STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2020AP000999-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DAVONTA J. DILLARD,

Defendant-Appellant.

Appeal from An Order Denying Motion to Suppress Evidence, Entered by Branch 31, Milwaukee County Circuit Court, The Honorable Hannah C. Dugan Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

I. Whether police were justified in opening the rear door to Davonta Dillard's vehicle due to the exigent circumstance of threat to safety.

Circuit court's response: Yes.

II. Whether the arrest of Mr. Dillard and search of his vehicle were supported by probable cause.

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. § 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. § 809.23(1)(b)4.

STATEMENT OF THE CASE

On May 24, 2018, Milwaukee Police Officer Evan Domine, along with officers Gaglione, Hauser, Schnell, Davis, and McDowell, was on bicycle patrol near 2878 North 37th Street in Milwaukee, Wisconsin. (R. 1:1; 72:23.)[1] During their patrol, the officers made contact with Davonta Dillard, who was subsequently arrested and charged with carrying a concealed weapon in violation of Wis. Stat. § 941.23(2). (R. 1:1.)

Around 10:00 p.m., Officer Domine had observed a four-door silver Infiniti that appeared to be running without an occupant. (R. 72:9; 14.) Officer Domine, who could clearly see through the front windshield, suspected an ordinance violation for leaving an unoccupied running vehicle. (R. 72:9; 14.) However, he also suspected criminal activity because the

[1] This brief cites to the record contained in 2020AP000999-CR as "R._:_." The first number indicates the identification of the document in the record and the second number indicates the page within that document.

vehicle was running at night in front of houses in the area with the highest crime rate in Milwaukee; an area where burglaries and firearm offenses are common and burglars leave vehicles running in accessible places so they can quickly flee. (R. 72:9-10, 13-14, 29-30.) As a result, the officers approached. (R. 72:10.)

As they approached, the officers illuminated the vehicle with their flashlights. (R. 72:10; 52.) Officer Domine observed a person in the back seat of the vehicle. (R. 72:10.) The person looked at the police and lunged downward and out of view. (*Id*.; R. 72:51.) Due to the time of night and heavy tint on the front passenger, rear passenger, back windshield, and rear driver windows, the officers could no longer see the person through the windows. (R. 72:10-11, 26.) Also, due to the evasive action by the person in the vehicle, Officer Domine was concerned that the person in the vehicle may have been arming himself or engaged in other criminal activity. (R. 72:11-14; 40.) A vehicle stop is one of the most dangerous parts of Officer Domine's, or any officer's, duties. (R. 72:12.) Officer Domine is aware of situations where suspects pointed a firearm through a heavily tinted window at an officer on the other side, so Officer Domine believed it was necessary to get visual contact as soon as possible. (R. 72:11-14; 40.) As a result, Officer Domine opened the left rear door of the vehicle due to the extreme safety hazard he perceived. (R. 72:10-11.)

Upon opening the vehicle's door, Officer Domine observed the person in the vehicle, Davonta Dillard. (R. 72:12.) Officer Domine told Mr. Dillard to show his hands. (R. 72:37.) Due to his safety concerns, Officer Domine did not take normal perfunctory steps such as asking the vehicle occupant to roll down his window or asking for identification. (R. 72:36-38.) Officer Domine was not searching for contraband or other evidence of a crime. (R. 72:39-42.) Officer Domine opened the vehicle door only because he believed the person inside was a threat, and opening the door was the fastest way to deal with that threat. (R. 72:41-42.)

Mr. Dillard disregarded Officer Domine's instructions and immediately attempted to flee out the rear right door. (*Id*.; R. 72:51.) Officer Domine's bodycam showed a gun in plain view within Mr. Dillard's reach as he tried to flee. (R. 28; Mot.

Hr. Exh. 1 NRI.) Officers on the right side apprehended Mr. Dillard after he got a few steps from the vehicle. (R. 72:12.) The entire sequence of events took less than one minute. (R. 72:35-36.)

After Mr. Dillard had fled, a loaded .40 Ruger handgun was visible on the rear floor of the vehicle where he had been hiding. (R. 1:1.) A records check revealed that Mr. Dillard did not have a permit to carry a concealed weapon. (*Id*.) As result, Mr. Dillard was arrested and charged with carrying a concealed weapon. (*Id*.)

Mr. Dillard filed a motion to suppress the firearm discovered in the vehicle. (R. 9.) On October 30, 2018, the trial court conducted an evidentiary hearing during which Officers Domine and Gaglione both testified. (R. 72:1-2.) After testimony closed, Mr. Dillard withdrew his arguments related to reasonable suspicion for the seizure, when his attorney stated "I actually do believe that there is reasonable suspicion for the officers to approach the vehicle." (R. 72:61) On January 11, 2019, the trial court denied Mr. Dillard's motion. (R. 59:12.) The court concluded that exigencies, specifically officer safety, justified opening the vehicle door, and that officers had probable cause. (R. 59:10-13.)

On February 27, 2019, the trial court conducted a jury trial. (R. 62:1-5.) On February 28, 2019, Mr. Dillard was found guilty by a unanimous jury and was convicted of carrying a concealed weapon. (R. 65:40.)

Mr. Dillard now asks this Court to reverse that conviction and the trial court's decision to deny the motion to suppress.

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). If a circuit court fails to make a finding that exists in the record, this Court also assumes the circuit court

determined the fact in a manner that supports the circuit court's ultimate decision. *State v. Martwick*, 2000 WI 5, ¶ 31, 231 Wis.2d 801, 604 N.W.2d 552. "But the circuit court's application of the historical facts to constitutional principles is a question of law [this Court] review[s] independently." *State v. Smith*, 379 Wis. 2d 86, 96.

ARGUMENT

I. The Officers' Act of Opening the Vehicle Door Was Justified By The Threat To Safety Exigency.

A. Although Reasonable Suspicion is Not Needed To Approach A Vehicle, The Officers Here Reasonably Suspected At A Minimum A Vehicular Ordinance Violation

The officers had reasonable suspicion to approach the vehicle. This point was conceded by Mr. Dillard at the motion hearing. (R. 72:61-63.) Nevertheless, Wisconsin permits police officers to approach a vehicle, and even make contact with it, without reasonable suspicion. *Cty. of Grant v. Vogt*, 2014 WI 76, ¶ 32, 356 Wis. 2d 343, 362, 850 N.W.2d 253, 262 (finding defendant was not "seized" when officer knocked on his driver's window and asked him to roll it down).

Not every contact between the police and a citizen constitutes a seizure *State v. Young*, 2006 WI 98, ¶ 66, 294 Wis. 2d 1, 37, 717 N.W.2d 729, 747. A seizure only occurs when police restrain a person by show of authority or physical force. *United States v. Mendenhall*, 446 U.S. 544, 552 (1980). As long as a reasonable person would feel free to go about their business, a seizure has not occurred and the Fourth Amendment is not implicated. *State v. Luebeck*, 2006 WI App 87, ¶ 10, 292 Wis. 2d 748, 756, 715 N.W.2d 639, 643.

The officers had observed a running vehicle without an occupant. (R. 72:9.) The officers knew that a running vehicle without a person in it is a city ordinance violation. (R. 72:14.) The vehicle was also suspicious because it was left running in front of house in the later evening hours, when it is dark, in an area known for high crime and burglaries. (R. 72:9-10, 13-14, 29-30.) Accordingly, the officers approached the vehicle. (R.

72:10, 14.) At that point, officers had reasonable suspicion to believe the vehicle was, at a minimum, violating city ordinances.

However, while approaching the vehicle the "threat to safety" exigency quickly occurred when they suddenly observed a person in the rear seat take evasive action by diving out of view, given all of the surrounding circumstances—the person's actions, the location being inside high crime area fraught with burglaries and firearm offenses, the time of night, the high window tint, the officers' experience with vehicles, and the officers' knowledge of firearms in vehicles being used against officers. (R. 72:10-11.)

B. Wisconsin Law Allows Police Officers to Take Reasonable Actions Under Exigent Circumstances.

While a search or seizure generally must be justified by probable cause in a warrant, *Katz v. United States*, 389 U.S. 347, 358 (1967), exigent circumstances may justify warrantless searches. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298 (1967). Reviewing whether exigent circumstances exist is to be "directed by a flexible test of reasonableness under the totality of the circumstances." *State v. Ayala*, 2011 WI App 6, ¶ 17, 331 Wis. 2d 171, 183, 793 N.W.2d 511, 517 (internal citations and quotations omitted).

Wisconsin recognizes four situations in which exigent circumstances exist: (1) hot pursuit; (2) threat to safety, (3) destruction of evidence; and (4) likelihood of flight. *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 540–41, 612 N.W.2d 29, 37. An officer may forego a warrant when obtaining one would "gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." *Id.*, ¶ 30 (quoting *State v. Smith*, 131 Wis. 2d 220, 230, 388 N.W.2d 601, 606 (1986), abrogated on other grounds by *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775).

As the Wisconsin Supreme Court noted in *Richter*, it is unrealistic to expect officers to wait for a threat to fully unfold before taking action:

> This expects too much and puts too much at risk. In the course of investigating crimes in progress and pursuing fleeing suspects, police officers are often called upon to make judgments based upon incomplete information. The exigency at issue here is the threat to physical safety. To require a police officer in this situation to have affirmative evidence of the presence of firearms or known violent tendencies on the part of the suspect before acting to protect the safety of others is arbitrary and unrealistic and unreasonably handicaps the officer in the performance of one of his core responsibilities.

Richter, 2000 WI 58, ¶ 40 (finding warrantless entry into trailer home, in which burglary suspect had been seeing fleeing was justified by the threat to safety and hot pursuit exigencies). The test for a safety exigency is whether a police officer reasonably believes that delay in procuring a warrant would "gravely endanger life." *State v. Leutenegger*, 2004 WI App 127, ¶ 11, 275 Wis. 2d 512, 521, 685 N.W.2d 536, 541 (finding exigent circumstances justified warrantless entry of officer into defendant's garage to ascertain his welfare and also to prevent him from causing harm to others). Accordingly, if police officers reasonably suspect a threat to their safety, they may take action without a warrant.

C. The Officers Reasonably Believed That There Was a Grave Safety Risk To Their Lives Justifying Opening the Vehicle Door.

Officer Domine reasonably believed that Mr. Dillard posed a threat to his safety that would gravely endanger life, and that threat justified opening the vehicle door. The question of what constitutes reasonableness is a common-sense test. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 9, 733 N.W.2d 634, 638. A court must determine what a reasonable police officer should reasonably suspect in light of his or her training and experience. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681, 684 (1996).

Evasive behavior is a factor in determining reasonable suspicion of criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Flight, while not illegal, may give "rise to a reasonable suspicion that some sort of wrongful activity might be afoot." *State v. Anderson*, 155 Wis. 2d 77, 88, 454 N.W.2d 763, 768 (1990).

Officer Domine reasonably believed that there was a grave threat to his safety and the safety of the officers around him. The officers were in a high-crime area known for drug crimes, firearm crimes, and burglaries. (R. 72:10.) It was around 10:00 P.M., very dark, and the vehicle windows were heavily tinted. (R. 72:10-11, 14, 26.) The vehicle was left running outside of houses, consistent with burglars' practice of having a quick escape vehicle. (R. 72:13.) An individual in a suspicious situation had just quickly ducked out of sight. Given that interactions with individuals in vehicles is one of the most dangerous parts an officer's duties, and given the officer's awareness that some individuals point firearms through heavily tinted windows at an officer on the other side, Officer Domine's concern that Mr. Dillard was arming himself with a weapon that could be used against the officers was reasonable. (R. 72:12, 39.) In fact, Officer Domine's safety concerns proved to be correct given that a firearm was ultimately seen and recovered in the area where Mr. Dillard ducked out of view. (Mot. Hr. Exh. 1 NRI.) Given these circumstances, it was reasonable for Officer Domine to believe that the person in the vehicle posed a threat to his safety and to open the door to mitigate that threat with the minimal action of opening the vehicle door. (R. 72:39-40.)

Mr. Dillard, citing *Welsh v. Wisconsin*, argues that the gravity of the underlying offense must be considered in the context of threat-to-safety exigencies. (Appellant's Br. at 22.) However, *Welsh* is distinguishable and does not control here. *Welsh* found no exigency based on threat to safety, nor that of hot pursuit *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984). The *Welsh* Court clearly explained that the only potential exigency they were addressing was the potential dissipation of blood-alcohol content. *See id*. at 746 ("The State attempts to justify the arrest ... on the need to preserve evidence of the petitioner's blood-alcohol level."). The decision said nothing about the justification and permissible scope of protective actions performed by police during traffic stops. Furthermore, the "hot pursuit" doctrine allowing warrantless entry into a private home "is a much greater intrusion than a traffic stop and thus requires a greater governmental interest to be reasonable." *State v. Rissley*, 2012 WI App 112, ¶ 24 n.5, 344 Wis. 2d 422, 438, 824 N.W.2d 853, 862. Here, under the totality of the

circumstances, which culminated into a sudden and ongoing threat to officer safety, the officers' actions were reasonable.

D. The Minor Intrusion of Opening the Vehicle Door Was Warranted Due to Officers' Reasonable Safety Concerns.

When an officer believes criminal activity is afoot, he may take reasonable actions to dispel risks to his own or others' safety. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Courts should distinguish searches for evidence and protective searches and apply different standards for each. *Id*. at 8. The nature of the intrusion against the individual must be balanced against the importance of the interest justifying the intrusion. *United States v. Place*, 462 U.S. 696, 703 (1983). Officer safety is a legitimate and significant interest. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). An officer conducting a stop "should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams v. Williams*, 407 U.S. 143, 146 (1972).

Although private interior areas stand at the "very core" of the Fourth Amendment right to be free from unreasonable governmental intrusion, *Silverman v. United States*, 365 U.S. 505, 511 (1961), vehicles typically command a lower expectation of privacy. *Carroll v. United States*, 267 U.S. 132, 153 (1925).

Officer Domine's primary concern was for his safety and the safety of others. (R. 72:37-38.) Officer Domine was not searching for contraband or other evidence of a crime. (R. 72:39-42.) Officer Domine opened the vehicle door only to make sure that the person inside was not a threat. (R. 72:41-42.) Officer Domine opened the vehicle door because it was the fastest way to make contact with Mr. Dillard. (R. 72:37.)

When Officer Domine opened the door to the vehicle, he was doing so as a protective search. Officer Domine's concern was not in obtaining evidence, it was in protecting himself. Officer Domine did the quickest thing that he could in order to protect himself and the other officers.

Mr. Dillard suggests that Officer Domine should have taken other actions such as asking to roll down the window or

trying to speak through the window to Mr. Dillard. However, just because other actions are possible does not make those actions reasonable. Officer Domine had only moments to decide what action to take and he made the only reasonable choice.

Mr. Dillard also suggests that Milwaukee Police created the safety risk because they could have "simply walked away." (Appellant's Br. at 24.) Mr. Dillard relies upon *State v. Robinson* for the proposition that exigency cannot exist when law enforcement creates that exigency. *State v. Robinson*, 2010 WI 80, 327 Wis. 2d 302, 786 N.W.2d 463. However, that reliance is misplaced for two reasons: first, *Robinson* states that when law enforcement behaves in a lawful manner, they are not the creators of exigency. *Id.*, ¶ 32. Second, there is no way to know beforehand whether ignoring a safety risk will dissipate or escalate that risk. Suggesting that officers should just turn their backs on potentially armed individuals in suspicious circumstances is inconsistent with the logic in *Richter* that is noted above.

Officer Domine reasonably believed that Mr. Dillard was a threat, and he took the only reasonable action by opening the vehicle door. Therefore, the Court should affirm the trial court's decision.

II. Officer Domine Observed In Plain View Evidence of Criminal Activity That Provided Probable Cause to Arrest Mr. Dillard and Search the Rest of the Vehicle.

Police may search a vehicle without a warrant and without a showing of exigent circumstances where there is probable cause to believe that evidence of a crime is inside the vehicle. *State v. Tompkins*, 144 Wis. 2d 116, 137-38, 423 N.W.2d 823 (1988). *See also California v. Acevedo*, 500 U.S. 565, 580 (1991) (providing that police may search containers within the vehicle when probable cause exists to believe evidence may be hidden there). Similarly, warrantless arrests supported by probable cause are lawful. *State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 391, 766 N.W.2d 551, 555.

Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. *Adams v. Williams*, 407 U.S. 143, 149 (1972). Probable cause is a nontechnical determination that views the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). Probable cause is flexible and based upon the assessment of probabilities in particular factual contexts. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003).

As soon as Officer Domine opened the door to the vehicle to mitigate the safety threat to him and the other officers, evidence of a crime was in plain view. The firearm, which was on the floor in the rear of the vehicle within Mr. Dillard's reach, was in plain view of the open door was otherwise concealed from ordinary observation outside the vehicle. (R. 1:1; R. 72:37; Mot. Hr. Exh. 1 NRI.) Even firearms lying on a vehicle's front seat are "concealed" within meaning of Wisconsin's concealed weapon statute § 941.23. *State v. Walls*, 190 Wis. 2d 65, 526 N.W.2d 765 (Ct. App. 1994). Mr. Dillard also resisted officers' attempts to detain him as he fled from the vehicle. (R. 72:35.) *See* Wis. Stat. § 946.41. Accordingly, probable cause existed to both immediately search the vehicle for contraband, namely for the violation of § 941.23, and to arrest him with violating both statutes.

The bulk of the trial court's decision focuses on the exigent circumstances surrounding the police contact with Mr. Dillard. (R. 58:6-12.) However, Mr. Dillard asked for clarification "that there's probable cause to search when the door was open or that the actions were justified by the exigent circumstances?" (R. 58:12.) The trial court added that it was finding both probable cause and exigent circumstances "well, really, both." (R. 58:12.) Unfortunately, the record is not totally clear on whether the trial court concluded that probable cause existed to justify opening the vehicle's door or in some other context.

Nevertheless, this Court need not decide that issue. Exigency existed to open the vehicle's door, and once the door was open, probable cause existed both to search and to arrest. Accordingly, the subsequent search of the vehicle and arrest of Mr. Dillard were reasonable. Therefore, this Court should affirm the trial court's decision to deny Mr. Dillard's motion.

CONCLUSION

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

Dated this 14th day of December 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 3525.

_____ _____
Date Anthony Moore
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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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