she deems suspicious." (Slip op., ¶22; App.

7, n. 2).[5] This case presents the opportunity for this Court to develop and clarify the law regarding the significance to the reasonable suspicion analysis of innocuous facts that the officer himself did not deem suspicious. Wis. Stat. §809.62(1r)(c).

A stop may be upheld based on a collection of innocuous facts if the totality of the circumstances points to a reasonable suspicion of criminal activity. However, that is because "[t]his process allows officers to draw on their own experience and specialized

[5]Judge Davis relied on the following authorities: *California v. Hodari D.*, 499 U.S. 621, 624 (1991) ("[O]f course, [the officer's] seeing the rock of cocaine, at least if he recognized it as such, would provide reasonable suspicion for the unquestioned seizure that occurred …." (emphasis added)); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) ("The officer … must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'" (emphasis added; citation omitted)); Adams v. Williams, 407 U.S. 143, 146 (1972) ("A brief stop … may be most reasonable in light of the facts known to the officer at the time." (emphasis added)); *United States v. Mendenhall*, 446 U.S. 554, 561 (1980) (reasonableness of stop depends on "the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise" (emphasis added)); *State v. Arias*, 2008 WI 84, ¶45, 311 Wis. 2d 358, 752 N.W.2d 748 ("[T]he scope of the officer's inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention …." (alteration in original; emphasis added; citation omitted)); *State v. Zamzow*, 2016 WI App 7, ¶14, 366 Wis. 2d 562, 874 N.W.2d 328 (2015) ("The question … [is] whether a reasonable officer, knowing what the officer on the scene knew at the time of the stop, would have had reasonable suspicion that [the defendant] had violated or was violating the law." (emphasis added))

training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750–51 (internal quote and citation omitted). The thrust of Judge Davis' criticism here is that in the absence of any testimony that the officer saw reasonable suspicion in the totality of the circumstances or any testimony about how his training and experience lent significance to his observations,[6] the court of appeals appointed itself the fact-finder. (Slip op., ¶ 19; App. 14). The court substituted its own judgment that a collection of innocuous events it did not observe was suspicious based on a sparse record.

That is not what decisions like *Jackson* contemplate. This Court should grant review to clarify that. Wis. Stat. §809.62(1r)2. Mr. Taylor proposes that this Court should set forth a rule that if reasonable suspicion is to be found from the cumulation of innocent observations, that finding must rest on testimony by a police officer that the totality of the circumstances led him to be suspicious or testimony about the significance of those observations in light of an officer's training and experience that would explain why an objective hypothetical police officer would be suspicious.

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[6] The only testimony about the officer's reliance on his training or experience was that a "short time contact" indicated "some sort of illegal activity such as a drug deal." (43: 7-8; App. 123-124). This adds nothing because the officer admitted that he had no idea whether a "short time contact" occurred here. (43: 9; App. 125).

This case presents the opportunity for this Court to develop the law in this area and to provide guidance to the court of appeals for applying these principles. This is an issue that is likely to recur, as evidenced by the disagreement among the judges here. Wis. Stat. §809.62(1r)(c).

## CONCLUSION

The police stop of Mr. Taylor's vehicle was unreasonable and unconstitutional. Therefore, Mr. Taylor respectfully requests that this Court grant review, reverse the decision of the court of appeals and 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 27th day of August, 2021.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 6,583 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 27th day of August, 2021.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender