STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP1908-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY FRANCEN HARRIS,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

LORYN L. LIMOGES
Assistant Attorney General
State Bar #1094653

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 294-2907 (Fax)
limogesll@doj.state.wi.us

INTRODUCTION

This Court should deny Harris' Petition for Review of the Wisconsin Court of Appeals' decision in *State v. Harris*, No. 2019AP1908, 2021 WL 3238873 (Wis. Ct. App. July 30, 2021) (unpublished). This case does not present any novel, unsettled, or important legal issue, and the court of appeals' opinion is exactly in line with the decisions of this Court and the United States Supreme Court. Review here would serve only to reiterate established precedent and will not affect the outcome of this case.

The relevant facts are that Harris pleaded no-contest to possession of THC and third-offense OWI and was convicted. *Id.* ¶ 9. He appealed the denial of his motion to suppress evidence obtained by law enforcement after it stopped his vehicle, arguing the arresting officer did not have reasonable suspicion to initiate the stop. *Id.* ¶ 1. The court of appeals affirmed the judgment of the circuit court holding that the "totality of the circumstances support[ed] the circuit court's finding of reasonable suspicion to stop Harris's vehicle." *Id.* ¶ 12. Harris petitions this Court for review. (Harris Pet. 1–22.)

ARGUMENT

This case does not warrant this Court's review.

Harris requests review for two reasons. Neither satisfies this Court's criteria for granting review under Wis. Stat. § (Rule) 809.62(1r). Both are based on an erroneous reading of the court of appeals' decision.

A. There is no real or significant question of constitutional law present in this case.

Harris argues this case warrants review under Wis. Stat. § (Rule) 809.62(1r)(a) and (c)3. because it "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.'" (Harris's Pet. 5.) Harris asks this Court to take review to "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." (Harris's Pet. 14.) Further, that where "an officer subjectively did not mean to make the mistake is irrelevant to the inquiry." (Harris's Pet. 14.)

First, Harris misstates the holding of the court of appeals in this case. Harris' Petition states the court "held the officer's 'good faith' mistake justified Mr. Harris's seizure." (Harris's Pet. 3.) That is incorrect. The court held that "[t]he totality of the circumstances support[ed] the circuit court's finding of reasonable suspicion to stop Harris's vehicle." *Harris*, 2021 WL 3238873, ¶ 12. The court pointed to the record that proved the stop occurred late at night, that Harris was in an area where there were numerous taverns, and that Harris' driving was erratic. *Id.* The totality of the circumstances supported the finding of reasonable suspicion to stop Harris' vehicle. *Id.* This holding is consistent with Wisconsin Supreme Court and United States Supreme Court precedent.

Second, contrary to Harris' claim, the court of appeals only pointed out that the police officer's mistaken belief that Harris was an unlicensed driver could be objectively reasonable under the facts of this case. *Id.* ¶ 13. The court does not then conclude that mistake of fact alone, because it was made in good faith justified the seizure in this case. *Id.* The court's decision is based on the totality of the circumstances, which included the erratic driving, time, place, and the officer's reasonable mistake of fact about Harris' driving status.

Finally, because of that, the court of appeals' decision does not run "afoul" of United States Supreme Court

precedent. *See Hill v. California*, 401 U.S. 797, 804 (1971) (subjective good-faith belief does not in itself justify the arrest or seizure); (*See* Harris Br. 4). Harris' argument that the court of appeals decision stands for the proposition that "it is reasonable for an officer to conduct a traffic stop simply because s/he 'read the wrong data'" which will "effectively authorize stops without probable cause or reasonable suspicion" is not an accurate portrayal of the court of appeals' decision in this case or its effect. (Harris's Pet. 14.) Ultimately, the court applied established Wisconsin precedent about when "[a]n investigatory traffic stop is justified by reasonable suspicion of criminal activity." *Harris*, 2021 WL 3238873, ¶ 11.

In summary, because this case does not present a real or significant question of constitutional law, this Court should deny Harris' Petition.

B. Error correction is unnecessary and this Court has already established that no bright-line rule is possible for what type or amount of evidence is necessary to reasonably suspect a driver of drunk driving.

Harris next argues this case warrants review because the court of appeals "incorrectly stated that the 'vehicle repeatedly deviat[ed] from [the] lane of traffic and cross[ed] the center line.'" (Harris's Pet. 5 (alterations in original) (emphasis omitted).) Harris therefore asks this court to grant review to "correct this misstatement." (Harris's Pet. 5.) Harris also argues this case presents the Court "an opportunity to address what quantum of evidence is necessary to reasonably suspect a driver of drunk driving." (Harris's Pet. 5.)

First, as to the alleged error, the court of appeals was referring to the fact that Harris' car had "weave[d] within its lane" as this is how the court described it in other parts of its

opinion. *Harris*, 2021 WL 3238873, ¶¶ 2, 8. This does not present an error that merits this Court's review as it will amount to merely a rephrasing of the court of appeals' decision and will not change the outcome of this case.

Second, it is well-established that this Court looks at the totality of the circumstances and not a specific type or number of facts to determine whether reasonable suspicion exists to justify an investigative stop. *State v. Post*, 2007 WI 60, ¶ 27, 301 Wis. 2d 1, 733 N.W.2d 634. In *Post*, this Court pointed out there can be no "bright-line rule" for when reasonable suspicion exists sufficient to make an investigatory stop because this Court has consistently held this determination is based on the "totality of the circumstances." *Id.* ¶¶ 18–27. Therefore, Harris' argument that this case presents the court with a new opportunity to "address what quantum of evidence is necessary to reasonably suspect a driver of drunk driving," (Harris's Pet. 5), has already been asked of and answered by this Court.

While the *Post* court held that a single weave within the same lane is not enough to create the reasonable suspicion necessary to conduct an investigative traffic stop, that is not what happened here. *Post*, 301 Wis. 2d 1, ¶ 38. Here, the police officer observed Harris' "vehicle cross the center line . . . and then weave within its lane." *Harris*, 2021 WL 3238873, ¶ 2. As required by this Court's precedent, the court of appeals pointed to other facts justifying the investigatory traffic stop, specifically the fact that Harris crossed the center line, that it was late at night, and that Harris was in an area where there were numerous taverns. *Id.* ¶ 12.

Accordingly, the court of appeals' decision is in line with United States Supreme Court and this Court's precedent. *See Post*, 301 Wis. 2d 1 (holding the totality of the circumstances gave rise to reasonable suspicion necessary to conduct an investigative traffic stop); *see also Whren v. United States*, 517 U.S. 806 (1996) (constitutional reasonableness of traffic stops

does not depend on the actual motivations of the individual officers involved).

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In summary, there is no basis for this Court's review under Wis. Stat. § (Rule) 809.62(1r).

CONCLUSION

This Court should deny Harris' Petition for Review.

Dated this 13th day of September 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Loryn L Limoges

LORYN L. LIMOGES
Assistant Attorney General
State Bar #1094653

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
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(608) 294-2907 (Fax)
limogesll@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this response is 1,267 words.

Dated this 13th day of September 2021.

Respectfully submitted,

Loryn L Limoges

LORYN L. LIMOGES
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

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

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

Dated this 13th day of September 2021.

Respectfully submitted,

Loryn L Limoges

LORYN L. LIMOGES
Assistant Attorney General