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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

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Case No. 2020AP878-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

AVAN RONDELL NIMMER,  
Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF CONVICTION  
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,  
THE HONORABLE GLENN H. YAMAHIRO, PRESIDING

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**BRIEF OF PLAINTIFF-RESPONDENT**

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## ISSUE PRESENTED

Did police have reasonable suspicion to conduct a *Terry* stop of Avan Nimmer when they were investigating a report of shots fired minutes earlier, they encountered Nimmer in the exact location where the shots were fired, no other individuals were present, and Nimmer reacted to the officers by quickly walking away from them, blading his body to conceal his left side, and grabbing at that side?

The circuit court answered: Yes.

This Court should answer: Yes.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted because this Court can resolve the issue presented with a straightforward application of well-settled Wisconsin law regarding reasonable suspicion to conduct a *Terry* stop.

## INTRODUCTION

Nimmer, who was charged as a felon in possession, sought suppression of the gun police found on him during a *Terry* stop. The circuit court denied his request, holding that the officers had reasonable suspicion to stop Nimmer. Because the officers had reasonable suspicion to stop Nimmer under the circumstances, this Court should affirm.

## STATEMENT OF THE CASE

In June 2019, the State charged Nimmer with possession of a firearm by a felon. The charge resulted from a police investigation of a ShotSpotter report of shots fired at a particular address in Milwaukee. Officers drove to the location of the shots within minutes of the report, where they encountered Nimmer standing outside with his right hand in his pocket. (R. 1:1.) After conducting a *Terry* stop, police found

a gun in the waistband of Nimmer's pants and arrested him for violating the felon-in-possession statute. (R. 1:1.)

Nimmer moved to suppress the firearm that police recovered during the stop. (R. 5:3.) He argued that the stop was unsupported by reasonable suspicion that he was engaged in criminal activity. (R. 5:2.) After a hearing, the circuit court denied the motion, holding that the officers had reasonable suspicion to conduct the *Terry* stop under the circumstances. (R. 25:37.)

Nimmer pleaded guilty and was sentenced to two years' initial confinement followed by two years' extended supervision. (R. 26:3, 18.)

Nimmer appeals.

### STANDARD OF REVIEW

An appellate court reviewing the denial of a motion to suppress will uphold the circuit court's findings of fact unless clearly erroneous, but it reviews de novo whether those facts constitute reasonable suspicion. *State v. Young*, 2006 WI 98, ¶ 17, 294 Wis. 2d 1, 717 N.W.2d 729.

### ARGUMENT

#### **Reasonable suspicion supported the *Terry* stop.**

Contrary to Nimmer's position, the officers here had specific, articulable facts to believe that Nimmer was engaging in criminal activity. Thus, the investigative *Terry* stop was justified by reasonable suspicion. Because of that, Nimmer is not entitled to relief.

#### **A. The Fourth Amendment allows law enforcement to perform a *Terry* stop based on reasonable suspicion of criminal activity.**

A police officer may, consistent with the Fourth Amendment, conduct a brief, investigative stop when the

officer has reasonable, articulable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); Wis. Stat. § 968.24. To establish reasonable suspicion, the police officer must provide “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. This standard requires the officer to have “a particularized and objective basis” for suspecting the person stopped has been engaging in criminal activity. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). Reasonable suspicion is less demanding than probable cause and requires a showing less than a preponderance of the evidence, but it does require at least a minimal level of objective justification. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). To that end, the officer must be able to articulate more than just an “inchoate and unparticularized suspicion or ‘hunch’” of criminal activity. *Terry*, 392 U.S. at 27.

Reasonable suspicion may be found under a commonsense test that asks, under all the facts and circumstances, “[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience”? *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). In this sense, a police officer has reasonable suspicion to stop a person when he or she observes acts that are individually lawful, but when taken together, allow that officer to objectively discern “a reasonable inference of unlawful conduct.” *Id.* at 60.

When looking at the totality of the circumstances, police do not need to “rule out the possibility of innocent behavior before initiating a brief stop.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Additionally, suspicious activity by its very nature is ambiguous, and the principal function of the investigative stop is to resolve that ambiguity quickly. *Id.*

**B. The officers here had reasonable suspicion to conduct a *Terry* stop of Nimmer based on the combination of his location, seeming flight from the officers, and suspicious behavior.**

Here, Milwaukee Police Officer Anthony Milone testified that he was on duty on June 15, 2019, with his partner, Officer Chad Boyack. (R. 25:4–6.) He explained that they were traveling in a marked squad when they received a ShotSpotter alert of four rounds fired a few blocks away at 3390 North 21st Street. (R. 25:7.) Milone explained that ShotSpotter is a gunshot location system that uses acoustic sensors to locate gunfire and alert law enforcement to the location of the gunfire. (R. 25:4–5.) Milone explained that he has responded to over a thousand such alerts in his nine years as a police officer. (R. 25:6.) When responding to these alerts, Milone stated that he and other officers look for potential victims, suspects, witnesses, or other evidence identifying the source of the shots. (R. 25:6.) When Officer Milone finds individuals at the reported location of the shots, he observes “what their response is upon sight of police, see[s] if they are shot, see[s] if they take off running, see[s] if they start grabbing any part of their clothing, any part of their body.” (R. 25:6.)

Within about one minute after receiving the ShotSpotter alert, Milone and Boyack observed Nimmer at the intersection of 21st and Townsend, which was “basically the exact location where the ShotSpotter came in.” (R. 25:7–8, 12.) Other than Nimmer, Officer Milone did not observe anybody else at that location. (R. 25:8.) Milone noticed that Nimmer, who had not yet seen the officer, had his right hand in his right pants pocket. (R. 25:8.) When Nimmer turned and saw the squad car, Nimmer “immediately looked away and began accelerating his walking pace.” (R. 25:8.) Officer Milone stated that based on those observations and his professional

experience, he believed Nimmer was possibly trying to flee from them. (R. 25:8–9.)

After Nimmer sped up, he “began digging around his left side with his left hand.” (R. 25:9.) At that point, Milone got out of the squad car and approached Nimmer from behind. As he did so, Nimmer began turning his left side away from Milone so that Milone could only see Nimmer’s right side. (R. 25:9.) Officer Milone testified that in the meantime, Officer Boyack drove the squad car past Nimmer, stopped it, and stepped out. When that happened, Nimmer stopped walking. (R. 25:9–10.) Based on the ShotSpotter alert and their observations of Nimmer, the officers conducted a *Terry* stop. (R. 25:10.) Milone could not recall exactly how he performed the stop, but agreed that he unholstered his weapon, he likely ordered Nimmer to stop, and he likely told him to raise his hands. (R. 25:17.)

Nimmer complied with Milone’s orders, and Milone patted Nimmer down for weapons. (R. 25:10.) When Milone began the pat down, Nimmer informed him that he had a gun; Milone then retrieved a .40 caliber pistol from Nimmer’s waistband on his left side. (R. 25:10.) The officers learned from a records check that Nimmer had a felony conviction and placed him under arrest. (R. 25:11.)

The court found Officer Milone to be credible and made findings consistent with his testimony. (R. 25:35.) It found that the officers encountered Nimmer, and no one else, at the location of the ShotSpotter alert within a minute of receiving the alert. (R. 25:35.) It found that Nimmer sped up his walking pace in reaction to seeing the officers and bladed his body in a manner to conceal his weapon. (R. 25:35–36.) The key, the court found, was the close timing of the officers’ observations following the ShotSpotter alert: “[r]eally, anyone that they encountered within a minute or two of receiving the alert should have been investigated if they were within a couple of blocks of the alleged shots being fired.” (R. 25:36.) In



all, the court determined, the officers were “completely appropriate in their investigation in the ShotSpotter complaint.” (R. 25:37.)

Those findings were not clearly erroneous. Moreover, they support the conclusion that the police had reasonable suspicion to conduct the *Terry* stop of Nimmer. Based on Officer Milone’s testimony and the circuit court’s findings, the officers reasonably inferred that Nimmer was either the shooter or had knowledge of the shooting. The facts and observations supporting that reasonable inference follow: when officers first saw Nimmer, he was the only person in a location near where, just a minute earlier, four gunshots had been fired. His evasive reactions upon seeing the police confirmed that inference of involvement and suggested that he had a weapon that he either used or carried illegally and did not want police to see. To that end, as the circuit court found, Nimmer’s being the only person at the location of the shots fired authorized the officers to stop him in their investigation. Indeed, they would have been derelict in their jobs had they allowed him to simply walk away. *See Anderson*, 155 Wis. 2d at 84 (citing *Terry*, 392 U.S. at 23) (noting that officer’s failure to investigate a person’s flight from police “would have been poor police work”).

Finally, Nimmer does not challenge the reasonableness of Officer Milone’s pat-down search, and for good reason: officers may frisk a person during a *Terry* stop if the officer reasonably believes that the person is armed and poses a safety risk. *See Young*, 294 Wis. 2d 1, ¶ 55. Given that Officers Milone and Boyack had reasonable suspicion to believe Nimmer was involved in gun-related criminal activity, they had a basis to frisk him and retrieve the gun.

**C. *Pugh and Washington* do not assist Nimmer.**

Nimmer argues that he was simply asserting his right to walk away from a police officer and, without more, his

walking away could not be sufficient reasonable suspicion. (Nimmer's Br. 11.) As an initial matter, "[f]light at the sight of police is undeniably suspicious behavior" and, without more, can constitute reasonable suspicion to effectuate a *Terry* stop. *Anderson*, 155 Wis. 2d at 84. And in all events, there were more facts supporting reasonable suspicion than Nimmer's simply walking away: the ShotSpotter alert and Nimmer's blading the left side of his body from Milone and "digging" at that area.

As for Nimmer's blading away from Officer Milone, he argues that that conduct does not support reasonable suspicion, and invokes *State v. Pugh*, 2013 WI App 12, 345 Wis. 2d 832, 826 N.W.2d 418, and *State v. Washington*, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305, for support. (Nimmer's Br. 11–14.) Both of those cases are distinguishable from Nimmer's.

In *Pugh*, the officers on patrol observed Pugh outside a vacant building next to one that had been known for drug dealing. *Pugh*, 345 Wis. 2d 832, ¶¶ 2–4. The officers approached Pugh, asked him why he was there, and if he had any information about a drug house nearby. Pugh responded that he parked his car at the vacant building and he did not have any information about the drug house. *Id.* ¶¶ 4–5. One officer then grabbed Pugh; they asked whether he had anything illegal, and he told them that he had a gun. *Id.* ¶ 6. The officers said that while speaking with them, Pugh had slowly walked backward and bladed the right side of his body away from them, which made them believe that he was concealing a firearm. *Id.*

This Court held that the police lacked reasonable suspicion to stop Pugh under those circumstances because "without more, backing away from a police officer is not sufficient objective evidence supporting a reasonable suspicion that criminal activity is afoot or that [Pugh] was a threat." *Id.* ¶ 12. Additionally, Pugh's presence in an area of

expected criminal activity was not enough to support reasonable suspicion. *Id.* And finally, given that those other facts under the circumstances did not support reasonable suspicion, the blading alone was likewise not enough. *Id.*

Similarly, in *Washington*, there was no reasonable suspicion where officers stopped and seized Washington under the following circumstances: (1) they were investigating a vague complaint of loitering, (2) Washington was simply near a vacant building, (3) officers had no reason to believe that Washington was engaged in criminal activity, and (4) Washington's taking a few steps backwards from police before stopping and asking what he had done was not enough to "equate his actions with fleeing." 284 Wis. 2d 456, ¶¶ 14, 17.

*Pugh* and *Washington* are distinguishable from this case. To start, the officers here were investigating a report of shots fired at a specific location, not simply patrolling like the officers in *Pugh* or following up on a vague complaint of loitering as in *Washington*. The timing of the investigation here was important: the shots had been fired just minutes earlier, whereas in *Pugh* and *Washington*, there was nothing to suggest that police were investigating a recent or ongoing crime. Further, unlike in *Pugh* and *Washington* where the stops appeared to be more or less solely premised on Washington's and Pugh's slowly stepping away from police, there were more circumstances at play in Nimmer's case. In addition to his being the sole person outside the address where shots had been fired a minute earlier, Nimmer did not slowly back away. Rather, he sped up his pace in walking away, grabbed at his left side, and bladed his left side away as if to hide a weapon—i.e., an object that had a nexus to the disturbance and potential crime that the police were investigating—from the officers, who again, were justified in approaching him to investigate the report that someone had just shot a gun.

Of course, there could be innocent explanations for each of Nimmer's actions. But Officers Milone and Boyack were not required to rule out those innocent explanations before initiating a temporary stop to resolve any ambiguities. *See Anderson*, 155 Wis. 2d at 84. Accordingly, that one could formulate innocent reasons why Nimmer happened to be where shots had just been fired did not depreciate the officers' reasonable suspicion that Nimmer was involved in firing those shots.

Hence, the circuit court did not err in denying Nimmer's motion. He is not entitled to relief.

### CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 31st day of July 2020.

Respectfully submitted,

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### **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2390 words.

Dated this 31st day of July 2020.



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### **CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

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

Dated this 31st day of July 2020.



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