STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2019AP001908-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY FRANCEN HARRIS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Is an officer's subjective good faith relevant to whether a mistake in fact is reasonable under the Fourth Amendment?

The court's below held the officer's "good faith" mistake justified Mr. Harris's seizure, despite the pronouncement in *Hill v. California,* 401 U.S. 797, 804 (1971) that "subjective good-faith would not in itself justify either the arrest or the subsequent search."

2. Under the totality of the circumstances, does the act of crossing the dotted white line that divides a multilane one-way street, one time, plus a single "weave" within the lane in the early morning hours of a weekday create a reasonable suspicion that criminal activity is afoot?

The court of appeals ruled this was sufficient to reasonably suspect the driver of drunk driving and thereby justify his seizure, though the decision misstated the facts and in addition this does not rise to the level typically associated with drunk driving in any precedential decision in Wisconsin.

CRITERIA FOR REVIEW

This case presents the Court with the opportunity to clarify what role an officer's subjective good faith has in an analysis of whether a mistake of fact is reasonable under the Fourth Amendment. *Hill*

v. California, 401 U.S. 797, 804 (1971) admonished that "subjective good-faith belief would not in itself justify either … arrest or subsequent search," yet in the decision below, the court of appeals has held that a "rookie" officer's subjective good faith made his mistake of fact reasonable under the Fourth Amendment. In doing so, the court of appeals decision not only runs afoul of *Hill,* 401 U.S. at 804, but also it fails to perform the reasonability analysis required of any Fourth Amendment challenge. This Court should take review to reiterate that "subjective intentions play no role in ordinary … Fourth Amendment analysis." *Whren v. U.S.,* 517 U.S. 806, 813 (1996).

The decision below inappropriately equated "good faith" with lack of malice. In this case, the officer looked at the "wrong set of data" in his squad car computer and as a result pulled Mr. Harris over incorrectly believing that Mr. Harris was driving a vehicle registered to an unlicensed driver. The mistake of fact in this case was thus entirely due to the officer's improper, negligent or careless use of his computer. This Court should take review and hold that the Fourth Amendment tolerates a seizure based on a mistake of fact only when officers have conducted a competent investigation using the diligence and due care the profession demands. *See e.g. Illinois v. Rodriguez,* 497 U.S. 177, 185-86 (1990); *Hill,* 401 U.S. at 804, *U.S. v. Miguel,* 368 F.3d 1150,1154 (9th Cir. 2004). A seizure cannot be reasonable under the Fourth Amendment if it is rooted in the officer's

incompetence, even in cases such as this one where the officer did not have nefarious intent.

This case thus presents a "real and significant question of federal and state constitutional law" that "is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." Review is therefore warranted under Wis. Stat. §§ 809.62(1r)(a) and (c)(3).

Should this Court take review, this case also presents this Court an opportunity to address what quantum of evidence is necessary to reasonably suspect a driver of drunk driving. The decision below held one subtle cross of a white dotted line on a multilane single direction roadway followed by a weave within the lane plus the time of day and close proximity to Lambeau Field is enough for an officer to reasonably suspect that the driver is driving while intoxicated, despite the fact that these facts are far less than those in any precedential case on reasonable suspicion in drunk driving cases.

In reaching its conclusion, the opinion incorrectly stated that the "vehicle *repeatedly* deviat[ed] from [the] lane of traffic and cross[ed] the center line." *State v. Harris*, 2019AP001908-CR, slip op. at ¶12 (App. 3-9). (emphasis added), though the circuit court did not find that these driving behaviors were repeated and the record does not support that finding. Although generally not an error correcting the court, should this Court take review, it should correct this misstatement and uphold the

circuit court finding that Mr. Harris's vehicle had crossed the white dotted line to the right of the vehicle one time. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569 (findings of fact are upheld unless clearly erroneous).

This Court should take review to address these significant questions of constitutional law. Wis. Stat. §§ 809.62(1r)(a) and (c).

STATEMENT OF THE CASE

In the early hours of the morning on March 30, 2018, Mr. Harris was traveling in the left westbound lane on Lombardi Avenue in Green Bay. (49:5, 7). Lombardi Avenue is a divided roadway, with three lanes going west, three lanes going east and a raised median in between. (59:7; 32). At 2:26 am, Officer Dan Skenandore of the Green Bay police department pulled Mr. Harris over. (59:6). Skenandore explained to Mr. Harris that he had pulled him over because the registered owner of the vehicle he was driving did not have a valid driver's license. (59:14, 33). In fact, the officer had made a mistake – when he indexed the registration, he had "scrolled back too far into the other vehicle that I had ran earlier." (59:27). In other words, he had "look[ed] at the wrong set of data." (59:10). The registered owner of Mr. Harris's vehicle did in fact have a valid driver's license. (59:15).

At an evidentiary hearing on a motion to suppress, Skenandore testified that in addition to the

unlicensed driver issue, another basis for the stop was observed bad driving. Skenandore testified that he observed Harris's vehicle once cross over the dotted white line to the right of the vehicle that separated two westbound lanes of traffic. (59:7). Although the vehicle never approached the median nor crossed over a line dividing traffic traveling in opposite directions, Skenandore referred to this as the vehicle crossing the "center line." (59:6). Skenandore explained that he observed both "the front and rear tires" cross over the line to the right of the vehicle. (59:7, 8, 20, 24). At another point, he remembered it differently, testifying that he "observed the vehicle appear to drive over the 'center line' with its passenger side rear tires [only] and then move back into the left portion of the left lane." (59:13). Skenandore's contemporaneous description of what he observed in the narrative section of his police report simply stated he "observed the vehicle cross the center line" and says nothing about what tires or how much of the vehicle crossed the line. (59:20; 30).

Skenandore also testified that he observed the vehicle weaving within the lane. (59:6, 8). Skenandore explained that he observed the car "move from the left portion of the lane of travel to the right portion." (59:8). Officer Skenandore offered no further description of what kind or how much weaving he saw.

The dash cam of Skenandore's squad car captures 32 seconds of Harris's driving before Skenandore initiated the stop. (59:12; 32). The dash

cam does not show Harris's vehicle crossing the "center line." (32). Skenandore explained that the crossing of the dotted white line to the right of the vehicle occurred before the dash cam was activated. (59:12).

The dash cam did capture the weaving within the lane component of the bad driving observed by Skenandore. (59:36). The prosecutor confirmed with Skenandore that "the driving behavior is what we see on the video ... as far as the weaving within the lane". (59:36). When the dash cam video begins, it shows Harris's vehicle hugging the right side of the lane of travel, with the tires touching the dotted white line. (32:0:00 – 0:09). After about 9 seconds, there is a slight bend in the road and Harris's vehicle moves towards the center of the lane, where it generally stays until Skenandore initiated the traffic stop. (32:0:10-0:32). At one point it is left of center, but the vehicle never goes all the way to the left or touches the left side lane lines. (32:0:10-0:32).

After reviewing the evidence, the circuit court determined that Skenandore appropriately initiated the traffic stop. With respect to the unlicensed driver issue, the circuit court stated "the officer made a mistake in good faith. …[H]e believed the registered owner of that car didn't have a valid driver's license." (60:12; App. 11). With respect to the bad driving issue, the court found that Harris's vehicle "had deviated within his lane and crossed the center line." (60:13; App. 12). The court stated:

> I think he felt he had the superior position of being a nonlicensed registered owner and thought that was the absolute guarantee of correctness in a traffic stop, and he was unfortunately incorrect because he had misread his screen which obviously is a rookie mistake, but he's a rookie. But he also had the weaving within his lane, the crossing the center line. You've got the time of night, obviously in that area you've got bars in Ashwaubenon in the football district area, a lot of taverns there…

(60:14; App. 13).

The evidence collected by the state after the seizure substantiated criminal charges for operating while intoxicated, 3rd and possession of THC. (1). Mr. Harris filed a suppression motion and after it was denied, he pled no-contest to these charges. (61). Following sentencing, Mr. Harris appealed.

In the court of appeals, Mr. Harris renewed his argument that the government's warrantless seizure was unconstitutional because the mistake of fact was unreasonable and because there was no reasonable suspicion to believe that Mr. Harris had committed a crime at the time he was pulled over. The court of appeals upheld the seizure reiterating the circuit court finding that "Skenandore acted in good faith" and therefore Skenandore's mistake "cannot be said to be unreasonable or indicative of any bad faith." *Harris*, slip op. at ¶13. The court of appeals further held that under the totality of the circumstances, there was reasonable suspicion of drunk driving. *Id.*, ¶14.

Mr. Harris seeks review in this court.

ARGUMENT

Neither of the two alleged bases for the stop of Harris's vehicle – a nonlicensed registered owner of the vehicle or observed driving behaviors suggesting criminal activity was afoot – pass constitutional muster. If it were true that Mr. Harris was driving a vehicle that was registered to an unlicensed driver, this would have been a valid basis for an investigative traffic stop. But that was not the case here. The officer's inability to properly use his equipment when he indexed the license plate – despite his subjective good faith – is not a reasonable basis for law enforcement to seize a citizen and is therefore unconstitutional.

Similarly, if the officer had observed driving behaviors that under the totality of the circumstances were indicative of drunk driving, the officer would have had reasonable suspicion criminal activity was afoot and the stop would have been valid. But the observed driving behaviors were not in violation of any traffic statute. Nor do the totality of the circumstances reasonably suggest that the driver had committed any other crime. Because neither proffered reason for the stop created a constitutional basis for seizure, Mr. Harris's seizure was invalid under the Fourth Amendment.

I. Officer Skenandore's seizure of Mr. Harris based on a mistake of fact, though made in good faith, is unreasonable under the Fourth Amendment.

Searches and seizures based on mistakes of fact are upheld if the mistake of fact was reasonable. *Rodriguez,* 497 U.S. at 185-86. While law enforcement officers are given "fair leeway for enforcing the law," "the Fourth Amendment tolerates only objectively reasonable mistakes." *Heien v. North Carolina*, 574 U.S. 54, 66, (2014) (adopting the same standard for reasonable mistakes of law) (quoting *Brinegar v. United States*, 338 U.S. 160, 176, (1949)).

The subjective actions and understandings of the particular officer involved in a seizure are not relevant to the Fourth Amendment analysis. *Heien*, 574 U.S. at 66; *see also Whren,* 517 U.S. at 813. As such, whether Officer Skenandore's mistake was made in good faith is not determinative of whether the mistake was reasonable. *Hill,* 401 U.S. at 804 ("subjective good-faith belief would not in itself justify either the arrest or the subsequent search"); *see also State v. Houghton,* 2015 WI 79, ¶¶72-78, 346 Wis. 2d 234, 868 N.W.2d 143 (2015) (evaluating the reasonableness, not the subjective good-faith, of the officer's mistake of fact).

Skenandore was not relying on information relayed to him by a reliable source or other facts that, though wrong, were obtained through utilizing the standards and due care his profession demands.

Compare with Hill, 401 U.S. at 804 (officer reasonably relied on multiple third party descriptions of a suspect, but arrested the wrong person even though he matched the description and was at the address of the suspect); *Rodriguez,* 497 U.S. at 188 (officer reasonably relied on third-party who said she had authority to consent to a search when in fact she did not); *U.S. v. Miguel,* 368 F.3d 1150, 1154 (2004) (9th Cir.) (officer's reasonably relied on erroneous data provided by the Arizona Motor Vehicle Department).

Rather, Skenandore's mistaken belief that he was following an unlicensed driver was entirely due to his misuse of the squad car computer. The circuit court found that Skenandore's incorrect factual determination was "obviously a rookie mistake." (60:14; App. 112). In other words, it was the officer's lack of training and inexperience that caused the officer to "look[] at the wrong set of data." (59:10). (*See merriam-webster.com/dictionary/rookie* defining "rookie" as "a person who has just started a job or activity and has little experience").

The common sense test – "What would a reasonable police officer reasonably suspect in light of his or her training and experience" – does not equate to the corollary, What would a reasonable police officer reasonably suspect in light of his or her *lack* of training and *in*experience*? State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Training and experience and "knowledge acquired on the job" are given weight because that training and experience provides a reliable and informed basis on which to

draw inferences and conclude suspicious activity is afoot. *State v. Betow*, 226 Wis. 2d 90, 98, 593 N.W.2d 499 (Ct. App. 1999). On the other hand, the officer's subjective inexperience does not help the officer make an informed decision about whether it is reasonable to suspect criminal activity, and in fact, makes it less likely the officer's suspicions are reliable. A mistake rooted in the subjective inexperience of an officer is therefore unreasonable.

The state, whose burden it is to show that the governmental intrusion was reasonable (*State v. Post,* 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634), offered no evidence that this was the kind of mistake a reasonable prudent officer would make. Presumably, an officer with sufficient training and experience is able to perform the simultaneous tasks of "driving a squad car, observing … driving behavior, entering the license plate number … and trying to read the results" without making a mistake. *Harris,* slip op. ¶13. If this investigative tactic routinely caused law enforcement officers to read the wrong set of data, then vehicles would be regularly seized without a legitimate basis. This also would be unreasonable and intolerable under the Fourth Amendment. The governmental interest in ascertaining if a vehicle is in fact registered to an unlicensed driver is not so great that law enforcement officers shouldn't take the time to double check that they are reading the correct screen before taking the significant step of initiating a "major interference in the lives of the [vehicle's] occupants." *Coolidge v. New Hampshire*, 403 U.S. 443, 479 (1971).

Mistakes that are the result of officer inexperience, negligence or ineptitude cannot be reasonable under the Fourth Amendment as this would incentivize shoddy police work and allow for wholly unreasonable search and seizures. Indeed, in *Heien*, the Supreme Court specifically noted mistakes that are the result of subpar policing efforts cannot support a Fourth Amendment search or seizure. *Heien*, 574 U.S. at 67. Just as "an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce," there can be no Fourth Amendment advantage to sloppy investigations of the facts. *Id.*

If the court of appeals decision is allowed to stand, and it is reasonable for an officer to conduct a traffic stop simply because s/he "read the wrong data" on the squad car computer – when there is no exigency or other facts that would cause a reasonable to officer read the wrong data – this will effectively authorize stops without probable cause or reasonable suspicion. This opens the door for pretextual and arbitrary stops in contravention to the Fourth Amendment and cannot be tolerated.

This court should take review and hold that a mistake of fact can only be reasonable under the Fourth Amendment if the mistake is one that an officer who utilizes diligence and due care would make. The fact that an officer subjectively did not mean to make the mistake is irrelevant to the inquiry. (And, of course, if there is a mistake in bad faith, it becomes intentional misconduct which triggers an entirely

different analysis). Here, though the mistake was in good faith, it was based solely on Officer Skenandore's improper, careless, or negligent use of the computer in his squad car. This court should hold Officer Skenandore's mistake was unreasonable under the Fourth Amendment and cannot justify the stop.

II. The totality of the circumstances do not support a reasonable inference that Mr. Harris had committed, was committing, or was about to commit a crime.

A police officer may conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569 (citations omitted). "Reasonable suspicion" is "suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An inchoate and unparticularized suspicion or hunch . . . will not suffice." *Waldner*, 206 Wis. 2d at 56 (internal citation omitted).

In a case with nearly identical facts, including a one-time cross of a dotted line at 2:10 in the morning, the court of appeals has recently held that a "momentary" cross, even if not "perfect" driving does not amount to reasonable suspicion because "drivers are not expected or required to be perfect." *State v.*

Lane, unpublished slip. op., ¶¶7, 16, No. 2021AP327 (Aug. 19, 2021) (App. 19-25); *See also United States v. Lyons*, 7 F.3d 973, 996 (10th Cir. 1993) ("if failure to follow a perfect vector down the highway. . . [was] sufficient reason[] to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy").

In addition, weaving within a single lane with nothing more does not give rise to reasonable suspicion of drunk driving. *Post,* 301 Wis. 2d 1, ¶14; *see also City of West Allis v. Michals*, unpublished slip op. No 2015AP1688 (Jan. 26, 2016) (App. 14-18) (three instances of swerving within one's own lane does not supply reasonable suspicion); *United States v. Colin*, 314 F.3d 439, 446 (9th Cir. 2002) (weaving must be "pronounced" and "for a substantial distance" to rise to reasonable suspicion of drunk driving).

A review of the dash cam video which, according to Skenandore captured the entirety of the alleged weaving, shows that to the extent there was weaving, it was very slight and definitely not repeated – Harris's vehicle moved from touching the right side dotted line to just left of center, one time. (59:36; 32: 0:00 – 0:32).

The cross of the dotted white line was similarly subtle. In describing the cross of the dotted white line, Skenandore alternatively stated the front and back tires crossed the line or just the back tires crossed the line. (59:7, 8, 13, 20, 24). The fact that Skenandore could not offer a consistent description of what he had

seen shows that the cross was not very notable and certainly not suggestive of criminal activity being afoot. In fact, the dash cam video suggests the single cross of the line occurred just before the alleged "weaving" and that the weave was actually an attentive correction to having been too far to the right. (32).

In describing the crossing, Officer Skenandore did not use the word veer, drift, cant, bounce, sudden, overcompensate, abrupt or any other word that would suggest he had observed something suspect or concerning about Harris's driving. He did not state that the driving behaviors were repeated or prolonged. Wisconsin cases in which a lane deviation or weaving has supported reasonable suspicion have involved far more. *See e.g. Post,* 2007 WI 60, ¶¶4-5 (vehicle "canted" between unmarked parking and traffic lanes and traveled in a repeated smooth "S-type" pattern for at least two blocks, moving ten feet from right to left); *Popke*, 2009 WI 37, ¶¶17-18 (three-fourths of the vehicle was left of the center of the road (in violation of Wis. Stat. § 346.05) and the car "swerved," "almost hit the curb" and then "nearly struck the median").

The state never asserted or identified a traffic infraction that in and of itself would have justified the seizure. *Compare with State v. Puchacz,* 2010 WI App 30, ¶¶16-17, 323 Wis. 2d 741, 780 N.W.2d 536 (even a momentary crossing of the centerline supports probable cause to believe the crossing the centerline statute, Wis. Stat. § 346.05, has been violated); *Popke*, 2009 WI 37, ¶¶17-18. Mr. Harris's vehicle was in the

left most lane in a multilane one-way street when it briefly crossed the dotted white line to the right. Wis. Stat. § 346.05's prohibition against crossing the center line does not apply to one-way streets. Wis. Stat. § 346.05(1)(f). Unlike in *Popke* and *Puchacz*, there was no traffic infraction that would have contributed to reasonable suspicion or given the officer probable cause to pull Mr. Harris over.

Despite the circuit court's sua sponte assertion that "obviously in that area you've got bars in Ashwaubenon in the football district area, a lot of taverns there," the state, whose burden it is to establish that the seizure was reasonable (*Post,* 2007 WI 60, ¶12), presented no evidence regarding the number of bars in the location Mr. Harris was arrested or that Mr. Harris might have been coming from one. Even if the court's assertion were true, without testimony from the officer, the significance of the purported bars is reasonably questioned. For example, it is not self-evident that bars in the football district would be regularly frequented or even open on a weekday in the off-season. (The National Football League's season ends in February, so the weekday in March of Mr. Harris's arrest clearly was not a Packer game day).

The only other fact that could possibly contribute to reasonable suspicion of drunk driving is the fact that the driving took place in the early morning hours. Notably though, because Mr. Harris was pulled over in the early morning hours of a weekday, "common knowledge" tells us it is less likely

that he was coming from a bar.[1] *See State v. Lange,* 2009 WI 49, 766 N.W.2d 551, 317 Wis. 2d 383 (2009) (noting the fact "it is a matter of common knowledge that people tend to drink during the weekend"). And as noted in *Lane,* "[e]ven coupled with the possibility that [the defendant] was coming from a bar and might have consumed alcohol, the slight lane deviation observed by the officer is not an objectively reasonable basis for stopping" the defendant. *Lane,* slip op. ¶16 (App. 26).

The officer was in possession of facts that may have been enough to create an inchoate suspicion that Mr. Harris was driving under the influence. But a hunch is insufficient to justify a stop. Had the officer not prematurely pulled Mr. Harris over after carelessly looking at the wrong set of data, he likely would have followed Mr. Harris's vehicle for a period to see if his hunch would develop into a reasonable suspicion. But that is not what happened here.

None of the facts in this case alone create reasonable suspicion. And taken together, one slight cross of the dotted white line that continued into a "weave" to the middle of the lane is not enough to cause a reasonable officer to suspect the driver was intoxicated, even when combined with the location and time of night. True enough that in another case under different circumstances one or more of the facts

[1] March 30, 2018, was a Friday. *See https://www.timeanddate.com/calendar/?year=2018&country=1* .

present this case could cause the scale to tip in favor of a reasonable suspicion finding, but in this case, we are left with 0 + 0 + 0 = 0.

This Court should take review and hold under the totality of the circumstances, the observed driving here was not enough to lead a reasonable officer to suspect that Mr. Harris was driving under the influence of an intoxicant or committing any other crime. As such, Mr. Harris's alleged bad driving did not create a constitutional basis for the seizure and subsequent search.

CONCLUSION

Review is warranted by this Court because the court of appeals inappropriately considered the subjective good faith of a police officer in justifying a seizure based on a mistake of fact, contrary to federal law and the Fourth Amendment. A state may grant greater individual rights on the basis of a state constitution, but a state cannot grant fewer rights than those conferred by the Federal Constitution as interpreted by the United States Supreme Court. If a Wisconsin court is to expand police power in the manner the court of appeals has done here at the expense of individual liberty, it should come from this law-declaring court, and not the error-correcting court of appeals. The Court, thus, is urged to grant review to decide this significant question of constitutional law.

Dated this 30th 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 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 4,370 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding 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 30th day of August, 2021.

Signed:

FRANCES REYNOLDS COLBERT
Assistant Public Defender