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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2020AP000372 CR

JALEN F. GILLIE,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order from Milwaukee County Case No. 2018CM4005 Denying Defendant's Motion to Suppress Evidence entered by the Honorable Daniel J. Gabler, Circuit Court, Branch 29, Milwaukee County

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BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the traffic stop of Mr. Gillie's vehicle was illegal when the officer testified that the stop was only based on suspected illegal window tint without any specific details or observations.

   A. Circuit Court's Answer: No. Police had reasonable suspicion to conduct a traffic stop of Mr. Gillie's vehicle.

II. Whether the search of Mr. Gillie's vehicle was illegal when it was conducted without a warrant and officers only observed Mr. Gillie reach forward and bend down toward the driver floorboard.

   A. Circuit Court's Answer: No. Police had a legal basis to search Mr. Gillie's vehicle without a warrant.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issue can be set forth fully in the briefs. Publication is unnecessary as the issue presented relates solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE

On November 28, 2018 at approximately 5:08 p.m. Officer Jose Rivera pulled Jalen Gillie's vehicle over for suspected illegal window tint; even though the officer had only observed the vehicle for a few seconds. (24: 8-9, 14.) Officer Rivera testified at a motion hearing that he was a tint meter-trained officer. (*Id*. at 7.) Through his training he learned how to observe legal and illegal tint through normal observation; though he did specify any observations regarding Mr. Gillie's vehicle's windows. (*Id*. at 8.)

After Officer Rivera activated his squad lights Mr. Gillie immediately pulled over to the side of the road. (*Id*. at 14-15.) Officer Rivera was with his partner Officer Zachary Ramion and was also assisted by officers Casey Donahue and Ryan MacGregor. (*Id*. at 13.)

Officer Rivera approached the vehicle and ordered Mr. Gillie to lower the windows down so that he could see, which he complied. (*Id*. at 9.) Upon approaching the vehicle Officer Rivera observed Mr. Gillie, the driver of the vehicle, bend forward and reach down towards the driver floorboard. (*Id*.)

Officer Rivera testified that based on his training and experience Mr. Gillie reaching down is consistent with

someone attempting to hide a weapon or illegal contraband. (*Id.* at 10.) He was fearful that Mr. Gillie could be armed or attempting to conceal a weapon. (*Id.*)

Officer Rivera also testified that he was wearing a body camera during the traffic stop. (*Id.* at 18.) The body camera video showed that Officer Rivera told Mr. Gillie to put his hands up, which he did. (Motion Hearing Exhibit 1-CD starting at 45 seconds.) Officer Rivera then asked him what he was reaching down for. (*Id.*) Mr. Gillie stated he was on the phone. (*Id.*) The video showed a cell phone on Mr. Gillie's lap, (*Id.*) which Officer Rivera also testified that he observed. (24:16.)

Officer Rivera asked if there were any weapons in the car or CCW or anything like that. (Motion Hearing Exhibit 1-CD.) Mr. Gillie stated "No." (*Id.*) Officer Rivera asked "Are you sure?" (*Id.*) Mr. Gille stated "Yes." (*Id.*) Officer Rivera then asked Mr. Gillie to step out of the car as Officer Rivera opened the driver's side door. (*Id.*) Mr. Gillie remained seated and asked what he was stepping out for. (*Id.*) Officer Rivera indicated that he was reaching so he wanted to make sure there were no weapons. (*Id.*)

Mr. Gillie remained in the vehicle and asked again what he was stepping out for and Officer Rivera stated for weapons. (*Id.*) Mr. Gillie stated he didn't have any weapons

and asked again why he needed to step out of the car. (*Id.*) Officer Rivera stated he saw him reaching down. (*Id.*) Mr. Gillie sat in the vehicle as he asked multiple times why he needed to step out of the vehicle and that he did not have any weapons. (*Id.*)

Officer Rivera then grabbed both of Mr. Gillie's wrists while another officer also grabbed Mr. Gillie's left wrist. (*Id.*) Officer Rivera repeatedly stated to step out of the vehicle in order to check for weapons. (*Id.*) Officer Rivera asked if Mr. Gillie had a gun on him to which he stated "No." (*Id.*) Mr. Gillie then stepped out of the vehicle. (*Id.*)

Mr. Gillie was instructed to stand at the rear of his vehicle, which he did. (24:11, 20.) Officer Rivera testified that he patted down Mr. Gillie for safety concerns. (*Id.* at 11.) No weapons were located on Mr. Gillie's person. (*Id.*) He was then handcuffed. (Motion Hearing Exhibit 1-CD.) There were no other occupants in the vehicle. (24:13.)

Another officer searched the driver's compartment and the area to ensure there was not a weapon in the vehicle. (*Id.* at 11.) Upon searching the driver's compartment, the officer found a loaded nine-millimeter firearm that was

wedged between the driver seat and the center console. (*Id.*)

Officer Rivera then looked at the firearm in the vehicle and described that he was not able to see the firearm from standing outside of the vehicle. (*Id.* at 21.) Officer Rivera had to stick his head inside the vehicle and look between the seat and center console in order to see the firearm. (*Id.* at 21-22.)

Officer Rivera then searched the vehicle and observed in plain view a clear corner-cut bag of suspected cocaine on the driver floorboard. (*Id.* at 12.) Officer Rivera also searched the center console and located a plastic bag of suspected marijuana. (*Id.*)

Officer Rivera asked Mr. Gillie if he had a carry concealed weapons permit and he stated he did not. (*Id.*) That information was also confirmed through a database. (*Id.*)

Officer Casey Donahue also testified at the motion hearing. (*Id.* at 23.) He testified that he was trained on measuring tint on car windows. (*Id.* at 24.) He was also certified in conducting tint meter readings. (*Id.* at 25.) He indicated that a Milwaukee city ordinance states that tinting of vehicle windows cannot be below fifty percent in

the front windows and thirty-five percent in the rear windows. (*Id.*)

Officer Donahue conducted a tint reading of Mr. Gillie's vehicle. (*Id.*) He testified that the driver's side window tint was 21.8 percent; the rear driver's side window tint was twenty-three percent; the passenger side window was 21.4 percent; and the rear passenger window was 15.9 percent. (*Id.* at 26.) He stated that all of the window tint was illegal. (*Id.*)

Mr. Gillie was later charged with carrying a concealed weapon, possession of THC and possession of cocaine. (1:1.) He subsequently filed a Motion to Suppress the evidence obtained from the illegal traffic stop and search and seizure of Mr. Gillie's vehicle. (6:1.) Mr. Gillie argued: (1) the police did not have reasonable suspicion to stop the vehicle, (2) the officers lacked reasonable suspicion to question Mr. Gillie about the presence of a firearm in the vehicle and to perform a *Terry* frisk and (3) the officers lacked probable cause to conduct a warrantless search of Mr. Gillie's vehicle. (*Id.* at 2-9.)

The State argued that (1) the officers had reasonable suspicion to conduct a traffic stop of Mr. Gillie's vehicle, (2) it was proper for officers to ask questions regarding their safety during the traffic stop and (3) the

officers properly conducted a frisk of the driver's seat area of the vehicle. (7:1-7.)

A motion hearing was held in which testimony was taken. (24.) At the hearing, the State argued that (1) police had reasonable suspicion to stop Mr. Gillie's vehicle (2) police could question Mr. Gillie about weapons and (3) police had reasonable suspicion to search Mr. Gillie's vehicle for weapons due to officer safety. (*Id*. at 32-34.)

Mr. Gillie argued (1) there was no reasonable suspicion for the traffic stop, (2) the traffic stop was illegally extended when police questioned Mr. Gillie about weapons and (3) there was no probable cause to search Mr. Gillie's car. (*Id*. at 35-39.)

The circuit court later issued an oral decision. (25.) The circuit court concluded there was reasonable suspicion to conduct a traffic stop. (*Id*. at 6.) The court found that Officer Rivera's observations were later confirmed by officer Donahue's testing of the windows that the windows were heavily tinted. (*Id*. at 6.)

The circuit court stated that "the law requires the window permits either equal or greater percent value of light to penetrate through particular windows, side windows fifty percent, rear windshield thirty-five percent, and Mr.

Gillie's windows varied from 15.9 percent to 21.8 percent." (*Id.*) Mr. Gillie's windows were tinted and an officer could reasonably conclude that Mr. Gillie's vehicle was in violation of the administrative law and municipal law that adopts the administrative code. (*Id.*)

The circuit court also found that the police did not extend the traffic stop to ask Mr. Gillie about a gun in the vehicle. (*Id.* at 12-13.) The police had a reasonable basis to be concerned for their safety based on their training and experience that Mr. Gillie may be concealing contraband or a weapon because of his furtive movement and initial refusal to get out of the vehicle. (*Id.* at 10.) Therefore, it made sense for the police to want to separate Mr. Gillie from the interior of the vehicle. (*Id.*)

Mr. Gillie's encounter with police was also "very, very fast." (Id. at 13.) Within thirty to forty-five seconds within the officer's encounter with Mr. Gillie he was out of the vehicle. (*Id.*)

The circuit court also concluded there was a legal basis to search Mr. Gillie's vehicle without a warrant. (*Id.* at 11.) The police had reasonable suspicion to believe that Mr. Gillie was concealing contraband. (*Id.*) The court explained that "Officer Rivera's concern and suspicion or probable cause to search the vehicle is based upon the fact

that police, in fact, did find a baggie containing suspected cocaine in the floorboards on the driver's side of Mr. Gillie's vehicle." (*Id*. at 11-12.)

Subsequently, Mr. Gillie pled guilty to and was convicted of carrying a concealed weapon. (13:1.) He now appeals his conviction.

STANDARD OF REVIEW

In reviewing a motion to suppress, this Court should apply a two-step analysis. *State v. Scull*, 2015 WI 22, ¶ 16, 361 Wis. 2d 288, 298, 862 N.W.2d 562, 566, *reconsideration denied*, 2015 WI 47, ¶ 16, 366 Wis. 2d 62, 862 N.W.2d 901.

First, this Court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id*. Second, this Court will apply constitutional principles to those facts independently. *Id*.

ARGUMENT

This Court should reverse the circuit court's decision that the evidence obtained during the traffic stop should not be suppressed. The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution guarantee citizens the right to be secure from unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11.

The temporary detention of an individual in a vehicle during a traffic stop by the police is a seizure within the meaning of the Fourth Amendment. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696, 698 (Ct. App. 1996).

Evidence obtained from an unreasonable search or seizure, in violation of the Fourth Amendment, can be suppressed as fruits of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963).

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION DENYING MR. GILLIE'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE TRAFFIC STOP OF MR. GILLIE'S VEHICLE WAS ILLEGAL.

An officer may conduct a traffic stop when he or she has reasonable suspicion to believe that a crime or traffic violation has been or will be committed under the totality of the circumstances. *State v. Popke*, 2009 WI 37, ¶ 23, 317 Wis. 2d 118, 132, 765 N.W.2d 569, 576. "The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." *Id.*

The question is "whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime."

Id. Reasonable suspicion cannot be based on an "officer's inchoate and unparticularized suspicion or hunch." *Id*.

In this case, the traffic stop was based on Officer Rivera's inchoate and unparticularized suspicion or hunch. Officer Rivera testified at the motion hearing that he had more than eleven years of experience as a police officer, he was tint meter trained, he learned "how to observe legal and illegal tint through normal observation," and he conducted a traffic stop of Mr. Gillie's vehicle for "suspected illegal window tint." (24:7-9.) That was the extent of his testimony regarding the reason for the traffic stop of Mr. Gillie and illegal window tint.

Officer Rivera's testimony did not support a finding that reasonable suspicion existed for the traffic stop. He did not testify at all about what he specifically observed about the windows on Mr. Gillie's vehicle to believe that they were illegally tinted. He did not testify at all about what makes tinting of a car window illegal or what level of tinting is illegal. He did not go into any detail regarding his training on how to observe illegal car window tint.

Officer Rivera did not point to any "specific and articulable facts" which would reasonably warrant the intrusion of the stop. In *State v. Conaway*, 2010 WI App 7, ¶ 8, 323 Wis. 2d 250, 255, 779 N.W.2d 182, 184, the court

held that an officer's testimony that he had thirteen years of experience as a state trooper, including training on use of a tint meter; that he was aware of the rear window thirty-five percent requirement; that he stopped between ten and one hundred vehicles for illegal window tint and that he stopped the defendant's vehicle because the rear window appeared to have dark window tint was not sufficient to supply reasonable suspicion to stop a vehicle for suspected window tint violation.

In *Conaway*, an officer stopped the defendant's vehicle for suspected window tint violation. *Id*. at ¶ 1. During the stop the officer located drugs and drug paraphernalia. *Id*. The occupants of the car later moved to suppress the drug evidence arguing "that the stop was not supported by reasonable suspicion that the rear window failed to meet the applicable light-pass-through standard in the administrative code. *Id*. The circuit court agreed and suppressed the evidence. *Id*. The court of appeals affirmed. *Id*.

The court described the window tint regulation at issue in that case which was that "rear window tinting is permitted only if the window allows at least thirty-five percent of light to pass through, except that the

limitation does not apply to tinting done during the original manufacture of a vehicle." *Id*. at ¶ 3.

The same window tint regulation is at issue in this case. Officer Donahue testified at the motion hearing that the Milwaukee city ordinance states that tinting of vehicle windows cannot be below fifty percent in the front windows and thirty-five percent in the rear windows. (24:25.) Additionally, the State's Response to Defense's Motion to Suppress in this case cited Wis. Admin Code Trans Statutes § 305.32(4)(b) and (5)(b) as the applicable window tint regulation, which is the same as specified in *Conaway*. (State's Response to Defense's Motion to Suppress p. 3.)

The court in *Conaway* explained that "the officer in [that] case did not need to be able to ascertain with certainty that there was a window tint violation." *Conaway*, 2010 WI App 7 at ¶ 7. Officers do not need to distinguish with the naked eye small variations in the amount of light that passes through windows. *Id*. Instead, an "officer need only reasonably suspect that the window violates the regulation." *Id*.

The court indicated "focusing solely on the 35%-light-pass-through requirement, it would be enough, for example, if an officer testifies that he or she is familiar with how dark a minimally complying window appears and that the

suspect window appeared similarly dark or darker, taking into account the circumstances of the viewing." *Id.* However, the officer in that case "did not provide any specific, articulable facts supporting reasonable suspicion of a violation." *Id.* at ¶ 8.

The court explained that the officer's testimony of his experience made no connection between his longevity or his tint meter training and his ability to differentiate between legally and illegally tinted glass. *Id.* at ¶ 9. For example, the officer did not explain that he had experience in correctly identifying windows that failed the tinting limitation. *Id.*

In the present case, although Officer Rivera stated he was trained in observing legal and illegal tint through normal observation he gave no details as to how he makes those observations, what he looks for or what observations he made in this case to believe the windows were illegally tinted. (24:8.) He also made no connection between his experience as an officer and his ability to differentiate between legally and illegally tinted glass. Further, he never indicated that he had actual experience in correctly identifying windows that failed the tinting limitation.

The court in *Conaway* went on to explain that "the officer [knowing] that a tinted rear window must allow at

least thirty-five percent of light to pass through does not show that he had the ability to look at a particular window and estimate whether it might fail the standard. *Conaway*, 2010 WI App 7 at ¶ 10. In this case, Officer Rivera did not even indicate that he was aware of the window tint regulation or what constitutes illegal tint on a car window, much less that he had the ability to look at Mr. Gillie's car windows and estimate whether it failed the standard.

The court in *Conaway* stated the fact that the officer had stopped numerous other vehicles for suspected window tint violations added nothing. *Id*. at ¶ 11. The officer did not testify whether or not his prior suspicions were ever verified by subsequent testing. *Id*. Therefore, he might have a very poor track record as far as the record disclosed. *Id*.

In the present case, Officer Rivera never even indicated that he had any prior experience in stopping other vehicles for suspected window tint or that his prior suspicions were verified by subsequent testing.

Finally, the court in *Conaway* stated that the officer's testimony that he stopped the defendant's vehicle because the rear window appeared to have "dark window tint" said nothing about the officer's ability to distinguish

between legal tinting and tinting that comes anywhere close to violating the code. *Id*. at ¶ 12.

In the present case, Officer Rivera testified to even less by stating he pulled Mr. Gillie over for "suspected illegal window tint." (24:8.) There was no detail of his observations of the windows at all, no information on his knowledge of what the code or regulation on window tinting allows or how he distinguished between legal and illegal window tinting.

The court in *Conaway* concluded that "nothing in the officer's testimony provide[d] a basis for a finding that the officer had the ability to judge whether a tinted rear window came close to or failed to meet the 35%-light-pass-through requirement." Just as the court concluded in *Conaway*, this Court should find that Officer Rivera's testimony did not support a finding that he had the ability to judge whether a tinted rear window came close to or failed to meet the 35%-light-pass-through requirement. Therefore, the reasonable suspicion requirement was not met.

The circuit court in this case found reasonable suspicion for the traffic stop based on "Officer Rivera's observations, later confirmed by Officer Donahue's testing of the windows- that the windows were heavily tinted."

(25:5-6.) The circuit court went on to explain that "the law requires the window permits either equal or greater percent value of light to penetrate through particular windows, side windows fifty percent, rear [windows] thirty-five percent and Mr. Gillie's windows varied from 15.9 percent to 21.8 percent." (*Id.* at 6.)

The circuit court then concluded because the windows were tinted an officer in Officer Rivera's position could reasonably conclude that Mr. Gillie's vehicle was in violation of the administrative law as well as the municipal law that adopts the administrative code. (*Id.*)

However, the circuit court's conclusion is based on circular logic, i.e. the windows were confirmed through testing to be illegally tinted after the traffic stop therefore it was reasonable for an officer to believe that the windows were illegally tinted before the traffic stop.

Additionally, there was absolutely no testimony from Officer Rivera regarding his observations of Mr. Gillie's vehicle's windows. He never even testified that the windows appeared dark, much less that the windows were "heavily tinted" as the circuit court found. (*Id.* at 5-6.)

Also, the tint meter readings conducted by Officer Donahue of Mr. Gillie's car windows after the traffic stop are irrelevant to the reasonable suspicion analysis. The

readings of the tint meter were not known to Officer Rivera at the time of the stop. Therefore, it cannot be used as a basis to support the reason for the traffic stop.

Officer Donahue testified at the motion hearing that he was trained on measuring tint on car windows and he was certified in conducting tint meter readings on windows. (*Id*. at 24-25.) He testified to his knowledge of the Milwaukee city ordinance which specifies the legal tint on car windows. (*Id*. at 25.) He also conducted the tint meter reading of Mr. Gillie's car windows and indicated that all the car door windows had illegal tint. (*Id*. at 25-26.)

However, Officer Donahue did not conduct the traffic stop of Mr. Gillie's vehicle nor was the information in his testimony known to Officer Rivera prior to conducting the traffic stop of Mr. Gillie's vehicle, including the tint meter readings of the windows. Therefore his testimony cannot be used to support a finding of reasonable suspicion as the circuit court tried to do.

Based on the testimony presented at the motion hearing, there was no basis to find reasonable suspicion for the traffic stop. Therefore, the traffic stop was illegal. The evidence obtained as a result of the stop should be suppressed.

Even if this Court found that the traffic stop was lawful, the evidence should be suppressed because it was obtained as a result of an illegal search.

II. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION DENYING MR. GILLIE'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE SEARCH OF MR. GILLIE'S VEHICLE WAS ILLEGAL.

"An officer conducting a protective search [must] have a reasonable suspicion to believe that the person is dangerous and may have immediate access to a weapon...." *State v. Johnson*, 2007 WI 32, ¶ 22, 299 Wis. 2d 675, 692, 729 N.W.2d 182, 190. This requirement "strikes a proper balance between two important interests: the safety of law enforcement officers and the right of persons to be free from unreasonable government intrusions. *Id.*

In *Johnson*, the court noted that the United States Supreme Court in *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) "held that officers may under the proper circumstances conduct a protective search of the passenger compartment of a vehicle during a traffics stop." *Johnson, 2007 WI 32 at ¶* 24. *Long* cited *Terry* in concluding that "such a search is justified when an officer reasonably suspects that the person is dangerous and may gain immediate control of weapons placed or hidden in the passenger compartment." *Id.*

However, the court in *Long* "stressed that its decision did not mean that the police may conduct automobile searches whenever they conduct an investigative stop." *Id.* at ¶ 26. The only basis for the search is the protection of the police officers and others nearby. *Id.* The protective search cannot be justified by any need to prevent the disappearance or destruction of evidence of a crime. *Id.*

In *Johnson*, two officers on patrol together pulled over a vehicle for an emissions violation and failure to signal for a turn. *Id.* at ¶¶ 2-4. It was dark outside, but the area was illuminated with street lamps. *Id.* at ¶ 3. The officers observed two people in the car. *Id.* One of the officers testified that he saw the driver of the vehicle, Johnson, "lean forward, which appeared to be reaching underneath his front seat." *Id.*

The other officer testified that he "observed [Johnson] make a strong furtive movement bending down as if he was reaching...underneath the seat...." *Id.* He stated that "the furtive movement was under the seat, his head and shoulders disappearing." *Id.* Both of the officers testified that based on their training and experience they believed that Johnson was attempting to conceal contraband or weapons because of his movement. *Id.*

The officers approached the vehicle and explained the reason for the stop. *Id*. at ¶ 4. Johnson provided the officer with paperwork that the emissions problem had been corrected. *Id*. The officer was satisfied that based on the paperwork the vehicle had passed the emissions test. *Id*. The officer did not ask Johnson about the movement both of the officers observed. *Id*.

Instead, the officer asked Johnson to step out of the car. *Id*. at ¶ 5. The officer explained that he was being asked to get out of the vehicle based on Johnson's movement inside of the car after being pulled over. *Id*. The officer testified that Johnson was asked to exit the vehicle "just for officer safety, not knowing what maybe he had been reaching for to either grab or to put down thinking it could possibly be a weapon that could injure us." *Id*.

The officers then patted Johnson down for weapons for their safety at the back of the vehicle. *Id*. at ¶ 6. An officer advised Johnson that due to his movements they were going to search his vehicle. *Id*. at ¶ 7. Johnson stated he did not have a problem with that. *Id*. However, both of the officers stated that they intended to search the vehicle with or without Johnson's assent. *Id*.

An officer searched the vehicle and found a baggie of marijuana under the driver's seat. *Id*. at ¶ 8. Johnson was

arrested. *Id*. He later moved to suppress, among other things, the evidence found in the vehicle. *Id*. at ¶ 9.

The court first found that Johnson did not consent to the search of his vehicle as the State conceded. *Id*. at ¶ 14. The court then found that under the totality of the circumstances, Johnson's head and shoulder movement did not give officers reasonable suspicion to conduct a search of Johnson's vehicle. *Id*. at ¶ 36.

The court found there was no reasonable suspicion to search the vehicle even though the officers both testified that based on their experience they believed Johnson's movement was consistent with attempting to conceal contraband or weapons. *Id*. at ¶¶ 36-37. The court explained that Johnson was only suspected of driving with a suspended registration for an emissions violation and failing to signal for a turn. *Id*. at ¶ 40. These violations were in no way related to criminal activity or weapons possession. *Id*.

Johnson was not suspected of a crime associated with weapons possession. *Id*. at ¶ 41. Nor did officers have any prior contact with him to suggest that he was a dangerous person. *Id*. The traffic stop occurred in the early evening in a well-lit area. *Id*. Johnson was also cooperative with police. *Id*.

The court analogized the case to *State v. Kyles*, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449, where the court also concluded that officers lacked reasonable suspicion to conduct a protective search. *Johnson*, 2007 WI 32 at ¶ 41. There too Kyles was not suspected of a crime associated with weapons possession and officers had no prior contact with him to suggest that he was dangerous. *Id*.

The circumstances facing officers in *Kyles* were even arguably more dangerous than in *Johnson*. *Id*. at ¶ 42. In *Kyles*, officers were involved in a face-to-face confrontation with an unusually nervous suspect who refused to remove his hands from his pockets. *Id*. The stop also occurred in a high-crime area at 8:45 p.m. *Id*. While in *Johnson*, the only alleged basis for the protective search was the driver's movement that officers observed. *Id*.

The court also explained the factual distinction of other cases which found there was reasonable suspicion to justify a protective search. *Id*. at ¶ 38. Such as in *State v. Williams*, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, where the defendant was suspected of selling drugs, a crime that officers know to be associated with possession of deadly weapons. *Johnson*, 2007 WI 32 at ¶ 38. Additionally, officers in *Williams* were in a more vulnerable position as

their squad car was nose-to-nose with the suspect's van in a narrow, alley-like driveway. *Id*.

Another case that was distinguishable from *Johnson* was *State v. McGill*, 2000 WI 38, 234 Wis. 2d 560, 609 N.W.2d 795. *Johnson*, 2007 WI 32 at ¶ 39. In *McGill*, the defendant smelled of drugs and alcohol when stopped. *Id*. The officers had a basis for believing that ongoing criminal activity may be afoot. *Id*.

Additionally, the defendant in *McGill* exhibited odd behavior, including continuing to drive for several blocks when signaled by officers to pull over, exiting his vehicle and walking away after the stop and exhibiting extreme nervousness. *Id*. All of these factors provided a compelling basis to justify the frisk. *Id*. Those compelling circumstances were not present in *Johnson*. *Id*.

Those compelling circumstances were also not present in this case. Mr. Gillie was pulled over for suspected illegal window tint. (24:8.) Just like in *Johnson*, the reason for the traffic stop was in no way linked to criminal activity or weapons possession. *Id*. at ¶ 40. Also like in *Johnson*, the officers had no prior contact with Mr. Gillie to suspect that he was a dangerous person. *Id*. at ¶ 41.

Like in *Johnson*, the stop in this case occurred in the early evening at 5:08 p.m. *Id*. (24:8.) Like Johnson, Mr. Gillie was also cooperative with police as he pulled over immediately when Officer Rivera activated his squad lights, he rolled down his windows as instructed and he showed his hands as instructed. (*Id*. at 9-10, 14-15.) Although Mr. Gillie did not immediately step out of his vehicle as requested because he was asking "why," he did ultimately comply and exited the vehicle. (*Id*. at 10-11.)

Just like in *Johnson*, the search of the vehicle in this case was based solely on observing a movement of the driver. *Id*. at 42. Officer Rivera testified that after he pulled Mr. Gillie's vehicle over for suspected illegal window tint, he starting approaching the vehicle and observed Mr. Gillie "bend forward and reach down towards the driver floorboard." (24: 8-9.)

Officer Rivera testified that based on his training and experience Mr. Gillie's movement was "consistent with someone attempting to hide a weapon or illegal contraband...." (*Id*. at 10.) He stated that he was "fearful [Mr. Gillie] could be armed or attempting to conceal a weapon...." (*Id*.)

Officer Rivera's body camera video showed that he asked Mr. Gillie to put his hands up, which he did. (Motion

Hearing Exhibit 1-CD starting at 45 seconds.) He then asked Mr. Gillie what he was reaching down for. (*Id.*) Mr. Gillie stated he was on his phone, which was in his lap. (*Id.*) Officer Rivera then asked him if there were any weapons in the vehicle to which Mr. Gillie responded no. (*Id.*)

Officer Rivera asked Mr. Gillie to step out of the vehicle. (*Id.*) Mr. Gillie remained in the vehicle and asked multiple times why he needed to step out. (*Id.*) As Officer Rivera grabbed both of Mr. Gillie's wrists he explained that he wanted to make sure there were no weapons. (*Id.*) Ultimately, Mr. Gillie exited the vehicle and walked to the rear of his car. (*Id.*)

Officer Rivera testified that he patted Mr. Gillie down for his safety. (24:11.) He did not locate any weapons. (*Id.*) Mr. Gillie was then handcuffed. (Motion Hearing Exhibit 1-CD.) Clearly at this point Mr. Gillie did not have any immediate access to weapons because he was handcuffed and was outside of his vehicle with four officers. (*Id.*) There was also no reason to believe that Mr. Gillie was dangerous.

Yet Officer Rivera had another officer search the driver compartment area of the vehicle because Mr. Gillie was reaching and he wanted to make sure there was not a weapon in the vehicle. (24:11.)

Upon searching the vehicle the other officer located a loaded nine-millimeter gun wedged between the driver seat and center console. (*Id.*) Officer Rivera then searched the vehicle. (*Id.* at 12) He located a corner-cut bag of suspected cocaine on the driver floorboard and a bag of suspected marijuana in the center console. (*Id.*)

Just like in *Johnson*, the search of Mr. Gillie's vehicle for weapons based on officer's safety was not supported by reasonable suspicion. See *Johnson*, 2007 WI 32 at ¶ 36. The sole purported basis to search the car was because Mr. Gillie bent forward and reached down. (24:9, 11.) A similar movement of the driver in *Johnson* was also not enough to support reasonable suspicion for a protective search of a vehicle. *Johnson*, 2007 WI 32 at ¶ 36.

The court in *Johnson* acknowledged:

> Were we to conclude that the behavior observed by the officers here was sufficient to justify a protective search of Johnson's person and his car, law enforcement would be authorized to frisk any driver and search his or her car upon a valid traffic stop whenever the driver reaches to get his or her registration out of the glove compartment; leans over to get his wallet out of his back pocket to retrieve his driver's license; reaches for her purse to find her driver's license; picks up a fast food wrapper from the floor; puts down a soda; turns off the radio; or makes any of a number of other innocuous movements persons make in their vehicles every day.

Id. at ¶ 43.

Here too if the Court were to conclude that the behavior observed by Officer Rivera was sufficient to justify a protective search of Mr. Gillie's vehicle, law enforcement would be authorized to frisk any driver and search his or her car upon a valid traffic stop whenever the driver reaches for his or her phone. (See 24:10.)

An officer simply observing a driver's head and shoulders move or even disappearing from view does not support reasonable suspicion to conduct a protective search of a car. *Johnson*, 2007 WI 32 at ¶ 43. "Without more to demonstrate that, under the totality of the circumstances, an officer possesses specific, articulable facts supporting a reasonable suspicion that a person is dangerous and may have immediate access to a weapon, such an observation does not justify a significant intrusion upon a person's liberty." *Id*.

The protective search of Mr. Gillie's vehicle was not supported by reasonable suspicion. Therefore, it was an illegal search and the evidence obtained as a result should be suppressed.

The circuit court in this case found that police "had reasonable suspicion to believe that Mr. Gillie was concealing contraband." (25:11.) However, a protective search cannot be justified by any need to prevent the

disappearance or destruction of evidence of a crime. *Johnson*, 2007 WI 32 at ¶ 26.

The circuit court incorrectly concluded there was a legal basis to search Mr. Gillie's vehicle without a warrant. The circuit court explained that "Officer Rivera's concern and suspicion or probable cause to search the vehicle [was] based upon the fact that police, in fact, did find a baggie containing suspected cocaine in the floorboards...on the driver's side of Mr. Gillie's vehicle. (25:11-12.)

Again the circuit court based its decision on circular logic, i.e. the police found drugs in Mr. Gillie's vehicle therefore the police had probable cause to search Mr. Gillie's vehicle. The fact that police found drugs after searching the vehicle is irrelevant in the analysis of whether the police had a legal basis to search the vehicle.

The police did not have probable cause to search Mr. Gillie's vehicle for drugs. The only purported basis for the search of the vehicle given in Officer Rivera's testimony was based on officer's safety to check for weapons. (24:11.) There was no testimony presented regarding a basis to search the vehicle for drugs.

The warrantless search of Mr. Gillie's vehicle was not supported by probable cause or reasonable suspicion for a

protective search. Therefore the search of the vehicle was illegal and the evidence obtained should be suppressed.

CONCLUSION

For the foregoing reasons, Mr. Gillie respectfully requests that the Court reverse the circuit court's decision and grant his motion to suppress evidence.

Dated this 26th day of May, 2020.

Respectfully Submitted,

_____

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CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 29 pages.

Dated this 26th day of May, 2020.

_____
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: this electronic brief is identical in content and format to the printed form of the brief as of this date.

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

Dated this 26th day of May, 2020.

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