STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP1539-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FREDERICK JENNINGS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JANET PROTASIEWICZ AND THE HONORABLE LINDSEY CANONIE GRADY, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

1. Does the record conclusively demonstrate that police had reasonable suspicion to detain Frederick Jennings as an occupant in a car with illegally tinted windows based on the totality of the circumstances, such that the circuit court properly denied both his suppression motion and his postconviction motion because trial counsel was not ineffective in arguing the motion to suppress?

The postconviction court answered: Yes.

This Court should affirm.

2. Do the trial court's factual findings, including credibility determinations, related to testimony regarding reasonable suspicion to stop Jennings and probable cause to search, support its decision denying suppression because they were not clearly erroneous?

The postconviction court answered: Yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees that neither publication nor oral argument are warranted in this case. These issues can be resolved based on well-settled law, the record in this case, and the briefs of the parties.

INTRODUCTION

After a guilty plea, Jennings was convicted of one count of possession of heroin. On appeal, he challenges the denial of his suppression motion and his postconviction motion alleging ineffective assistance of trial counsel. Jennings alleges that his counsel was ineffective for conceding that the suppression hearing testimony of one police officer supported reasonable suspicion for the investigative stop and asserts that the

testimony of both police officers was insufficient to support reasonable suspicion. Jennings' claims that his counsel was ineffective and that police lacked reasonable suspicion for the investigative stop are meritless. Likewise, Jennings' claim the court's findings of fact regarding witness credibility and reconciling the officers' testimonies were clearly erroneous also fails.

Jennings' trial counsel was not ineffective because the record conclusively demonstrates that under the totality of the circumstances established by the testimony of both officers—the excessively tinted windows in the car that Jennings controlled and occupied, as well as Jennings' furtive movement, quick exit, and evasive behavior—police had reasonable suspicion for the investigative stop. And based on the strong odor of marijuana and a marijuana stem in plain view, the officers had probable cause to search the car. After the search recovered more marijuana and other drug paraphernalia, police arrested Jennings and searched him incident to his arrest, finding heroin in his pants pocket. In denying suppression, the court properly concluded that both officers' testimonies were credible and that the alleged inconsistencies were attributable to the officers' different vantage points and time compression. This court should affirm both the order denying Jennings' postconviction motion without a hearing and the judgment of conviction.

STATEMENT OF THE CASE

Police stopped Jennings after he exited from the passenger side of a car with heavily tinted windows. Police looked into the car and saw marijuana in plain view in the center cup holder. (R. 1:1.) After searching Jennings, police found 8.92 grams of heroin and oxycodone in his pockets. (R. 1:1–2.) A search of the car recovered marijuana, scales with both marijuana and heroin residue, and a firearm. (R. 1:2.)

The State charged Jennings with one count of possession with intent to deliver heroin. (R. 1:1; 3.)

Jennings filed a motion to suppress physical evidence recovered by police during the search of his person and the vehicle. (R. 7.) At the suppression hearing, the court entered a sequestration order for the testifying witnesses. (R. 65:3–4, A-App. 117–18.)

Officer Jonathon Newport's testimony. Officer Newport testified that on November 2, 2015, he was assigned to the anti-gang unit of the Milwaukee Police Department and was on patrol. He was in the front passenger seat of the patrol car with two other officers, Phillip Ferguson, who was driving, and Justin Schwarzhuber, who was in the rear passenger-side seat. (R. 65:4–5, A-App. 118–19.) As they were driving, they saw a parked gray Toyota with excessively tinted windows. As a member of the Violent Crime Tint Crew, Newport had experience with convicted drug dealers who had admitted that the reason for excessive window tint was "to conceal their identity from law enforcement." (R. 65:6, A-App. 120.) Newport testified that based on his training "in the tint meter," he knew that the legal limit of window tint was 50 percent. (R. 65:7, A-App. 121.) Based on his experience, he could "tell that this vehicle, specifically the window tint, was much darker" than the legal tint percentage. (R. 65:7, A-App. 121.)

After observing the illegal window tint, the officers pulled up "just in front of the vehicle" and activated the spot lamp to "illuminate the windshield." (R. 65:8, A-App. 122.) Newport saw someone "in the front passenger seat, later identified as Frederick Jennings." (R. 65:9, A-App. 123.) After seeing the squad car, Jennings "made a furtive movement towards the floor board," dropping his shoulder with his hands out of view, and then "quickly exited the front passenger door of the vehicle and started walking quickly up the front stairs." (R. 65:9, A-App. 123.) Newport testified that

the type of movements Jennings made were "[t]ypically" made by "somebody discarding contraband or a weapon or trying to recover contraband or a weapon." (R. 65:10, A-App. 124.)

After Jennings quickly exited the Toyota, Newport got out of the squad car and told Jennings to stop as he was walking up the stairs to the residence. Jennings responded, "what, what, what" as he was "still trying to make his way towards the house." (R. 65:11, A-App. 125.) Newport approached Jennings on the stairs, took "control of his wrist," and "escort[ed] him down the stairs." (R. 65:12–13, A-App. 126–27.) After Newport patted Jennings down for weapons, Officer Schwarzhuber "took control" of Jennings while Newport went back to the Toyota. (R. 65:13, A-App. 127.)

When Newport looked into the Toyota through the front windshield, he saw a stem in the cupholder that he "believed to be . . . marijuana," which later tested positive for THC. (R. 65:15, A-App. 129.) Based on his training and experience in identification of controlled substances, as well as "the smell of fresh marijuana around the vehicle," Newport identified the stem in the cupholder as marijuana. (R. 65:16–17, A-App. 130–31.)

Newport first smelled the marijuana odor when he "was standing outside of the vehicle," before seeing the marijuana stem inside. After he saw the marijuana stem through the front window in the cupholder, Newport opened the front passenger door and the marijuana "smell was even stronger at the point." (R. 65:17, A-App. 131.) Newport looked under the front passenger seat and found a black bag containing unused sandwich bags. In the glove compartment, he found a clear plastic bag containing marijuana, "and that's when I told my partners to arrest Mr. Jennings." (R. 65:17, A-App. 131.) Newport could see the marijuana stem from outside the car without the door open. (R. 65:18, A-App. 132.)

The time frame during which the squad drove up to the Toyota, Newport saw Jennings in the car make a furtive movement, the squad activated its lights, and Jennings left the vehicle, "happened fast," with these events occurring "within a couple of seconds of each other." (R. 65:20, A-App. 134.) After Newport saw the marijuana stem and then opened the unlocked passenger door, he looked underneath the front passenger seat and in the glove compartment, where he "saw the marijuana." (R. 65:26–29, A-App. 140–43.) At that point, Newport told his partners to arrest Jennings. (R. 65:30, A-App. 144.)

In Newport's experience, "every single time" he has stopped a car with heavy tinted windows resulted either in the suspect fleeing or in an arrest. (R. 65:32, A-App. 146.) Moreover, in "numerous debriefs of people" arrested after being stopped for overly tinted windows, those people have told him that "the sole purpose of the dark tinted windows is to evade law enforcement officers so they can flee and not be identified." (R. 65:32, A-App. 146.) When police issue a citation for overly tinted windows, it is issued to either the driver if the car is moving, the owner of the car, or the person that has control of the car at that time. (R. 65:34, A-App. 148.) Jennings exercised control over the Toyota with the excessive window tint because "[h]e had the keys in his hand." (R. 65:35, A-App. 149.)

Newport testified that he did not know when he started the body camera video and that he could not identify "at what point during our investigation this video was taken." (R. 65:37–38, A-App. 151–52.) In the video, Newport identified events that occurred after the initial stop of Jennings: Schwarzhuber on the steps leading to the residence and Newport using his flashlight to search inside the car. (R. 65:38–39, A-App. 152–53.) After Newport searched the glove compartment and found marijuana, he said "C-1," which told

the other officers to arrest Jennings. (R. 65:40–41, A-App. 154–55.)

On re-direct, Newport testified that after the squad car pulled past the car with the excessively tinted rear and side windows, he saw Jennings through the untinted windshield inside the vehicle. (R. 66:4–5, A-App. 166–67.) He also reiterated that he was trained in determining tint meter and that he determined that the Toyota's windows were significantly darker than what the Milwaukee ordinance allows. Newport clarified that before he looked into the front windshield and saw the marijuana stem in the cupholder, and while standing outside the car, he detected the odor of marijuana although the doors and windows of the car were closed. (R. 66:6, A-App. 168.) When he opened the front passenger door to search inside the car, the odor of marijuana increased. Based on his search of the car, during which he found marijuana, he told the other officers to arrest Jennings. (R. 66:7, A-App. 169.)

On re-cross, Newport testified that his basis for searching the car was "[t]he smell of fresh marijuana and [his] observation of the marijuana stem in the cupholder." (R. 66:9, A-App. 171.) He smelled the marijuana first next to the car; after that, he saw the marijuana stem in the cupholder. (R. 66:9, A-App. 171.) After both smelling marijuana and seeing the marijuana stem in the cupholder from outside the car, he searched the inside of the car. (R. 66:10, A-App. 172.)

Officer Justin Schwarzhuber's testimony. Schwarzhuber was on patrol with Newport and Ferguson on November 2, 2015, when he saw a car "with heavily dark tinted windows" and a man "standing with the front passenger door open." (R. 66:12, A-App. 174.) As the squad car turned the corner, the man "quickly shut the door and started to walk towards a house." (R. 66:12, A-App. 174.) Based on his training with tinted windows, Schwarzhuber observed that the windows were "in the category of heavily dark tinted

windows." (R. 66:13, A-App. 175.) Schwarzhuber concluded that the windows had a "[v]ery illegal tint." (R. 66:13, A-App. 175.)

As the squad car turned the corner and approached the car with the dark tinted windows, Schwarzhuber was seated in the back-passenger seat. (R. 66:19–20, A-App. 181–82.) He saw Jennings standing outside the open front passenger door "in an A-frame" between the open door and the car, "[w]here a person would normally stand if they had just gotten out of the vehicle." (R. 66:21–22, A-App. 183–84.) During the three to five seconds before the squad car stopped, Jennings "shut the door and walked away" from the car "towards the house." (R. 66:23–24, A-App. 185–86.)

When the officers got out of the squad car and asked Jennings, who was on the walkway to the house, to stop, he did not respond at first but "attempted to walk away towards the house." (R. 66:24–25, A-App. 186–87.) After officers again gave him "another verbal command to stop he stopped." (R. 66:25, A-App. 187.) Schwarzhuber saw that Jennings "had a towel or a moist towelette, some sort of cloth in his hand," and told the officers "he was wiping the car down." (R. 66:25, A-App. 187.) Schwarzhuber did not see Newport looking into the car because his back was turned talking to Jennings, but Newport told him that "[h]e was going to look inside" the car "from the outside." (R. 66:26–27, A-App. 188–89.)

After Newport found marijuana in the vehicle, Schwarzhuber arrested Jennings: "at that point we placed Mr. Jennings in handcuffs, and he was under arrest." (R. 66:15, A-App. 177.) Schwarzhuber and Ferguson then "conducted a search incident to that arrest of Mr. Jennings," finding an Oxycodone pill in a plastic bag in his coin pocket, heroin in a plastic bag in his rear pants pocket, some additional plastic bags, and currency. (R. 66:16–17, A-App. 178–79.)

Court's decision denying suppression. In an oral decision, the court denied Jennings' motion to suppress. (R. 67:24, A-App. 114.) The court found that Newport observed Jennings as the front passenger in "an excessively tinted Toyota." (R. 67:16, A-App. 106.) Based on his experience and knowledge with window tint levels, Newport determined that the windows had "a tint level well above the legal limit." (R. 67:16, A-App. 106.) Newport "used a spot lamp to shine in the vehicle" and saw Jennings making "furtive movements" to the floor, opening the door, leaving the car, and walking towards the front of the house. (R. 67:16, A-App. 106.) When police told him to stop, Jennings "was backing up and saying what, what, what." (R. 67:17, A-App. 107.) Police patted Jennings down for weapons and then looked into the car's passenger compartment and saw "the marijuana stem in the cupholder." (R. 67:17, A-App. 107.) After searching the car, police "found marijuana in the glove compartment," as well as bags, scales and a gun. (R. 67:17, A-App. 107.) Newport "testified that he could smell marijuana when standing outside the vehicle" and "could see that [marijuana] stem through the front windshield." (R. 67:17, A-App. 107.)

The court found that Newport "did not use the keys to open the door" and that "Jennings had the keys to the car in his hand." (R. 67:15, A-App. 108.) Newport had "never stopped a car with overly tinted windows without the car fleeing" or "making an arrest." (R. 67:18, A-App. 108.) Based on the testimony, the court determined that the car's window tint "was significantly darker than the allowable tint level," that "the odor of marijuana when standing next to the vehicle . . . increased when . . . the door was open," that Newport both smelled marijuana and saw the marijuana stem while he was "standing outside the car," and that "he smelled the marijuana first." (R. 67:18–19, A-App. 108–109.)

Based on Schwarzhuber's testimony, the court found that Schwarzhuber saw Jennings "standing by the front

passenger door," that it was clear that the car windows were tinted too much, that Jennings told him he was wiping the vehicle down, that he placed Jennings under arrest, and when he searched Jennings with Officer Ferguson, they found "an Oxy pill," "suspected heroin," and "currency." (R. 67:19, A-App. 109.) Schwarzhuber "first observed [Jennings] being outside the vehicle between the door and the vehicle" and "he did not recall the spotlight." (R. 67:19, A-App. 109.)

The court noted that it heard motions "on a weekly basis" that were related to "darkly tinted windows." (R. 67:20, A-App. 110.) The court found that "overly tinted windows are an indication that people are potentially dealing drugs" and that excessive window tint "is an area of suspect that police officers have." (R. 67:20, A-App. 110.) The court determined that police are able to stop cars with darkly tinted windows for "an ordinance violation." (R. 67:20, A-App. 110.)

The court made credibility determinations related to Newport and Schwarzhuber's testimony, finding that it could reconcile any alleged conflict between them based on their different perspectives and the short time span of events. Newport testified that "his first observation of [Jennings] was he was sitting in the car, he looked up at the spot light and then . . . reached down and got out of the car," while Schwarzhuber testified that he first saw Jennings "standing by the front passenger door." (R. 67:20–21, A-App. 110–11.) The court found that there was a "a difference of perhaps three seconds between looking, reaching down, and opening the door and getting out" of the car. (R. 67:21, A-App. 111.) Moreover, the court found that the officers were "two different people" in "two different areas of the police vehicle" and that "the difference between the [testimony of the] officers" was not "substantial." (R. 67:22, A-App. 112.) As such, the court determined that there was not "a major problem with the credibility of the officers' testimony." (R. 67:23, A-App. 113.)

The court concluded that the investigative stop was based on "an ordinance violation" for excessive window tint. (R. 67:23, A-App. 113.) Because the officers saw Jennings in the car, they were "entitled to stop the passenger." (R. 67:23, A-App. 113.) Moreover, the court determined that the smell of the marijuana allowed the officer "to search the car, [and] search the defendant," and after finding drugs the officers arrested Jennings. (R. 67:23, A-App. 113.) The court specifically found that Jennings "was in the car initially, and the stop can be made because of the tinted windows. The tinted windows were clearly tinted too dark based upon the officer's measurements." (R. 67:24, A-App. 114.) Thus, the court determined that neither the initial stop nor the search violated Jennings' Fourth Amendment rights, and denied his motion to suppress. (R. 67:24, A-App. 114.)

Plea, sentencing, postconviction motion and appeal. Jennings agreed to plead guilty to one count of possession with intent to deliver heroin, which had a maximum penalty of 15 years of imprisonment and a $50,000 fine. (R. 30.) Jennings entered his plea and the court accepted it after a plea colloquy. (R. 72:3–10.) The court sentenced Jennings to well less than the 15-year maximum and less than the State's recommended sentence of three to four years of confinement and two-and-a-half years of extended supervision, imposing 30 months of initial confinement and 30 months of extended supervision. (R. 72:31.) The court entered the judgment of conviction reflecting its sentence. (R. 35.)

In his postconviction motion, Jennings argued that his trial counsel was ineffective for conceding that if the court believed Newport's testimony, then the "temporary detention of Jennings was sound, the search of the black Toyota was justified, and the subsequent arrest of Jennings and search incident to arrest was constitutional." (R. 57:8.) Jennings claimed that his counsel "should have argued that even if

Office[r] Newport's version is credited, the observations he said he made did not give the officers a reasonable suspicion to detain Mr. Jennings." (R. 57:8.) Jennings sought a hearing on his motion and an order suppressing evidence and vacating his conviction. (R. 57:13.)

The circuit court entered a written decision and order denying Jennings' postconviction motion without a hearing. (R. 59, A-App. 101–05.) The court determined that Jennings had not sufficiently alleged that his counsel was ineffective because, even if his counsel had not conceded that Officer Newport's testimony supported the stop and search, and had instead argued that neither Newport nor Schwarzhuber's testimony supported reasonable suspicion or probable cause, there was no "reasonable probability" that the court would have granted his suppression motion. (R. 59:4–5, A–App. 104–05.)

Jennings appeals from the judgment of conviction and the order denying his postconviction motion without a hearing. (60.)

STANDARDS OF REVIEW

A circuit court may deny a postconviction motion without a hearing if the motion fails to raise facts sufficient to entitle the movant to relief, the movant presents only conclusory allegations, or the record conclusively shows that the movant is not entitled to relief. *State v. Sulla*, 2016 WI 46, ¶ 27, 369 Wis. 2d 225, 880 N.W.2d 659. An appellate court reviews de novo whether a defendant's postconviction motion clears those three prongs. *Id.* ¶ 23. If the motion fails one or more of those prongs, a circuit court has discretion to grant or deny a hearing. *Id.* If a hearing was not required, this Court reviews the decision granting or denying a hearing under the "deferential erroneous exercise of discretion standard." *Id.* (citation omitted). When reviewing a claim of ineffective assistance of counsel, this Court upholds the circuit court's

factual findings unless they are clearly erroneous, and it independently determines whether counsel was ineffective. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695.

"A suppression issue presents a question of constitutional fact." *State v. Smith*, 2018 WI 2, ¶ 9, 379 Wis. 2d 86, 905 N.W.2d 353. This Court reviews "the circuit court's findings of historical fact under the clearly erroneous standard." *Id.* (quoting *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560). "But the circuit court's application of the historical facts to constitutional principles is a question of law [this Court] review[s] independently." *Id.* (quoting *Floyd*, 377 Wis. 2d 394, ¶ 11).

Factual findings include the circuit court's credibility determinations, which are also reviewed deferentially. *State v. Jenkins,* 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24 (clearly erroneous standard of review). In other words, credibility of the witnesses and weight of the evidence are for the factfinder, not this Court, to determine. *State v. Below*, 2011 WI App 64, ¶ 4, 333 Wis. 2d 690, 799 N.W.2d 95. This Court must accept the inferences drawn by the factfinder, even if other inferences could also be drawn. *State v. Williams,* 2002 WI 58, ¶ 74, 253 Wis. 2d 99, 644 N.W.2d 919.

ARGUMENT

I. The court properly exercised its discretion to deny Jennings' postconviction motion alleging ineffective assistance without a hearing.

On appeal, Jennings argues that his trial counsel was ineffective for conceding that the testimony of Officer Newport supported reasonable suspicion to stop Jennings. (Jennings' Br. 9–12.) Jennings claims that neither Newport nor Schwarzhuber's testimony supported reasonable suspicion to detain Jennings and that his trial counsel "should have argued that even if Office[r] Newport's version is

credited, the observations he said he made did not give the officers a reasonable suspicion to detain Mr. Jennings." (Jennings' Br. 12.) Jennings is wrong. The additional arguments he proposes would not have changed the outcome of the suppression hearing; thus, his trial counsel was not ineffective. Both officers' testimony supported reasonable suspicion for the investigative stop of Jennings, as well as probable cause to search the car and to arrest Jennings and search him incident to that arrest.

A. To obtain a hearing on his ineffective assistance claim, Jennings had to allege sufficient evidence that his trial counsel performed deficiently and that he was prejudiced.

A court can deny a postconviction motion without a hearing "if the record conclusively demonstrates that the [defendant] is not entitled to relief." *State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 682 N.W.2d 433. To show that counsel was ineffective, a defendant must establish both that trial counsel's performance was deficient, and that this performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. To prove that counsel was deficient, "[t]he defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms." *State v. Swinson*, 2003 WI App 45, ¶ 58, 261 Wis. 2d 633, 660 N.W.2d 12.

To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687. A

defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Counsel is not ineffective for failing to make an argument or other legal challenge that would have failed. *See State v. Butler*, 2009 WI App 52, ¶ 8, 317 Wis. 2d 515, 768 N.W.2d 46.

B. Police had reasonable suspicion to stop Jennings based on a totality of the circumstances.

1. Reasonable suspicion to support an investigative stop is a fact-intensive, totality of the circumstances test that does not require police to rule out the possibility of innocent behavior.

The Fourth Amendment to the United States Constitution, and Article I, § 11 of the Wisconsin Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. I, § 11. This Court has generally conformed its "interpretation of Article I, Section 11 and its attendant protections with the law developed by the United States Supreme Court under the Fourth Amendment." *State v. Rutzinski*, 2001 WI 22, ¶ 13, 241 Wis. 2d 729, 623 N.W.2d 516; *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W. 2d 729. Consistent with Fourth Amendment protections, law enforcement may conduct an investigatory or *Terry*[1] 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. *Young*, 294 Wis. 2d 1, ¶ 20.

[1] *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." *Young*, 294 Wis. 2d 1, ¶ 21. What constitutes reasonable suspicion is a commonsense, 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). 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.

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. The facts in *Terry v. Ohio*, 392 U.S. 1 (1968), as discussed in *Waldner*¸ illustrate that principle.

In *Terry*, the United States Supreme 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.* "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.*

This Court has found that excessive window tint is a factor contributing to reasonable suspicion. "[T]inted windows add to suspicion because they suggest a possible desire of the operator to conceal from outside observation [of] persons, items, or activity in the vehicle." *State v. Floyd*, 2016 WI App 64, ¶ 16, 371 Wis. 2d 404, 885 N.W.2d 156, *aff'd on other grounds*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560.[2] 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); *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). While evasion or flight alone might not constitute probable cause, they can certainly

[2] This case was appealed to the Wisconsin Supreme Court, which affirmed on different grounds, without commenting on this Court's reasonable suspicion determination.

indicate "that all is not well" and justify a brief stop for further inquiry. *Anderson*, 155 Wis. 2d at 84.

2. The record conclusively demonstrates that both officers' testimony provided reasonable suspicion to temporarily detain Jennings.

Jennings' primary argument is that his trial counsel was ineffective for not arguing at the suppression hearing that the officers' testimony did not support reasonable suspicion to detain him, thus tainting the subsequent searches which recovered marijuana and heroin. (Jennings' Br. 9–12.) Jennings alleges that neither the officers' testimony about the Toyota's window tint nor the officers' "other observations" about Jennings' behavior—including that he made a "furtive movement," he was evasive, and he walked quickly away from them—supported reasonable suspicion. (Jennings' Br. 12–19.) Jennings maintains that his trial counsel's "failure to raise" these arguments in support of suppression constituted deficient performance and "was prejudicial because Mr. Jennings would have prevailed on a suppression motion if this argument had been presented." (Jennings' Br. 19.) Jennings is incorrect that the court would have granted suppression based on these arguments. The record conclusively demonstrates that police had reasonable suspicion to detain Jennings based on the totality of the circumstances.

One factor supporting reasonable suspicion to conduct an investigative stop of Jennings was that the car he occupied and controlled had a window tint violation, as determined by the officers with knowledge about and training in excessively tinted windows. In *State v. Conaway*, 2010 WI App 7, 323 Wis. 2d 250, 779 N.W.2d 182, this Court determined that reasonable suspicion of 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." *Id.* ¶ 9. Both Officer Newport and Officer Schwarzhuber testified about their training and experience in determining excessive window tint levels and violations of the ordinance prohibiting such excessive window tint. (R. 65:6–7, A-App. 120–21; 65:32–34, A-App. 146–48; 66:4–5, A-App. 166–67; 66: 12–13, A-App. 174–75.) Newport had extensive training in window tint, could tell that the Toyota's window tint was illegal, and in his experience, such illegally tinted windows were an attempt by drug dealers to evade detection by police. (R. 65:6–7, A-App. 120–21; 65:32–34, A-App. 146–48; 66:4–5, A-App. 166–67.) Schwarzhuber consistently testified that based on his training and experience, he could tell that the Toyota's level of window tint was "[v]ery illegal." (R. 66:13, A-App. 175.)

In its decision denying suppression, the court found that in the officers' training and experience, the Toyota's windows had "a tint level well above the legal limit." (R. 67:16, A-App. 106.) The court noted both that Newport had "never stopped a car with overly tinted windows without the car fleeing" or "making an arrest." (R. 67:16, A-App. 108.) In the court's experience with weekly motions related to "darkly tinted windows," that "overly tinted windows are an indication that people are potentially dealing drugs." (R. 67:19–20, A-App 109–10.) Because excessive window tint is "an area of suspect" for police, an officer could stop a car with darkly tinted windows for "an ordinance violation." (R. 67:19–20, A-App. 109–10.) The court found that Jennings was an occupant of the Toyota and had keys to the car. (R. 67:18, A-App. 108.) Ultimately, the court determined that Jennings, as a passenger or occupant controlling the car, was subject to the window tint ordinance. (R. 67:23, A-App. 113.)

Jennings makes much of the fact that he was a passenger in the car, not the operator, arguing that he was not subject to the window tint ordinance and "there was no reasonable suspicion to detain him for a suspected equipment

violation." (Jennings' Br. 12–13.) This argument is a red herring. The issue is not whether Jennings could receive a citation for excessive window tint as an occupant of the vehicle, but whether the vehicle's ordinance violation was one factor giving rise to reasonable suspicion to detain him. Based on the totality of the circumstances, the court determined that the excessive window tint on the car that Jennings was a passenger in, exited from, and had control over was a fact that contributed to the officers' reasonable suspicion to conduct an investigative stop. That determination was sound.

The record conclusively demonstrates that the officers had reasonable suspicion to stop Jennings based not only on the window tint but also on their other observations. While one fact alone may be insufficient, in this case there were multiple facts that in the aggregate and under the totality of the circumstances analysis established reasonable suspicion.

First, both officers testified that Jennings "quickly" exited from the Toyota with the excessive window tint and then "quickly" walked towards the house as the officers approached. (R. 65:9–11, A-App. 123–25; 66:12–13, A-App. 174–75.) Second, Newport testified that Jennings made a "furtive movement" when he saw the officers approaching, which in his experience indicated an attempt to discard contraband. (R. 65:9–10, A-App. 123–24.) Third, when Newport told Jennings to stop, he questioned this command, saying "what, what, what," continuing towards the house, and eventually stopping (R. 65:11, A-App. 125); Schwarzhuber consistently testified that Jennings did not immediately respond to the command to stop. (R. 66:24–25, A-App. 186–87.) Fourth, Schwarzhuber testified that when he asked Jennings what he was doing after he exited the car, Jennings told him that he was "wiping the vehicle . . . down", without any further explanation. (R. 66:15, A-App. 177.) All of these behaviors—Jennings' furtive movement, quick exit from the car with heavily-tinted windows, attempt to go into the house,

response to officers' commands, and explanation for exiting the car—were behaviors that could reasonably be construed by officers to be suspicious and add to their calculus of a reasonable suspicion.

While any one of these factors, by itself, might not be enough to form reasonable suspicion (and one arguably could think of an innocent explanation for all of them), taken together they gave an appearance of suspicious, evasive behavior, which could indicate "that all [was] not well." *Anderson*, 155 Wis. 2d at 84. "The building blocks of fact accumulate." *Waldner*, 206 Wis. 2d at 58. 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. *See Anderson*, 155 Wis. 2d at 84. That was the case here. The totality of the circumstances made the investigative stop of Jennings a reasonable one.

In a recent decision, this Court found reasonable suspicion on facts no more compelling than those present here. In *Floyd*, this Court relied on three facts to support reasonable suspicion: (1) the officers found air fresheners in every vent of the vehicle as well as the rear-view mirror, (2) the stop was in a high-crime area, and (3) the vehicle Floyd occupied had tinted windows. *Floyd*, 371 Wis. 2d 404, ¶¶ 13–16. This case shares the excessive window tint factor. While the window tint provided the most immediate basis for the officers' reasonable suspicion for the stop, it was not the only basis. The additional persuasive facts outlined above exist here that were not present in *Floyd*: Jennings's hasty exit from the car with the illegally tinted windows when police approached, his furtive movement, his attempt to evade police into the house, his questioning their order to stop, and his bizarre response that he was "wiping the vehicle . . . down" when asked what he was doing after he got out of the car. (R. 66:15, A-App. 177.)

Jennings emphasizes the perils of basing *Terry* stops on "furtive movement" which could have an innocent explanation, arguing that the "furtive movement" here was insufficient to support reasonable suspicion. (Jennings' Br. 15–16.) Jennings also argues that he did not flee from police, but instead exercised his right to avoid confrontation by walking away from them. (Jennings' Br. 16–17.) However, as discussed above, the reasonable suspicion here is derived not from any one of these actions in isolation, but from the cumulative effect of all the circumstances, which in combination all formed the requisite reasonable suspicion to detain Jennings for further investigation.

The postconviction court rejected Jennings' claim that his counsel was ineffective for not arguing that the "window tint," Jennings' "furtive movement," and Jennings' "subsequent actions (i.e. exiting the vehicle and walking toward the house) did not give rise to reasonable suspicion to conduct the *Terry* stop." (R. 59:4–5, A-App. 104–05.) The court noted that "both officers testified that the windows of the vehicle were illegally tinted, which provided them with a basis to investigate the vehicle" in which Jennings was sitting and concluded that even if Jennings counsel had "advanced the specific arguments" he now raised, there was "no reasonable probability" that the court would have granted his suppression motion. (R. 59:5, A-App. 105.)

The postconviction court was correct. Based on the cumulative effect of all the circumstances, the record conclusively demonstrates that the officers had reasonable suspicion to stop Jennings and question him. Jennings' counsel was not ineffective because the court would have denied suppression even if Jennings' counsel had made the arguments he advances.

C. Police had probable cause to conduct a warrantless search of the Toyota.

1. Police may conduct a warrantless search of a vehicle with probable cause if they believe that it contains evidence of a crime and finding such evidence provides probable cause to arrest and search incident to arrest.

"The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted). While a warrantless search is presumptively unreasonable, a court will uphold the search if it falls within an exception to the warrant requirement. *Id*. ¶ 30.

Law enforcement officers may conduct a warrantless search of a vehicle if they have probable cause to believe that the vehicle, found in a public place, contains contraband or evidence of a crime and the vehicle is readily mobile. *Maryland v. Dyson*, 527 U.S. 465, 467 (1999); *State v. Tompkins*, 144 Wis. 2d 116, 137–38, 423 N.W.2d 823 (1988). The officers may conduct a warrantless search under the automobile exception even after they have arrested the driver and impounded the vehicle. *State v. Marquardt*, 2001 WI App 219, ¶¶ 40–43, 247 Wis. 2d 765, 635 N.W.2d 188. Probable cause to search a vehicle requires only that the facts available to the police officer would warrant a person of reasonable caution to believe that contraband is likely to be in the vehicle. *Tompkins*, 144 Wis. 2d at 123–25. It is a flexible, commonsense standard employing the totality of the circumstances and weighing the facts as understood by those versed in the field of law enforcement. *Id*. at 125. There must be more than a possibility that contraband will be found in the vehicle, but it need not be more likely than not that

contraband will be found in the vehicle. *Id.* The ultimate question is whether it is reasonable under the circumstances to believe that contraband will be located in the vehicle. *Id.* Whether a search warrant could reasonably have been obtained is not important. *Tompkins*, 144 Wis. 2d at 128.

Probable cause to arrest and search incident to arrest requires that the "officer have sufficient knowledge at the time of the arrest to 'lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.'" *Young*, 294 Wis. 2d 1, ¶ 22 (quoting *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999)). Just as a "mere hunch" cannot qualify as reasonable suspicion, the latter is insufficient to establish probable cause, but the lines between hunch, reasonable suspicion, and probable cause are fuzzy, with each case requiring an examination of the facts. *Young*, 294 Wis. 2d 1, ¶ 22. Probable cause is a less exacting standard of proof than establishing guilt "beyond a reasonable doubt or even that guilt is more likely than not." *Id.* (quoting *Secrist*, 224 Wis. 2d at 212). "Whether probable cause exists in a particular case must be judged by the facts of that case." *Secrist*, 224 Wis. 2d at 212. "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *State v. Sykes,* 2005 WI 48, 279 Wis. 2d 742, ¶ 14, 695 N.W.2d 277 (citation omitted).

2. The officers' testimony provided probable cause for the vehicle search and search incident to arrest.

Jennings argues that the "fatal flaw of the circuit court's decision denying Mr. Jennings' postconviction motion was that in order to reach the conclusion that there was a reasonable suspicion to stop, the circuit court relied on 'the odor of fresh marijuana emanating from the vehicle the

defendant had just exited.'" (Jennings' Br. 18 (citing 59:5, A-App. 105).) Jennings misreads the postconviction court's decision, which did not rely on the marijuana odor to find reasonable suspicion. As set forth above, the court specifically determined that the illegal window tint, in combination with Jennings' actions, provided the reasonable suspicion to temporarily detain Jennings who was sitting in the vehicle and to investigate the vehicle. The postconviction court further determined that in the decision denying suppression, the trial court relied on the "odor of fresh marijuana emanating from the vehicle the defendant had just exited" to support its determination that the officers legally *searched* Jennings: "because the officers did smell [the marijuana], they did have the opportunity search the car, search the defendant. They found the drugs on the defendant and were very much entitled to make the arrest at that point in time." (R. 59:5, A-App. 105 (citing 67:23, A-App. 113).)

The court was correct. Viewed in their totality, the facts and circumstances supported probable cause both for the search of the Toyota and to arrest Jennings.

The probable cause calculus must consider the circumstances discussed above relevant to reasonable suspicion for the stop: the officers' experience that excessive window tint is indicative of drug dealing, Jennings' actions after police approached him of making a furtive movement, hastily exiting the vehicle, quickly moving towards the house, and evasively responding to officers' questions. Probable cause to search the vehicle arose when, after Jennings exited the vehicle and all of these circumstances were observed by the officers, but before Newport looked inside, Newport smelled the strong odor of marijuana outside the Toyota. (R. 66:6, 9, A-App. 168, 171.) Jennings does not, because he cannot, argue that the smell of marijuana outside the car did not provide probable cause to search the car. There is ample case law that the unmistakable odor of marijuana is a stand-

alone justification for a warrantless probable cause search of a vehicle. *E.g.*, *Secrist*, 224 Wis. 2d at 210.

Additionally, while still outside the Toyota where he smelled the marijuana odor, Newport looked through the windshield and saw, in the center console cupholder, a marijuana stem. (R. 65:15, A-App. 129; 66:9, A-App. 171.) The plain view doctrine allows an officer to seize evidence in plain view and use that evidence against a defendant if the evidence is in plain view. The officer has a lawful right of access to the object itself, and the object provided "probable cause to believe there is a connection between the evidence and criminal activity." *State v. Buchanan*, 2011 WI 49, ¶ 23, 334 Wis. 2d 379, 799 N.W.2d 775 (citation omitted). Here, Newport saw the marijuana stem in plain view inside the parked Toyota without making a prior physical intrusion into the car, a constitutionally protected area. Newport's plain view, non-search observation was not a seizure of that object, but formed a basis for probable cause to search the Toyota. All of these circumstances—the smell of marijuana, the marijuana stem in plain view, Jennings' actions, and the surrounding circumstances—taken together, would "warrant a person of reasonable caution in the belief" that Jennings was engaged in criminal activity and that evidence of criminal activity was likely to be in the Toyota which was tied to him. *Tompkins*, 144 Wis. 2d at 124 (citation omitted). Accordingly, the record conclusively demonstrates that the officers had probable cause to search the vehicle.

Jennings bases his appeal on his claim that the officers did not have reasonable suspicion to detain him and does not discuss probable cause to search the car or to arrest him. However, he does argue the odor of marijuana coming from the vehicle did not provide reasonable suspicion for the stop. (Jennings' Br. 18.) Jennings confuses the reasonable suspicion for the investigative stop, discussed above, with the probable cause to search the Toyota. As explained above,

police had reasonable suspicion to detain Jennings based on the unlawfully tinted windows and Jennings' actions when the officers approached him. That reasonable suspicion to detain him on the steps evolved into probable cause to search the Toyota when the officers smelled the strong odor of marijuana outside the car and saw the marijuana stem through the windshield in the cupholder in plain view.[3]

Indeed, "the Fourth Amendment requires only a reasonable assessment of the facts, not a perfectly accurate one." *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000). Accordingly, the suspected marijuana stem in plain view, coupled with the marijuana odor and the other evidence discussed above, gave the officers probable cause to search the Toyota. There was at least a "fair probability" under the totality of the circumstances that police would find additional evidence of illicit drug use or possession inside the car. *State v. Pallone*, 2000 WI 77, ¶¶ 74–76, 236 Wis. 2d 162, 613 N.W.2d 568. The circumstances were "sufficient in themselves to warrant" a reasonable person's "belief that" an offense had been or was being committed, and supported more than a mere possibility that the vehicle contained evidence of a crime. *Carroll v. United States*, 267 U.S. 132, 162 (1925); *Tompkins*, 144 Wis. 2d at 125.

In sum, there was reasonable suspicion to detain Jennings based on the illegally tinted windows in the Toyota, in which an officer observed him making a furtive movement and from which officers observed him hastily exit, and walk quickly away as they approached. His evasive behavior and

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[3] Moreover, Newport's belief that the stem inside the Toyota was marijuana was confirmed when it tested positive for THC. (R. 65:15, A-App. 129.) (*See State v. Buchanan*, 2011 WI 49, ¶¶ 21–27, 334 Wis. 2d 379, 799 N.W.2d 775 (immediately apparent test was met where the officer saw "a piece of green plant material" under the ashtray, and the officer recognized it as marijuana "by its appearance and smell").

inexplicable response to police contributed to their reasonable suspicion. This reasonable suspicion for the legal detention developed into probable cause to search the Toyota as a result of the marijuana odor outside the car and the marijuana stem in plain view inside the car. The search recovered more marijuana and drug paraphernalia. Jennings does not dispute that there was subsequently probable cause to arrest him and search him incident to that arrest, which recovered the heroin.

Thus, the postconviction court was correct when it denied Jennings' motion without a hearing. Even if his trial counsel had "advanced the specific arguments that postconviction counsel raises," Jennings did not show a "reasonable probability" that the trial court "would have decided the motion any differently. Therefore, counsel was not ineffective for failing to present these arguments in the suppression hearing." (R. 59:5, A-App. 105.) Because the record conclusively demonstrates that Jennings' trial counsel was not ineffective in arguing the suppression motion, this Court should affirm.

II. The circuit court properly denied the suppression motion because its witness credibility determinations and findings of fact based on the officers' testimony were not clearly erroneous.

Because the trial court is the ultimate arbiter of the credibility of witnesses, "its credibility determinations will not be upset unless clearly erroneous." *State v. Bermudez*, 221 Wis. 2d 338, 346, 585 N.W.2d 628 (Ct. App. 1998). "[I]t is the role of the fact finder listening to live testimony, not an appellate court relying on a written transcript, to gauge the credibility of witnesses." *Pallone*, 236 Wis. 2d 162, ¶ 45. "Different witnesses' testimony may be contradictory and at times one witness's testimony may be inherently inconsistent. The trial judge not only hears the testimony, but also sees the

demeanor of the witness and the body language" and "hears volume alterations and intonations"; thus, the trial court "has a superior view of the total circumstances." *State v. Owens,* 148 Wis. 2d 922, 929, 436 N.W.2d 869 (1989). When witness testimony conflicts or contains contradictions, it is "the trial court's obligation to resolve it." *Id.* at 930. "Sorting out the conflicts and determining what actually occurred is uniquely the province of the trial court, not the function of the appellate court." *Id.; see Below,* 333 Wis. 2d 690, ¶ 4 (credibility of witness is for factfinder, not this Court, to determine).

On appeal, Jennings asserts that this Court should find that the circuit court's credibility determinations and findings of fact at the suppression hearing were clearly erroneous: specifically, when "it concluded that both officers' versions of events could be true, and there was no need for the court to determine which was more credible." (Jennings' Br. 20.) Jennings is wrong when he claims that the court's factual findings were clearly erroneous, and he misrepresents the circuit court's findings of fact regarding Newport and Schwarzhuber's testimony.

In its decision denying suppression, the court specifically made the finding of fact that Jennings "was in the car initially." (R. 67:24, A-App. 114.) This finding could only be based on Newport's testimony that he first saw Jennings inside the Toyota before he quickly exited. (R. 65:9, A-App. 123.) Newport testified that there was "no chance" that Jennings was outside the car when the officers arrived. (R. 65:35, A-App. 149.) And, Newport testified more than once that he first saw Jennings inside the car, where he made a furtive movement, and then quickly exited. (R. 65:9, A-App. 123; 65:11, A-App. 124; 66:4–5, A-App. 166–67.) Schwarzhuber, however, testified that when he first saw Jennings, he was just outside the Toyota's passenger door, as if he had "just gotten out" of the vehicle. (R. 66:21–22, A-App. 183–84.) As it was entitled to do, after hearing both officers'

testimony the trial court made credibility determinations, and based its finding of fact that Jennings was inside the car on Newport's testimony. The court's credibility determination was not clearly erroneous.

The trial court also properly determined that the officers' allegedly conflicting testimony was based on their unique perspectives and on the fast-moving series of events leading up to the investigative stop of Jennings. The court believed Newport's testimony that the squad car approached the Toyota and activated its lights, Newport saw Jennings' furtive movement, and Jennings quickly got out of the Toyota. The court believed these events "happened fast," all "within a couple of seconds of each other." (R. 65:20, A-App. 134.) In denying suppression, the court found Newport's testimony that he first saw Jennings "sitting in the car," where he "reached down and" then "got out of the car," and Schwarzhuber's testimony that he first saw Jennings "standing by the front passenger door" represented "a difference of perhaps three seconds between looking, reaching down, and opening the odor and getting out." (R. 67:21, A-App. 111.)

The court's reconciliation of Newport's testimony that he saw Jennings inside the car and Schwarzhuber's testimony that he first saw Jennings outside the car just after he exited was not clearly erroneous. The court concluded that Newport's testimony about the time frame was credible and that it was reasonable that the quick sequence of events accounted for the differences in the officers' versions of when they first saw Jennings. The claimed discrepancies are consistent with the fact that Schwarzhuber was a backseat passenger in the squad car. (R. 66:19–20, A-App. 181–82.) Further, the court may have noticed that Schwarzhuber was more hesitant in his memory or sounded less sure about his testimony, something that the transcript would not reflect. As the finder of fact at the suppression hearing, the trial court

was the ultimate arbitrator of witness credibility and demeanor, and its findings should not be disturbed by this Court.

Jennings relies heavily on Newport's body camera video, arguing that it supported Schwarzhuber's testimony as the "more credible version." (Jennings' Br. 22.) But Newport testified that the video was dark and unclear and that he could "[b]arely" see "the officer standing at the steps." (R. 65:37, A-App. 151.) Moreover, Newport did not know when he started the video and thus, he could not tell "at what point during our investigation this video was taken." (R. 65:37–38, A-App. 151–52.) Thus, Newport's testimony about what the video portrayed was inconclusive. He identified that the video showed Schwarzhuber on the steps to the residence and Newport using his flashlight to search inside the car. (R. 65:38–39, A-App. 152–53.) These events occurred after the investigative stop of Jennings and were not inconsistent with Newport's description that Jennings was initially inside the vehicle. Schwarzhuber did not testify about the body camera video. This Court simply cannot find that the circuit court's credibility determinations and reconciliation of the officers' testimony about the investigative stop were clearly erroneous based on an unclear depiction of the stop and subsequent search in a video.

In sum, this Court should not second guess the circuit court's findings of fact about the officers' testimony. They were not clearly erroneous. This Court should affirm.

CONCLUSION

For the all these reasons, this Court should affirm the order denying Jennings' postconviction motion and the judgment of conviction.

Dated this 5th day of February 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 9,087 words.

Dated this 5th day of February 2020.

_____
ANNE C. MURPHY
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 5th day of February 2020.

_____
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