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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LATASHA RENEE BLACK,

Defendant-Appellant.

Appeal

No. 2020-AP-1483 CR

Milwaukee Circuit Court Case
No. 2018-CF-2513

Three-Judge Panel

BRIEF OF DEFENDANT-APPELLANT

Appeal from the Circuit Court of Milwaukee County,
Honorable Milton Childs, Judge.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE PRESENTED FOR REVIEW	1
STATEMENT ON ORAL ARGUMENTS AND PUBLICATION	2
STATEMENT OF THE CASE	3
I. Nature of the case.....	3
II. Procedural history and disposition in the trial court	3
III. Statement of facts	4
IV. The trial court’s findings.....	7
ARGUMENT	7
I. Standard of review for motion to suppress	7
II. Legal standard as to whether a stop is unconstitutional	8
III. The trial court’s finding of one material fact was clearly erroneous.....	9
IV. The trial court misapplied the law because it did not examine whether the stop was reasonable in the first place.....	10
V. If the trial court had applied the law correctly, it would have found the stop unreasonable and granted the Motion.	10
CONCLUSION	15
CERTIFICATION AS TO FORM AND LENGTH	16
CERTIFICATION AS TO TEXT OF ELECTRONIC BRIEF	17
CERTIFICATION REGARDING ELECTRONIC APPENDIX	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

Cases

<i>Curley v. Klem</i> , 499 F.3d 199 (3d Cir. 2007).....	8
<i>Hoover v. Walsh</i> , 682 F.3d 481 (6th Cir. 2012)	12
<i>Johnson v. State</i> , 602 S.W.3d 50 (Tex. App. 2020)	13
<i>Karnes v. Skrutski</i> , 62 F.3d 485 (3d Cir. 1995)	8, 14
<i>State v. Brown</i> , 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66	8
<i>State v. Glover</i> , 2011 WI App 58, 332 Wis. 2d 807, 798 N.W.2d 321	9, 10
<i>State v. Houghton</i> , 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143.....	8
<i>State v. Nagel</i> , 2020 VT 31, 232 A.3d 1081, 1087 (Vt. 2020)	12
<i>State v. Post</i> , 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634	8, 9, 11
<i>State v. Sloan</i> , 2007 WI App 146, 303 Wis. 2d 438, 736 N.W.2d 189	8
<i>U.S. v. Bohman</i> , 683 F.3d 861 (7th Cir. 2012)	12, 13, 14
<i>Ybarra v. Illinois</i> , 444 U.S. 85 (1979).....	12

Constitutions

U.S. Const. amend. IV	8
Wis. Const. art. I, § 11	8

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Issue: Was the stop of Ms. Black's car permissible under the U.S. Constitution and the Wisconsin Constitution when she was parked legally with allegedly unusual behavior as to lights and moving the car and with possible proximity to a suspected drug house?

Circuit court's decision: Yes.

Appellant's answer: No, because the police did not have a reasonable suspicion of the commission of a crime to justify the stop of Ms. Black's car.

STATEMENT ON ORAL ARGUMENTS AND PUBLICATION

Ms. Black does not request oral argument in this matter because it appears to meet the criteria for submission on briefs pursuant to Wis. Stat. (Rule) § 809.22(2).

Ms. Black does not request publication of the opinion in this matter because this appeal does not appear to meet any of the criteria for publication set forth in Wis. Stat. (Rule) § 809.23.

STATEMENT OF THE CASE

I. Nature of the case

The police stopped Ms. Black's car, searched the vehicle, and found narcotics. No violation of law prompted the stop, and the police had no reasonable suspicion that criminal activity was afoot. The trial court made an error of law when considering whether the stop was reasonable: the court examined all facts between the police's first spotting of Ms. Black and the finding of the narcotics. The court should have first determined whether the stop itself was unconstitutional by examining the facts leading to the police's decision to stop Ms. Black. If the court had done so, the court would have found the stop unconstitutional and would have granted Ms. Black's motion to suppress the evidence gathered from the stop, fruit of the forbidden tree. Without the evidence from the stop, there is no criminal case against Ms. Black whatsoever.

II. Procedural history and disposition in the trial court

The State charged Defendant-Appellant Ms. Black with possession with intent to deliver controlled substance (methamphetamine). (R. 1.) Ms. Black moved to suppress evidence, the state responded, and the trial court held a hearing and denied Ms. Black's motion (the "Motion"). (R. 6, 8, 56.) The State used the evidence at trial, and Ms. Black was found guilty and sentenced accordingly. (R. 63, 66.) Ms. Black appeals.

III. Statement of facts

On March 6, 2018, Officer Kyle Gerasch (“Mr. Gerasch”), employed with the St. Francis Police Department for about two years at the time, began his shift on the patrolling division and passed near 3900 South Packard Avenue. (R. 56 at 5: 1–4, 5:24–25, 16: 8–10.)¹ Around 12:45 A.M., Ms. Black was sitting in her parked car midway down the 3900 block with her car lights on. (*Id.* 16: 6–14.)

Ms. Black’s car caught Mr. Gerasch’s attention because it was parked on the “wrong” side of the street. (*Id.* 16:2–5.) Beginning at 3:00 A.M., any cars parked on this side of the street would have violated St. Francis’ parking regulations. (*Id.* 20:6–8.) Even though it was only 12:45 A.M. when Mr. Gerasch noticed Ms. Black’s car, he found it suspicious that Ms. Black chose to park on the “wrong” side of the street. (*Id.* 10:14–15.)

Mr. Gerasch found Ms. Black’s car stuck out because her car lights were on. (*Id.* 6:25–7: 1.) Mr. Gerasch thought the car stood out because “[g]enerally people don’t just sit in their car for a couple of minutes, turn their lights on, still sit in their car waiting for who knows.” (*Id.* 9:17–19.)

Mr. Gerasch decided to continue patrolling the surrounding area for a short time after 12:45 A.M. before circling back to check on Ms. Black’s car.

¹ The transcript of the hearing on the motion to suppress being the first document in the Appendix, the paginations of the transcript and the Appendix are identical. Thus, citations to the transcript will indicate pagination only once.

(*Id.* 16: 23–17:2.) On this second pass by Ms. Black’s car, Mr. Gerasch noticed that the car lights were off. (*Id.* 7:9–10, 9:6–13, 17: 1–9.) At this point, Mr. Gerasch decided to park a short distance from Ms. Black’s car to “watch . . . to see what happened.” (*Id.* 7:9–12.)

The St. Francis Police Department had been investigating a “possible drug house,” that was located somewhere “off of Packard Avenue.” (*Id.* 7:6–8.) Mr. Gerasch did not remember where the car was parked nor where the suspected drug house was and never stated that the car was parked in front of the suspected drug house. (*Id.* 7:6–8, 16:11–14.) The fact that the car was “close to a currently being investigated drug house” raised Mr. Gerasch’s suspicion. (*Id.* 17:19–23.)

During the next five to ten minutes that Mr. Gerasch watched Ms. Black, the only activity that Mr. Gerasch observed is that “the vehicle turn[ed] its lights back on” and “slowly pulled forward.” (*Id.* 10:4–10.) At that point, Mr. Gerasch didn’t know if “the person might need help,” determined it “was suspicious activity in general based upon where it was parked,” and decided to perform a traffic stop. (*Id.* 10:11–16.) For clarity, when Ms. Black refers in this brief to a “stop,” it means only the action of pulling over the car by the police, not subsequent actions.

Mr. Gerasch told Ms. Black he pulled her over because she was “suspiciously stopping, starting and parking.” (*Id.* 22:24–23:3.) This statement to Ms. Black appears to summarize the reasons why he stopped Ms. Black.

(*Id.* 17: 20–23 (“Being that it [the car] moved forward, stopped, parked in that area as it was described [i.e., “wrong” side of the street”], that was close to a currently being investigated drug house, the fact its lights were on and off, nobody entered or exited the vehicle.”).)

But between the time Mr. Gerasch pulled behind Ms. Black’s car and the time Mr. Gerasch reached Ms. Black’s car window, he noticed there were no permanent rear plates. (*Id.* 21:22–23.) Mr. Gerasch did not know Ms. Black’s car did not have license plates before deciding to conduct a stop:

Q: But you didn’t know that there were no plates until you decided to make the FI; correct?

A: Correct.

(*Id.* 23:5–7.) (*See also id.* 10:11–16 (Gerasch decided to “make an FI, stop, talk to the vehicle” immediately after he observed Black pull forward).)

After pulling behind Ms. Black, Mr. Gerasch made contact. (*Id.* 11:25–12:3.) At this point, Gerasch smelled burnt marijuana. (*Id.* 12:1–3.) Based on this smell, Gerasch advised Black to stay in the vehicle and called for an additional officer to watch Ms. Black while Mr. Gerasch searched the vehicle. (*Id.* 12:13–20.) When the second officer arrived, Ms. Black got out of her car and stood by him. (*Id.* 24:15–19.) Ms. Black was cooperative throughout the entire interaction with the police. (*Id.* 23:12–13, 24:2–5, 24:15–17.) Mr. Gerasch searched Ms. Black’s car and ultimately found narcotics, which were used as evidence in this action and led to her conviction for possession with intent to deliver controlled substance (methamphetamine). (*Id.* 14:2–17.)

IV. The trial court's findings

The trial court found the following facts on which it based its denial of the Motion:

(1) On his first pass, Mr. Gerasch noted that Ms. Black's car was parked in an unusual spot although it would not be a parking violation until more than two hours later. (*Id.* 41:18- 42:3.)

(2) On the first pass, Mr. Gerasch noted the car's lights were on, but on the second pass, they were off. (*Id.* 42:4–6.)

(3) On the third pass, Mr. Gerasch noted the car had moved. (*Id.* 42: 6–7.)

(4) The car was parked near a suspected drug house. (*Id.* 42:18–20.)

(5) Mr. Gerasch noted the car had no license plates, which was a reason and a basis justifying the stop. (*Id.* 42:11–12.)

(6) After the traffic stop, Mr. Gerasch noticed there was a temporary license plate in the window and the plate did not match the car. (*Id.* 42:14–17.)

(7) When he approached the car, Mr. Gerasch detected a strong smell of burnt marijuana. (*Id.* 42:21–23.)

ARGUMENT

I. Standard of review for motion to suppress

This Court reviews a motion to suppress in two steps: first, the Court reviews the trial court's findings of fact and upholds them unless they are clearly erroneous. Second, the Court reviews the application of constitutional

principles to the facts de novo. *State v. Sloan*, 2007 WI App 146, ¶ 7, 303 Wis. 2d 438, 736 N.W.2d 189).

II. Legal standard as to whether a stop is unconstitutional

“The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect citizens from unreasonable searches and seizures.” *State v. Brown*, 2014 WI 69, ¶ 19, 355 Wis. 2d 668, 850 N.W.2d 66, *overruled on other grounds by State v. Houghton*, 2015 WI 79, ¶ 19, 364 Wis. 2d 234, 868 N.W.2d 143. Traffic stops are seizures and must “pass constitutional muster.” *Id.* (citations omitted). A court will generally not admit evidence obtained as a result of an unreasonable seizure. *Id.* (citations omitted).

The Court should use “common sense” to determine reasonableness. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634. The Court must examine whether, under the totality of facts and circumstances, a reasonable officer, in light of his training and experience, would suspect that a person “has committed, was committing, or is about to commit a crime.” *Id.* (citations omitted). But it is “impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.” *Karnes v. Skrutski*, 62 F.3d 485, 496 (3d Cir. 1995) *abrogated on other grounds by Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007).

Before considering what took place after the stop, this Court must determine whether the stop itself was reasonable. *Post*, 301 Wis. 2d 1, ¶ 13. The Court must first determine whether the “initial interference” with the car driver, i.e., the stop, was justified. *State v. Glover*, 2011 WI App 58, ¶ 8, 332 Wis. 2d 807, 798 N.W.2d 321 (unpublished) (Blanchard, J.) (citations omitted). If the stop was not justified, the seizure was unreasonable, and the Court need not look at subsequent police conduct. *Id.* (citation omitted). The State carries the burden to prove that a stop is reasonable. *Post*, 301 Wis. 2d 1, ¶ 12 (citation omitted). The stop must be based on more than an “inchoate and unparticularized suspicion or ‘hunch’ [but] [r]ather... must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the stop. *Id.* ¶ 10 (citation omitted).

III. The trial court’s finding of one material fact was clearly erroneous.

The trial court found that Mr. Gerasch noted the car had no license plates, which was a reason and a basis for further investigation. (R. 56 at 42:11–12.) However, Mr. Gerasch made clear on the record that he did not know the car did not have license plates before he decided to initiate the stop. (*Id.* 10:11–16, 23:5–7.) This is a clearly erroneous finding of fact. As will be explained below, this clearly erroneous finding is material to the issue at hand.

IV. The trial court misapplied the law because it did not examine whether the stop was reasonable in the first place.

The trial court methodically explained its ruling. (R. 56 at 41:2–44:12.) But the court did not address independently the threshold question of whether the traffic stop was constitutional in the first place. (*Id.*) Instead, the court examined all facts indiscriminately, from the first time Mr. Gerasch spotted Ms. Black’s car until he found the narcotics. (*Id.*) The court misapplied the law because it should have first considered whether the facts that led to the stop itself (i.e. the location of Ms. Black’s car and Ms. Black’s act of turning her lights on or off) were reasonable enough to justify a stop before continuing its inquiry and examining subsequent facts. *Glover*, 332 Wis. 2d 807, ¶ 8. It is impossible to determine the weight the court gave to pre-stop facts, and whether the court would have found them sufficient by themselves to form a reasonable suspicion to make the stop in the first place. For this reason alone, this Court should reverse the trial court’s denial of the Motion.

V. If the trial court had applied the law correctly, it would have found the stop unreasonable and granted the Motion.

The only facts known to Mr. Gerasch before he decided to stop the vehicle were:

(1) On his first pass, Mr. Gerasch noted that Ms. Black’s car was on the “wrong side” of the street although it would not be a parking violation until more than two hours later. (*Id.* 41:18- 42:3.)

(2) On the first pass, Mr. Gerasch noted the car's lights were on, but on the second pass, they were off. (*Id.* 42:4–6.)

(3) On the third pass, Mr. Gerasch noted the car had moved. (*Id.* 42: 6–7.)

(4) The car was parked near a suspected drug house. (*Id.* 42:18–20.)

The trial court, if applying the law correctly, could not rely on the other facts that raised Mr. Gerasch's suspicions.

Now, this Court, applying common sense, should find that these facts were not sufficient to make the stop reasonable. *Post*, 301 Wis. 2d 1, ¶ 13. Common sense dictates that being parked in an area in which there is a suspected drug house, without any interaction with the house or with *any* house, is not suspicious. Otherwise, every neighbor (in the broadest definition of neighbor) of a suspected drug house or any visitor would raise suspicion. Ms. Black never left her car, and naturally never entered or exited a possible drug house. Ms. Black was legally parked. Being parked at an unusual time, staying in a car, turning lights on or off, and moving a car also is insufficient to raise reasonable suspicion. It is normal behavior when picking up a friend. It is not only normal but also safe behavior to stop by the side of the road to look at a map and/or call for directions. Those are just a few of many things that Ms. Black could have been doing. The factors the trial court relied upon cannot reasonably lead to suspicion of criminality. *See Post*, 301 Wis. 2d 1, ¶ 13. The conduct of Ms. Black and her location are not enough to reasonably infer she “has committed, was committing, or [was] about to commit a crime.” *Id.*

Case law concurs with common sense. The fact that Ms. Black was near a suspected drug house does not give rise to reasonable suspicion. A person's proximity to others "*independently* suspected of criminal activity" is insufficient to justify a search. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (emphasis added). Here it was never alleged, even after the fact, that any alleged criminal activity by Ms. Black was related to any suspected drug house: whatever activity took place (or didn't) at a drug house was independent from Ms. Black, and her alleged proximity doesn't give rise to reasonable suspicion.

In fact, under circumstances more suspicious than in Ms. Black's case, courts have consistently found no reasonable suspicion.

First, being in an area of *known* criminal activity in itself does not provide reasonable suspicion. *State v. Nagel*, 2020 VT 31, ¶ 11, 232 A.3d 1081, 1087 (Vt. 2020) (citation omitted). Here, there was *suspected* criminal activity and no *known* criminal activity, which makes any suspicion as to Ms. Black even more unreasonable than it was in *Nagel*.

Second, being in a *high* crime area in itself does not provide reasonable suspicion that a person is involved in a crime. *Hoover v. Walsh*, 682 F.3d 481, 495 (6th Cir. 2012). Here, the area was either low- or no-crime since the suspected drug house is the only possible criminal activity presented to the court, which makes any suspicion as to Ms. Black even less reasonable.

Third, the police may not search a person because they leave the property where suspected illegal activity takes place. *U.S. v. Bohman*, 683 F.3d 861, 864,

866 (7th Cir. 2012). Here, Ms. Black never left her car. She had no interaction or contact with any suspected drug house, or with *anybody* as it happens, which makes any suspicion as to Ms. Black even more unreasonable than it was in *Bohman*.

Even unusual parking behavior is insufficient to give rise to reasonable suspicion. *Johnson v. State*, 602 S.W.3d 50 (Tex. App. 2020), *petition for discretionary review granted* (Sept. 16, 2020). In *Johnson*, the defendant was parked at midnight in a 24-hours-a-day park and ride, with his lights off. *Id.* at 55. Although few people park in a park-and-ride lot at midnight, an officer's suspicion based on the time of day was not reasonable. *Id.* at 61. Here, Mr. Gerasch testified that few people park on the "wrong" side of the street around 1 A.M. even though it is legal. Just like in *Johnson*, Ms. Black's being parked legally, however unusual, is not sufficient for reasonable suspicion.

Moreover, moving the car forward and turning lights on or off are not facts sufficient for reasonable suspicion that a person is involved in a crime. *Bohman*, 683 F.3d 861. In *Bohman*, the police was surveilling an area and accidentally honked. *Id.* at 863, 865. The honk caused a car to turn on its lights and start driving down for about thirty seconds. *Id.* at 863. The car then drove back to its initial location. *Id.* at 863. The officer's conclusion that this was surprising and unusual behavior did not constitute reasonable suspicion. *Id.* at 864–65. "[A]s surprising as this behavior may have been, it does not on

its own lend a suspicion of something illegal or wrong as to the [vehicle].” *Id.* at 865. Here, Ms. Black’s similar behavior provides no grounds for reasonable suspicion.

The facts combined did not give rise to reasonable suspicion. It is true that a court must look at the totality of circumstances, but the combination of innocent facts does not give rise to suspicion without an explanation. *Karnes*, 62 F.3d at 496. In fact, while the *Bohman* court observed that “susceptible to an innocent explanation when isolated from its context may still give rise to reasonable suspicion when considered in light of all of the factors,” the court looked at presence in the driveway of a suspected meth lab *plus* unusual behavior as to moving and parking the car and found no basis for reasonable suspicion. 683 F.3d at 865 (citation omitted). Here, the situation is similar except that the connection to a suspected drug house is more elusive: if the decision to stop the car in *Bohman* was “based only on a hunch,” here it was based on less than a hunch. *Id.* at 866. Thus, there could not be reasonable suspicion.

In sum, we have legal parking with allegedly unusual behavior as to lights and moving the car, and the possible proximity of a suspected drug house. That’s it. (Mr. Gerasch noticed the absence of license plates only after he decided to stop the vehicle and do a field investigation.) Suspecting criminal activity based on these facts defies common sense and constitutional protections.

CONCLUSION

Ms. Black respectfully requests that this Court reverse the trial court's denial of her Motion to suppress, find that the stop and therefore the search were unreasonable as a matter of law, and remand to the trial court for further proceedings.

Dated this 16th day of December 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,164 words.



Jerome C. Mohsen

CERTIFICATION AS TO TEXT OF ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

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.

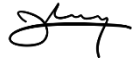
A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.



Jerome C. Mohsen

**CERTIFICATION REGARDING
ELECTRONIC APPENDIX**

I hereby certify that I have submitted an electronic copy of the appendix which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix filed as of this date.



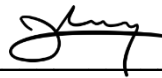
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2020, I caused three copies of this Brief and Appendix to be served upon each of the following persons via U.S. Mail, First Class:

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