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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2020AP000372-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JALEN F. GILLIE,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order from
Milwaukee County Case No. 2018CM004005 Denying
Defendant’s Motion to Suppress Evidence entered by the
Honorable Daniel J. Gabler, Circuit Court, Branch 29,
Milwaukee County

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

- I. Whether police officers had reasonable suspicion to conduct a traffic stop of Mr. Gillie's vehicle because police suspected the vehicle possessed illegal window tint?

Circuit court's response: Yes.

- II. Whether police officers had reasonable suspicion to conduct a search of Mr. Gillie's vehicle because police observed him reach forward and bend down toward the driver's side floorboard?

Circuit court's response: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On November 28, 2018, City of Milwaukee Police Officers Jose Rivera and Zachary Ramion were patrolling the area of 400 West Garfield Avenue, Milwaukee, Milwaukee County, Wisconsin. (R. 24:6-13.)¹ Officer Rivera has been employed by the City of Milwaukee Police Department for over eleven years, is a tint meter trained officer and narcotics testing officer, and is currently assigned to District 5's anti-gang unit. (R. 24:6-7.) Officer Rivera specified that the area District 5 covers is known for a high level of crime, including shootings, homicides, and violent crimes. (*Id.*) In his training, Officer Rivera learned how to observe legal and illegal tint through normal observation. (R. 24:8.) On this date, Officer

¹ This brief cites to the record contained in 2020AP000372-CR as "R. _:_." The first number indicates the identification of the document in the record and the second number indicates the page of that document.

Rivera was assigned to Milwaukee Police District Five and a member of the Anti-Gang Unit. (R. 24:7.) Milwaukee District Five is commonly known for being a high crime area – shootings, homicides, and violent crimes. (R. 24:7-8.)

On the above date, at approximately 5:08 p.m., it was a dark November evening, and Officer Rivera observed a silver Nissan 4-door vehicle travelling eastbound in the 400 block of West Garfield Avenue. (R. 24:8, 19.) Officer Rivera conducted a traffic stop because he suspected the window tint on the vehicle was illegal. (R. 24:8.) The officers activated their squad lights and conducted a stop of the silver Nissan 4-door vehicle. (R. 24:8-9.) Assisting with the traffic stop were Milwaukee Police Officers Casey Donahue and Robert Gregory. (R. 24:11, 13.)

Upon exiting the squad car, Officer Rivera approached the stopped vehicle and ordered the occupants to lower the window so he could see. (R. 24:9.) The driver lowered his window and Officer Rivera approached the vehicle. (*Id.*) During the approach, Officer Rivera observed the driver, bend forward and reach down towards the driver floorboard. (*Id.*) This movement caught Officer Rivera's attention; through his training and experience, the driver's bend forward movement was consistent with someone attempting to hide a weapon or illegal contraband. (R. 24:10.) Officer Rivera indicated this made him fearful that the driver was armed or was attempting to conceal a weapon. (*Id.*)

Upon seeing the movement, Officer Rivera asked the driver to show his hands. (*Id.*) The driver, later identified by a Wisconsin identification as Jalen Gillie, complied by showing Officer Rivera his hands. (*Id.*) Officer Rivera then asked Mr. Gillie what he was reaching for and Mr. Gillie responded with "A cell phone." (*Id.*) Officer Rivera then asked Mr. Gillie if there were any weapons in the vehicle, and Mr. Gillie said "No." (*Id.*) Officer Rivera ordered Mr. Gillie to step out of the car to ensure that Mr. Gillie was not armed. (*Id.*) Mr. Gillie refused to exit the vehicle. (R. 24:10-11.) Officer Rivera commanded several times to Mr. Gillie to exit the vehicle, but Mr. Gillie defiantly remained in the vehicle. (R. 24:11.) The Officers, fearing for their safety and under the belief that Mr. Gillie had a weapon in the vehicle, took control of Mr. Gillie's

hands. (*Id.*) Mr. Gillie finally complied and exited the vehicle. (*Id.*)

After Mr. Gillie exited the vehicle, to ensure Officer Rivera's immediate safety, the officer conducted a pat-down of Mr. Gillie's person. (*Id.*) No weapons were found on Mr. Gillie's person. (*Id.*) Mr. Gillie was directed to stand at the rear of the vehicle and the officer's checked the driver's side of the vehicle, the area where Officer Rivera had seen Mr. Gillie's movement during the traffic stop, to ensure that there was not a weapon. (*Id.*) There, wedged between the driver's seat and the center console, Officer Gregory located a loaded, black 9mm Smith and Wesson gun with the handle pointing upward. (R. 1:1-3; 24:11, 20.)

Upon finding the loaded gun in the vehicle, Officer Rivera also looked into the vehicle and observed in plain view a clear corner-cut bag of suspected cocaine on the driver's side floorboard. (R. 24:12.) Officer Rivera also searched the center console compartment of the vehicle and located Mr. Gillie's identification card and a plastic bag of suspected marijuana and Mr. Gillie's Wisconsin identification. (*Id.*)

During this time, Officer Donahue conducted a tint reading of the vehicle's windows. (R. 24:25.) Officer Donahue was trained and certified as a tint meter operator and certified to conduct tint meter readings. (R. 24:23-25.) Moreover, Officer Donahue has been employed by the City of Milwaukee Police Department for over five years. (R. 24:24.) As a trained and certified tint meter operator, Officer Donahue was knowledgeable of the Wisconsin law regarding window tint. (R. 24:25.) The Wisconsin law mandates that the front windows are above 50% transmissivity and the rear windows above 35% transmissivity. (*Id.*)

Officer Donahue, verifying that his tint meter reading equipment was calibrated and working properly, conducted a tint reading of Mr. Gillie's vehicle windows. (R. 24:25, 29-30.) Officer Donahue reported the following window tint readings: the driver's side window was 21.8%; the rear driver's side was 23%; the passenger side window was 21.4%; and the rear passenger window was 15.9%. (R. 24:26) According to Officer Donahue's tint meter readings, all Mr. Gillie's vehicle's

windows were illegally tinted. (*Id.*) In fact, Officer Donahue described the front driver's side window as "highly illegal." (*Id.*)

Subsequently, Mr. Gillie was arrested and charged with carrying a concealed weapon, possession of Tetrahydrocannabinols (THC), and possession of cocaine. (R. 1:1.) Mr. Gillie filed a Motion to Suppress the evidence obtained from the November 28, 2018, traffic stop and eventual search of his vehicle. (R. 6:2-7.) An evidentiary hearing was conducted by the circuit court. (R. 24.) During the evidentiary hearing, Officer Rivera's body camera video was admitted as Exhibit 1. (R. 24:18, 31.) The video depicts windows which are so dark that you cannot clearly see the driver. (Mot. Hr. Exh. 1 NRI.)

The circuit court determined that the stop and search was based upon articulable specific facts and reasonable inferences. (R. 25:6-11,13-15.) The circuit court concluded that the stop and search was reasonable and denied the motion to suppress. (*Id.*) The court particularly noted that Exhibit 1 was consistent with Officer Rivera's testimony and the court found Officer Rivera credible. (R. 24:44.)

On August 2, 2019, Mr. Gillie pled guilty to carrying a concealed weapon and the charges of possession of Tetrahydrocannabinols (THC), and possession of cocaine were dismissed and read in. (R. 29:4,37-43.) Mr. Gillie was consequently convicted of carrying a concealed weapon. (R. 13:1.)

Mr. Gillie now asks this court to reverse that conviction and the trial court's denial of his suppression motion.

STANDARD OF REVIEW

"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*, 2017 WI at ¶ 11).

ARGUMENT

I. Police Officers' Traffic Stop Was Valid As They Reasonably Suspected Mr. Gillie Was Violating Wisconsin Law.

A. Wisconsin law prohibits vehicle window tint that allows less than 50% of light passage through front side windows and less than 35% through the rear window.

Wisconsin Statute regulates how darkly a vehicle's windows may be tinted. Specifically, Statutes §§ 305.32(4)(b) and 305.32(5)(b) permit tinting that is performed by the vehicle's manufacturer during manufacturing. It also permits the subsequent application of a tinting film to the vehicle's *front side* window glazing so long as the film is not reflective and the "combination of the glazing and tinting film permits passage through the window of at least 50% of the visible light striking the window." Wis. Stat. § 305.32(4)(b)(1). Also, the statute permits the subsequent application of a tinting film to the vehicle's *rear* window glazing so long as the film is not reflective and the "combination of the glazing and tinting film permits passage through the window of at least 35% of the visible light striking the window." Wis. Stat. § 305.32(5)(b)(1).

B. An officer may stop a subject if there is suspicion, grounded in specific articulable facts and their reasonable inferences, that the subject has committed a crime.

The United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11; *State v. Artic*, 2010 WI 83, ¶28, 327 Wis. 2d 392, 412, 786 N.W.2d 430, 440. Wisconsin's prohibitions against unreasonable searches and seizures are neither broader nor narrower than the federal prohibitions. *State v. Eason*, 2001 WI 98, ¶47, 245 Wis. 2d 206, 243, 629 N.W.2d 625, 642. All evidence obtained by unreasonable searches and seizures in violation of the Constitution is inadmissible. *Mapp v. Ohio*, 367 U.S. 643, 655

(1961). A traffic stop is a seizure. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 56. The defendant bears the burden to produce evidence that suggests the State violated his rights, but the State bears the ultimate burden of persuasion. *State v. Jackson*, 229 Wis. 2d 328, 336, 600 N.W.2d 39, 43 (Ct. App. 1999).

Even when there is no probable cause to make an arrest, police officers may approach individuals to investigate possible criminal behavior. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). A police officer may conduct a stop if he or she *reasonably suspects* an individual is breaking the law in order to “obtain information confirming or dispelling the officer’s suspicions.” *State v. Houghton*, 2015 WI 79, ¶ 22, 364 Wis. 2d 234, 868 N.W.2d 143 (citation and internal quotations omitted). *State v. Young*, 2006 WI 98, ¶ 20, 294 Wis. 2d 1, 17, 717 N.W.2d 729, 737.

Reasonable suspicion exists if, under the totality of the circumstances, the facts would warrant a reasonable officer, in light of his or her training and experience, to reasonably suspect that a person has committed, was committing, or is about to commit a crime. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634. This is as a common-sense test that takes into account an officer’s training and experience. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681, 684 (1996). An unformed and vague suspicion is insufficient to support an investigatory stop. *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). However, “the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387, 392 (1999). Rather, the officer need only have “specific and articulable facts” that warrant the intrusion. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). As the Wisconsin Supreme Court notes, “the lines between hunch, reasonable suspicion, and probable cause are fuzzy, with each case requiring an examination of the facts.” *State v. Young*, 2006 WI 98, ¶ 22.

Officers are not required to exhaust the existence of other innocent inferences that could be drawn before commencing a temporary seizure. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763, 766 (1990). So long as the facts,

circumstance, and reasonable inferences suggest past, present, or future criminal conduct, officers have the right to temporarily freeze the situation in order to investigate further, notwithstanding the existence of other inferences that can be drawn. *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386, 391 (1989).

Specifically in the context of investigatory stops based on illegal vehicle window tint, Wisconsin courts have concluded that:

Officers need not, and likely cannot, distinguish with the naked eye small variations in the amount of light that passes through suspect windows. Reasonable suspicion does not require such precision. Rather, the officer need only reasonably suspect that the window violates the regulation. 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.

State v. Conaway, 2010 WI App 7, ¶ 7, 323 Wis. 2d 250, 254–55, 779 N.W.2d 182, 1849 (holding that under the specific facts, the officer lacked a reasonable suspicion to stop a car to investigate a suspected window tint violation).

Therefore, an officer's familiarity with an illegally tinted windows and their comparison to the window in question is sufficient to support a stop.

C. The officer reasonably believed that Mr. Gillie's vehicle's windows were excessively dark in violation of Wisconsin law.

In the current case, Officer Rivera was an eleven-year veteran of Milwaukee Police Department with tint meter training, which included training in how to discern legal and illegal window tinting by normal observation. (R. 24:7-8.) Officer Rivera testified he stopped Mr. Gillie's vehicle for suspected illegal tint and even asked the driver to lower his window so the officer could see properly. (R. 24:7-8.) Therefore, it is clear that the windows were so dark as to obstruct the officer's view of the inside of the vehicle. In fact,

Officer Rivera's suspicions were correct, the windows were illegally tinted, one of which was described as "highly illegal." (R. 24:26.)

Mr. Gillie argues that the officer who correctly suspected that the vehicle's windows were tinted in excess of code, did not have reasonable suspicion to believe the windows were illegally tinted and stop the vehicle. (Gillie's Br. 10-13.) Mr. Gillie relies on *State v. Conaway*, 2010 WI App 7, 323 Wis. 2d 250, 779 N.W.2d 182. However, in *Conaway*, there was no indication that the windows were ever tested or whether they were, in fact, illegally tinted. Also there is no indication in *Conaway* that a video of the stop was admitted. Therefore, *Conaway* is distinguishable on its facts. Unlike there, Officer Rivera did demonstrate his accuracy in determining window tint violations with Mr. Gillie's vehicle, which was, in fact, "highly illegal." (R. 24:26) Officer Rivera, upon viewing Mr. Gillie's car's windows, believed that the windows were excessively tinted to the point that the windows needed to be lowered to clearly see inside. (R 24:8-9.) Furthermore, the video itself shows that the windows were so dark that one cannot clearly see the driver. (Mot. Hr. Exh. 1 NRI.) It was reasonable for Officer Rivera, with his training and experience, to suspect that the windows were illegally tinted because they *were* illegally tinted. Therefore, the circuit court's conclusion that Officer Rivera had reasonable suspicion, was correct and this court should affirm. (R. 25:6-11,13-15.)

II. Police Officers had Reasonable Suspicion to Conduct a Protective Search of Mr. Gillie's Vehicle because The Officer Observed Mr. Gillie's Furtive Movement Towards the Driver's side Floorboard.

A. An officer may search a vehicle if there is suspicion, grounded in specific articulable facts and their reasonable inferences, that he or another is in danger of physical injury.

Wisconsin Statutes § 968.25 "permits an officer to search the passenger compartment of a vehicle for weapons where the individual who recently occupied the vehicle is stopped for temporary questioning under sec. 968.24, and the

officer reasonably suspects that he or another is in danger of physical injury.” *State v. Moretto*, 144 Wis. 2d 171, 174, 423 N.W.2d 841, 842 (1988) (internal quotations omitted). The search of the vehicle may extend to “areas in which a weapon may be placed or hidden.” *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

When considering whether an officer had reasonable suspicion justifying a protective search, courts “decide on a case-by-case basis, evaluating the totality of the circumstances.” *State v. Buchanan*, 2011 WI 49, ¶ 9, 334 Wis. 2d 379, 389, 799 N.W.2d 775, 780. It is an objective test, “[w]hether a reasonably prudent officer in the circumstances would be warranted in the belief that his or her safety or that of others was in danger because the person may be armed with a weapon and dangerous.” *State v. Bridges*, 2009 WI App 66, ¶ 11, 319 Wis. 2d 217, 225, 767 N.W.2d 593, 597. It is also a common sense test that considers “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *State v. Sutton*, 2012 WI App 7, ¶ 7, 338 Wis. 2d 338, 808 N.W.2d 411.). It does not require certainty. *Terry*, 392 U.S. at 27 (“The officer need not be absolutely certain that the individual is armed ...”). To the contrary, the “required showing of reasonable suspicion is low, and depends upon the facts and circumstances of each case.” *State v. Eason*, 2001 WI 98, ¶ 19.

Courts consider the time of day, area of the stop, and suspected activity. *State v. Williams*, 2001 WI 21, ¶ 51, 241 Wis. 2d 631, 661, 623 N.W.2d 106, 120. For example, in *State v. Alexander*, this court determined that the officer’s protective search was reasonable due to the stop occurring in a high-crime or violent area with numerous firearm-related crimes. 2008 WI App 9, ¶¶ 9-10, 307 Wis. 2d 323, 330, 744 N.W.2d 909, 913. Also, the Supreme Court has “consistently upheld protective frisks that occur in the evening hours, recognizing that at night, an officer’s visibility is reduced by darkness and there are fewer people on the street to observe the encounter.” *State v. McGill*, 2000 WI 38, ¶ 32, 234 Wis. 2d 560, 609 N.W.2d 795.

Additionally, an “unexplained reaching movement or a furtive gesture by a suspect... can be a factor in causing an officer to have reasonable suspicion that a suspect is dangerous

and has access to weapons.” *State v. Sumner*, 2008 WI 94, ¶ 26, 312 Wis. 2d 292, 307, 752 N.W.2d 783, 790 (citing *State v. Johnson*, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182). However, the simple act of ducking a head or shoulder in a furtive gesture, *without more*, is not enough to reasonably suspect someone may be armed. *See Johnson*, 2007 WI 32, ¶ 40. Because it is a fact-specific analysis, Wisconsin courts have distinguished numerous cases from *Johnson*. For example, in *State v. Bailey*, this court distinguished *Johnson*, stating:

We conclude that there are four key distinctions between the search in *Johnson* and the search of Bailey's vehicle: (1) Bailey's furtive-type movements were repeated; (2) Bailey was given a chance to explain and gave an apparently disingenuous response; (3) Bailey's stop was in a high crime area; and (4) Novack had experience recovering guns under similar circumstances and was genuinely concerned for his safety.

State v. Bailey, 2009 WI App 140, ¶¶ 35-37, 321 Wis. 2d 350, 369–70, 773 N.W.2d 488, 497. (pagination omitted).

Likewise, in *State v. Sutton*, the court determined that a protective search was reasonable due to “two large and distinct rocking motions” once a vehicle stopped. 2012 WI App 7, ¶ 8.

B. The police officers reasonably feared for their safety due to Mr. Gillie’s furtive movement and the police conducted a protective search of the vehicle.

Here, it was reasonable for Officer Rivera to suspect that Mr. Gillie was armed with a weapon, placing himself and others at risk, based on the combination of the high-crime area of the stop, Mr. Gillie’s specific and well defined furtive movement, Mr. Gillie’s lack of cooperation, and Officer Rivera’s training and experience.

Specifically, Officer Rivera was assigned to a high-crime area that was known for its high rate of shootings, homicides, and other violent crimes. (R. 24:6-7.) Officer Rivera testified that it was dark outside at the time of the stop. (R. 24:8, 19.) Because of the area and lighting conditions, the officers were on heightened alert for the safety of themselves and the community.

Officer Rivera also clearly articulated that Mr. Gillie made a very specific movement; he bent forward and reached down towards the driver floorboard. (R. 24:9-10.) Officer Rivera, who is assigned to an anti-gang unit in the high-crime area of District 5, testified that this drew his attention due to his training and experience, which identified Mr. Gillie's movement as consistent with someone attempting to hide a weapon or illegal contraband. (*Id.*) Officer Rivera testified that this specific movement caused him to fear for his safety and believe that Mr. Gillie was armed or was concealing a weapon. (*Id.*)

Further, Mr. Gillie was defiant with the officers and refused to exit the vehicle. (R. 24:10-11.) Officer Rivera commanded Mr. Gillie several times to exit the vehicle, but Mr. Gillie did not comply. (R. 24:11.) Mr. Gillie's defiance illustrates his intent to hide something. This defiance reasonably would put an officer on heightened alert for their safety.

Mr. Gillie argues that the current facts are identical to *State v. Johnson*, thus requiring suppression. However, *Johnson* is distinguishable. There, Johnson was stopped for an emissions violation and Johnson showed the officers documentation that the violation had been fixed prior to officers asking him to step out of the vehicle. 2007 WI at ¶ 4.

Therefore, the specific question which the *Johnson* court considered was "whether there was reasonable suspicion to justify a protective search ...after the traffic stop was resolved." *State v. Buchanan*, 2011 WI 49, ¶ 9 (emphasis added). Here, unlike *Johnson*, the reason for the stop had not been resolved before the protective search. And unlike in *Johnson*, the officers' suspicion was based on more than just the driver's furtive movement. Here, unlike Johnson, Mr. Gillie was not compliant with the officers. (R. 24:10-11.) This, in conjunction with the totality of the circumstances, was sufficient for Officer Rivera, to reasonably suspect Mr. Gillie was armed. Again, the officers here are experienced and well trained, the location of the traffic stop, the time day and darkness, along with the observation of Mr. Gillie's furtive movement toward the driver's side floorboard to conceal a weapon; led the officers to have reasonable suspicion to

conduct a search of Jalen Gillie's vehicle. Thus, it was reasonable for the officers to perform a protective search of Mr. Gillie's vehicle. Therefore, the Court should affirm the trial court's decision denying Mr. Gillie's motion to suppress.

CONCLUSION

For the reasons discussed, this Court should affirm the circuit court's denial of Mr. Gillie's motion to suppress and affirm his judgment of conviction.

Dated this _____ day of August, 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 word count of this brief is 3846.

Date

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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, if any, which complies with the requirements of s. 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.

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