STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2021AP311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONTE QUINTELL MCBRIDE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING MOTION TO SUPPRESS ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JONATHAN D. WATTS PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2065
(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

ISSUES PRESENTED

1. Police observed a vehicle parked without its headlights activated in an alleyway in a high-crime area in a manner that obstructed traffic with two people inside. Upon turning on their squad spotlight, they observed the passenger making furtive movements.

Did police have reasonable suspicion under the totality of the circumstances to seize the passenger –McBride? [1]

The circuit court answered: Yes.

This Court should answer: Yes.

2. Did Officer Rivera lawfully search McBride as either a *Terry*-style protective search or a search incident to a lawful arrest and did Officer Rivera lawfully seize the drugs from McBride's person that he uncovered during the search?

The circuit court answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

[1] McBride frames the issues as three distinct events: (1) an initial seizure; (2) a seizure that exceeded the scope of the initial seizure; and (3) the pat-down search of McBride. The State views McBride's first two issues as one seizure and responds to his arguments following that framework. Although many of the same legal principles apply to address the validity of the search, the State addresses the search and the seizure of contraband separately from the seizure of McBride's person.

INTRODUCTION

Donte McBride pleaded guilty to various drug offenses after the circuit court denied his motion to suppress evidence of oxycodone, heroin, and fentanyl that police found on his person. McBride argues that the evidence should have been suppressed because he was unlawfully seized and subjected to an unlawful search. To the contrary, a reasonable officer in Officer Rivera's position could have concluded that, under the totality of the circumstances, criminal activity was afoot at the time of the stop. Further, and especially because of McBride's furtive movements, a reasonable officer could conclude that McBride may have been armed. The facts of this case justify both McBride's seizure and the subsequent search. Because Officer Rivera lawfully seized and searched McBride, the circuit court correctly denied his motion to suppress, and this Court should affirm.

STATEMENT OF THE CASE[2]

On the night of October 28, 2018, at approximately 11:15 p.m., City of Milwaukee Police Officers Jose Rivera and Eric Kradecki were performing a routine patrol for the City of Milwaukee Police Department's Anti-Gang Unit. (R. 40:3–5.) While on patrol, the officers observed an SUV parked in an alley near 416 East Locust Street in Milwaukee. (R. 40:5–6.) The SUV had no lights on and was parked in a manner that obstructed traffic. (R. 40:6–7; 43 at 00:00:21.) The squad car approached the SUV from the front. (R. 43 at 00:00:21.)

Officer Rivera, unable to immediately determine whether there were people inside the vehicle due to the time of night and darkness of the alley, illuminated his squad car's spotlight. (R. 40:6–7.; 43 at 00:00:23) Upon illuminating his

[2] The State and McBride cite to the same video from Officer Rivera's bodycam using the same citation conventions in their appellate briefs. (*See* McBride's Br. 10 n.1.)

spotlight, Officer Rivera saw that two individuals occupied the vehicle. (R. 40:7; R. 43 at 00:00:24.) Officer Rivera observed the passenger, McBride, "bend down towards his waist area and begin to reach around in the vehicle." (R. 40:7.) Based on his "experience in training and dealing with similar situations," Officer Rivera testified that such movement is "consistent with someone having illegal narcotics or weapons on their person." (R. 40:8.)

After observing McBride bend toward his waist and reach around in the vehicle, Officer Rivera approached the SUV, ordering the occupants to show their hands. (R. 40:9; 43 at 00:00:28.) Despite Officer Rivera's order, McBride continued to "reach[] inside the vehicle." (R. 40:10.) McBride eventually complied with the order. (R. 40:10.)

"[B]ecause [McBride's] movements made [him] fear that [McBride] might have a weapon on his person," Officer Rivera opened the passenger's-side door and removed McBride from the SUV. (R. 40:11.) Officer Rivera handcuffed McBride "for [Officer Rivera's] safety with [McBride's] movements because he could [have] be[en] armed or a weapon might [have] be[en] in the vehicle." (R. 40:11.)

When he opened the car door, and prior to removing McBride from the SUV, Officer Rivera observed an orange, unlabeled pill bottle "between the front passenger door and seat." (R. 1:2.) Based on his training and experience, Officer Rivera suspected that McBride "possess[ed] a controlled substance without a prescription." (R. 40:12.) Officer Rivera conducted a pat-down that revealed another unlabeled pill bottle in McBride's front right pocket and a clear, plastic bag that contained a "tan chunky substance," which later proved to be heroin. (R. 1:2; 32:6–7.)

The State charged McBride with one count of possession with intent to deliver a controlled substance (heroin) (>3-10 gram), second and subsequent offense and two counts of

possession with intent to deliver narcotics, second and subsequent offense. (R. 6:1–3.)

McBride moved to suppress the drug evidence. (R. 7.) Following briefing and a hearing, the circuit court found Officer Rivera's testimony regarding the furtive movements and the high-crime area credible. (R. 40:43, 46.) The circuit court ultimately denied the motion to suppress, finding that, based on the totality of the circumstances, there was reasonable suspicion to seize and search McBride.[3] (R. 40:50; 46:23.)

McBride pleaded guilty, and the circuit court accepted his plea and convicted him. (R. 46:51.) The circuit court sentenced McBride to 10 total years with five years of confinement and five years of extended supervision. (R. 17:1.) McBride now appeals his judgment of conviction. (R. 29.)

STANDARD OF REVIEW

When reviewing a decision on a motion to suppress evidence, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Genous*, 2021 WI 50, ¶ 10, 397 Wis. 2d 293, 961 N.W.2d 41.

[3] The circuit court did not find that a lack of visible furtive movements from Officer Rivera's bodycam diminished Officer Rivera's testimony. (R. 40:41.) Officer Rivera testified that, while the bodycam is in a fixed position facing forward, he was able to move his head around and see the vehicle from a different angle. (R. 40:17.) The circuit court also found that testimony credible. (R. 40:41.) ("It merely is the Court's understanding that a body camera of an officer presents one perspective and view of the circumstances.")

ARGUMENT

I. Officer Rivera lawfully seized McBride because there were specific and articulable facts that gave rise to reasonable suspicion that criminal activity was afoot.

A. Police officers may temporarily seize an individual if the officers have reasonable suspicion of illegal behavior.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729. Police officers may temporarily seize an individual for investigatory purposes without violating the Fourth Amendment's prohibition against unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

A temporary detention, or *Terry* stop, is constitutional "if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *Young*, 294 Wis. 2d 1, ¶ 20. "Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Id.* ¶ 21. While a "mere hunch" is insufficient to justify an investigatory stop, police officers are not required to dispel of innocent behavior before making a stop. *Id.*

Whether an officer possessed reasonable suspicion is an objective inquiry: it asks, "What would a reasonable police officer reasonably suspect in light of his or her training and experience?" *Genous*, 397 Wis. 2d 293, ¶ 8 (citation omitted). To that end, courts do not view facts in isolation; rather, "[t]he building blocks of facts accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn." *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996); *see also Genous*, 397 Wis. 2d 293, ¶ 12. Said

differently, Wisconsin courts "consider everything observed by and known to the officer, and then determine whether a reasonable officer in that situation would reasonably suspect that criminal activity was afoot." *Genous*, 397 Wis. 2d 293, ¶ 10.

The cumulative facts that Officer Rivera observed and knew reveal that a reasonable officer in Officer Rivera's position would have had reasonable suspicion to seize McBride.

B. Based on the SUV's location in a high-crime area late at night in a dark alley, parked in a manner that would obstruct traffic, and McBride's furtive movements in response to the police spotlight, Officer Rivera had reasonable suspicion to seize McBride.

Based on the totality of the circumstances, Officer Rivera had reasonable suspicion that McBride was engaging or had engaged in illegal conduct. The following facts support the conclusion that a reasonable officer in Officer Rivera's position would have reasonable suspicion: (1) the vehicle was parked in a high crime area; (2) the vehicle was parked with its lights off in an alley in a way that obstructed traffic; (3) "the discovery of occupants in an unilluminated vehicle parked in the middle of the alley"; and (4) McBride's furtive movements in response to seeing Officer Rivera's spotlight.[4]

---

[4] The State acknowledges that the circuit court also credited an "inferential" factor in its determination. (R. 40:48.) However, the State posits that, in context, the circuit court was further explaining its reasoning for elevating the furtive movement factor above the others rather than isolating a separate factor. For example, the circuit court stated "the timing of the furtive movements is particularly concerning to the officer. . . . This is an inference that the occupants, that is, the defendant and the driver, saw a vehicle, at least with a spotlight, but arguably, saw a police vehicle. His furtive movements *are in response to being detected by*

(continued on next page)

(R. 40:46–47.) Taken as a cumulative whole, these facts demonstrate reasonable suspicion.

"[A]n officer's perception of an area as 'high-crime' can be a factor justifying a search." *State v. Morgan*, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995). The circuit court heard testimony from Officer Rivera, an 11-year veteran of the Milwaukee Police Department and member of the Anti-Gang Unit, that he has "taken many calls for service regarding shootings, shots fired, drug dealings, [and] things of that nature." (R. 40:5.) Officer Rivera testified to making "over two dozen" arrests in the area. (R. 40:6.) The circuit court found Officer Rivera's testimony credible and added the "high-crime area" to the reasonable suspicion calculus. (R. 40:46.) To be sure, an individual's presence in a high-crime area alone is insufficient to demonstrate reasonable suspicion. *State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997). However, this is not a case of a car merely idling in a high-crime area.

Adding to the analysis is the fact that the SUV obstructed traffic such that it could have been ticketed or towed.[5] (R. 46:21.) This Court has held that an officer has reasonable suspicion to conduct a *Terry* stop "based on a reasonable suspicion of a non-criminal traffic violation." *State v. Colstad*, 2003 WI App 25, ¶ 11, 260 Wis. 2d 406, 659 N.W.2d 394 (citing *State v. Griffin*, 183 Wis. 2d 327, 331–34, 515 N.W.2d 535 (Ct. App. 1994)). Like the SUV here, the vehicle in *State v. Neal*, No. No. 2017AP1397-CR, 2018 WL 1633577, ¶ 2 (Wis. Ct. App. Apr. 3, 2018) (unpublished) (R-App. 101–

---

the police." (R. 40:49 (emphasis added).) The State reads the circuit court's discussion on the record as crediting the above four factors in its reasonable suspicion analysis.

[5] Pursuant to Milwaukee, Wis. Traffic Code, 101-24.2 (2020), it is "unlawful for any vehicle to be parked or left standing in a highway in such a manner as to obstruct traffic."

03.),[6] was "parked in the middle of an alley, blocking traffic." This Court held that the stop was reasonable because "the vehicle [was] parked towards the middle of the alley, blocking traffic in at least one direction," which was in violation of the City of Milwaukee Traffic Code. *Id.* ¶ 11. (R-App. 102.) Just as the stop in *Neal* was reasonable, so too does the SUV obstructing traffic contribute to reasonable suspicion here.

McBride makes two arguments concerning the positioning of the vehicle. First, he argues that the vehicle's positioning is irrelevant because Officer Rivera did not actually stop the vehicle for a traffic infraction. (McBride's Br. 21, 22–23.) However, the law is well-established that the pertinent inquiry for purposes of the Fourth Amendment is whether a *reasonable officer* would have reasonable suspicion to stop a vehicle. *Whren v. United States*, 517 U.S. 806, 813 (1996) (foreclosing "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"). Here, a reasonable officer would have been justified in stopping McBride's vehicle due to a traffic code infraction. *See State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143.[7]

Second, McBride relies on *State v. Evans*, No. 2020AP286-CR, 2021 WL 279105 (Wis. Ct. App. Jan. 28, 2021) (unpublished) (R-App. 104–20), for the proposition that

---

[6] Pursuant to Wis. Stat. § (Rule) 809.23(3)(b), an unpublished opinion issued after July1, 2009 may be cited for its persuasive value.

[7] Wisconsin also does not limit traffic stops to merely traffic code infractions. For example, the supreme court has held that an officer may conduct a traffic stop if the officer has reasonable suspicion of non-traffic violations. *See, e.g., State v. Iverson*, 2015 WI 101, ¶¶ 52–55, 365 Wis. 2d 302, 871 N.W.2d 871 N.W.2d 661 (holding that reasonable suspicion that a motorist has violated the littering statute, a non-traffic civil forfeiture violation, is sufficient to justify a traffic stop).

"sitting in an idling car in a parking lot is not enough to establish reasonable suspicion." (McBride's Br. 20.) *Evans* is inapposite. Unlike the SUV in this case, the vehicle in *Evans* was parked legally in a parking lot. *Evans*, 2021 WL 279105, ¶ 5. (R-App. 104.) In *Evans*, the officer witnessed Evans and a woman leave a hotel, enter a vehicle, drive to an apartment, return to the hotel, and park and remain in the parking lot. *Id.* ¶¶ 4–5. (R-App. 104.) The circuit court in *Evans* relied on the following facts to support reasonable suspicion: (1) the stop occurred in a high-crime area; (2) the time of day; and (3) "Evan's conduct in coming from and returning to the hotel and sitting in his parked car." *Id.* ¶ 38. (R-App. 109.) This Court rejected that those circumstances contained specific and articulable facts that would lead to reasonable suspicion. *Id.* ¶¶ 39–46. (R-App. 109–11.)

Unlike *Evans*, the SUV here was not merely idling in a parking lot. The SUV obstructed traffic in a dark and narrow alley. The facts here more closely align with *Neal*, not *Evans—i.e.*, a car parked in an alley at night in a way that obstructs traffic rather than a car merely parked in a hotel parking lot. Further, there are more building blocks here that support reasonable suspicion.

Next in the totality of the circumstances is that the seizure here occurred in a dark alley around 11:00 p.m. (R. 40:6.) Additionally, due to the time of night and darkness of the alley, Officer Rivera did not know whether the SUV was occupied until he illuminated his spotlight. (R. 40:6, 7.) The time of day (or night) and "darkness, visibility, isolation of the scene, and the number of people in an area may all contribute to the determination of reasonable suspicion." *State v. Kyles*, 2004 WI 15, ¶ 58, 269 Wis. 2d 1, 675 N.W.2d 449. Additionally, the time of day is relevant to whether an "individual's activities may or may not be consistent with the typical behavior of a law-abiding citizen at that time." *Id.*

Two individuals sitting in an unilluminated vehicle at 11:15 p.m. in a dark alley in a high-crime area known to the officers for shootings and drug transactions is hardly "consistent with the typical behavior of a law-abiding citizen at that time." *Kyles*, 269 Wis. 2d 1, ¶ 58. Rather, a reasonable officer could conclude that those facts, under the totality of the circumstances, are suspicious and potentially dangerous. Observing furtive movements only bolsters that conclusion.

The final building block is McBride's furtive movements. When he illuminated his squad car's spotlight,[8] Officer Rivera witnessed McBride bending down toward his waist and reaching around his seat. (R. 40:7.) Officer Rivera viewed these movements as consistent with concealing contraband such as drugs or a weapon. (R. 40:8.) "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, 752 N.W.2d 783.

Courts consider furtive movements, like any other factor, in light of all of the facts that the officer knew and observed at the time of the stop. *See State v. Buchanan*, 2011 WI 49, ¶ 11, 334 Wis. 2d 379, 799 N.W.2d 775. Add the furtive movements to an unilluminated SUV obstructing traffic in a dark and narrow alley late at night in a high-crime neighborhood, and any reasonable officer could conclude that McBride may have been armed or attempting to conceal contraband.

---

[8] McBride acknowledges that the seizure did not occur until Officer Rivera ordered McBride to show his hands and McBride complied. (McBride's Br. 18.) Accordingly, this Court can rely on all of the facts the Officer Rivera knew and observed up until that point. *State v. Genous*, 2021 WI 50, ¶ 10, 397 Wis. 2d 293, 961 N.W.2d 41. As explained, this includes the furtive movements.

Police officers, based on their training and experience, may view behavior that others may describe as innocent and conclude that that behavior is suspicious or dangerous. *Young*, 294 Wis. 2d 1, ¶ 64. As *Young* explained, "[a]lthough there are innocent explanations [for the situation], . . . [the officer] was not required to rule out all these potential explanations before initiating his investigation." *Id.* Importantly, in *Young*, "[t]he officer described the particular facts that made him suspicious and linked those facts to his seven years of experience patrolling the neighborhood." *Id.*

Here too, Officer Rivera witnessed an accumulation of facts that, based on his 11 years of training and experience, led him to suspect that criminal activity was afoot and that McBride may be armed. Officer Rivera was not required to dispel of possible innocent explanations prior to seizing McBride.

Based on the totality of the circumstances, including his training and experience, Officer Rivera's seizure of McBride was reasonable. Officer Rivera was patrolling a high-crime area when he witnessed an SUV parked in an alley in a way that would obstruct traffic. (R. 40:6–7.) Officer Rivera's observations occurred late at night and in a dark alley—an alley so dark that Officer Rivera could not discern whether the SUV was occupied until he shined his spotlight into the car. (R. 40:7.) At that point he realized that the vehicle had two occupants, one of whom began bending toward his waist and reaching around under his seat. (R. 40:7–9.) Under the totality of these circumstances, a reasonable officer could form the suspicion that criminal activity was afoot. Therefore, Officer Rivera could investigate his suspicions by temporarily detaining McBride.

Further, as explained below, based on the same accumulated facts, a reasonable officer could conclude that McBride's unexplained reaching movements indicated that he may be armed—removing McBride from the vehicle and

handcuffing him were both reasonable under the circumstances for officer safety. *See Terry*, 392 U.S. at 27. Accordingly, based on the totality of the circumstances, Officer Rivera's seizure of McBride was reasonable.

C. Rivera did not exceed the scope of the *Terry* stop by removing McBride from the vehicle and handcuffing him. [9]

McBride argues that removing him from the vehicle, Officer Rivera "exceeded the scope of a *Terry* stop." (McBride's Br. 22). This assertion is contrary to decades of precedent that permits officers to use reasonable force during a *Terry* stop.

1. Officers are permitted to use reasonable force during *Terry* stops, including handcuffing individuals.

If an officer has reasonable suspicion that an individual presents risk of harm to the officers, the officer may handcuff the individual without rendering the interaction unreasonable or transforming it into an arrest. *See State v. Blatterman*, 2015 WI 46, ¶ 31, 362 Wis. 2d 138, 864 N.W.2d 26 (citing *State v. Pickens*, 2010 WI App 5, ¶ 32, 323 Wis. 2d 226, 779 N.W.2d 1 and *State v. Vorburger*, 2002 WI 105, ¶ 65, 255 Wis. 2d 537, 648 N.W.2d 829). Officer Rivera had such reasonable suspicion.

In *Graham v. Connor*, 490 U.S. 386, 396 (1989), the Supreme Court acknowledged that "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an

[9] As noted above, the State views the entire interaction here as one seizure followed by a protective search. Even if the Court accepts McBride's proffered framework for this case, the result is the same because the same factors that justified seizing McBride in the first instance also justified removing him from the vehicle while the investigation was underway.

arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or thereat thereof to effect it." Courts have held that drawing a weapon or handcuffing a suspect may be reasonable under the circumstances. *See Jones v. State*, 70 Wis. 2d 62, 70, 233 N.W.2d 441 (1975) (weapons); *see Blatterman*, 362 Wis. 2d 138, ¶ 31 (handcuffs). "The calculus for reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–97.

2. Officer Rivera's use of force was reasonable under the circumstances.

Here, Officer Rivera was faced with a freshly illuminated vehicle that revealed two people, late at night in a dark and narrow alley located in a high-crime area. (R. 40:6–12.) An officer in these circumstances, who then witnesses an individual begin to make furtive movements at the sight of a police spotlight, could come to the reasonable conclusion that the officer faced a possible threat. To that end, Officer Rivera's first action was to make the driver's and McBride's hands visible. (R. 43 at 00:00:30–34.) He continually asked McBride whether he had weapons and what he was reaching for. (R. 43 at 00:00:40–00:01:05.) Officer Rivera testified that he was concerned that McBride was reaching for a weapon. (R. 40:11, 13, 24, 27.) The circuit court believed that Officer Rivera was concerned for his safety. (R. 40:44–45.)

In sum, Officer Rivera was forced to make a split-second decision to investigate and neutralize any possible threat. *See Graham*, 490 U.S. at 396–97. His actions were therefore reasonable and did not exceed the scope of the *Terry* stop.

3. *Pennsylvania v. Mimms* and *Maryland v. Wilson* do not compel a different result.

McBride largely appears to argue that Officer Rivera was not entitled to remove McBride from the SUV because the *per se* rule that an officer may remove a driver or passenger from a vehicle does not apply in a non-traffic stop context. (McBride's Br. 22–23); *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (holding that an officer may order a driver out of a vehicle during a traffic stop); *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997) (extending *Mimms* to the removal of passengers). But McBride fails to acknowledge that the *per se* rule from *Mimms* and *Wilson* is not the only circumstance under which an officer can remove a person from a vehicle.

For example, in *Morgan*, the officer stopped the defendant based on his car's license plates being expired. *Morgan*, 197 Wis. 2d at 204. Like in this case, the stop occurred at night in a high-crime area. *Id.* The officer observed Morgan act nervously. *Id.* The officer removed Morgan and searched him. *Id.* at 204–05. The supreme court upheld that search and seizure based on the totality of the circumstances—it did not mention *Mimms*. *Id.* at 210–16. Similarly, in *State v. King*, the officer pulled King over because King's vehicle matched the description of a vehicle that was at a shooting. *State v. King*, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993). Just as Officer Rivera witnessed McBride reach underneath his seat, the officer witnessed King "fidgeting and making repeated movements below the front seat." *Id.* at 149. The officer was concerned King was concealing a weapon and removed him upon stopping the vehicle. *Id.* This Court examined and upheld the seizure, not in the context of *Mimms*, but under the totality of the circumstances.

As explained above, Officer Rivera's actions were reasonable regardless of whether this was a traffic stop—therefore, this Court does not need to address the validity of Officer Rivera's actions under *Mimms* or *Wilson*.

However, even if this Court were to evaluate the circumstances under the *Mimms/Wilson* framework, the result is the same. The record reveals that the SUV first caught the officers' attention because of how it was parked. (R. 40:6–7.) Suspecting it was parked obstructing traffic (a traffic code violation), Officer Rivera could investigate that suspicion and could, under *Mimms,* remove the driver and, under *Wilson*, remove McBride.

The policy of officer safety that underlies the Court's decisions in *Mimms* and *Wilson* supports this conclusion—not McBride's. McBride points out that "in both *Mimms* and *Wilson*, the Court's concern was the hazards and danger to police investigating a traffic violation on a roadway." (McBride's Br. 22.) True, but McBride's focus is too narrow. The Court in *Mimms* was concerned more broadly on the "inordinate risk confronting an officer as he approaches a person seated in an automobile." *Mimms*, 434 U.S. at 110 (also citing the number of officer homicides that occur during traffic stops). Adding to its analysis, the Court then stated that "[t]he hazard of accidental injury form passing traffic to an officer standing in the driver's side of a vehicle may also be appreciable in some situations." *Id.* at 111. In *Wilson*, the Court further acknowledged "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Wilson*, 519 U.S. at 414. *Mimms* and *Wilson* recognize that officer safety during automobile interactions is of tantamount concern regardless of whether officers are exposed to passing traffic.

And the above policy considerations beg the question: How would an officer face any *less* danger when investigating a traffic code violation in the middle of a dark and narrow

alley late at night in a high-crime area? McBride does not say; he merely notes that this was not a roadside stop. Speaking to only McBride's point regarding the hazards of a roadside stop, while officers are exposed to the danger of passing traffic during a roadside stop, Officers Rivera and Kradecki were exposed to the dangers of on-street traffic given the positioning of the vehicle and its location in a narrow, dark alleyway. Moreover, as noted above, *Mimms* and *Wilson* were concerned with more than passing vehicles striking officers during a roadside stop. Rather, by citing the number of officer homicides that occur during traffic stops, the Court acknowledged the inherent dangers that officers face from the driver or passenger during a traffic stop.

Contrary to McBride's argument, Officers Rivera and Kradecki faced the type of dangerous situation that *Mimms* and *Wilson* were concerned with. Accordingly, removing and handcuffing McBride was also justified in this context.

II. Officer Rivera lawfully searched McBride either as a *Terry*-style protective search or as a search incident to arrest and lawfully seized the contraband that he found on McBride's person as a result of the search.

A. Officer Rivera lawfully conducted a protective search of McBride pursuant to *Terry* and lawfully seized the drugs that he found on McBride's person pursuant to the plain touch exception.

1. Officer Rivera's protective search was based on reasonable suspicion that McBride may be armed.

"A pat down, or 'frisk' is a search." *Morgan*, 197 Wis. 2d at 208 (citing *State v. Guy*, 172 Wis. 2d 86, 93, 492 N.W.2d 311 (1992)). While it is true that *Terry* stops do not give police carte blanche to also search a suspect, "[p]at-down searches

are justified when an officer has reasonable suspicion that a suspect *may* be armed." *Id.* at 209 (emphasis added). Importantly, an officer need not have reasonable suspicion that a suspect *is* armed before conducting a protective search. *Id.*

Courts permit officers to conduct protective searches out of concern for officer safety. *State v. McGill*, 2000 WI 38, ¶ 19, 234 Wis. 2d 560, 609 N.W.2d 795; *Terry*, 392 U.S. at 23–25. To that point, 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 in the street to observe the encounter." *McGill*, 234 Wis. 2d 560, ¶ 32 (collecting cases). "Where an officer reasonably believes that his safety may be in danger because the suspect he is investigating may be armed, it would be unreasonable not to allow him to conduct a limited search for weapons." *Id.* ¶ 19.

Whether an officer has reasonable suspicion to conduct a pat-down search is also based on specific and articulable facts, "taken together with any rational inferences that may be drawn from those facts." *Id.* ¶ 22. The facts and inferences are viewed under the totality of the circumstances. *Id.* Like the reasonable suspicion inquiry for seizures, the reasonable suspicion inquiry for protective searches is an objective one: "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger." *Id.* ¶ 23 (quoting *Terry*, 392 U.S. at 27). Although an objective standard, also relevant to the reasonableness of a protective search may be "a police officer's fear or belief that his or her safety or that of others was in danger." *Kyles*, 269 Wis. 2d 1, ¶ 34.

The same factors that justified seizing McBride in the first place also justified Officer Rivera's protective search of McBride. Again, Officer Rivera discovered an unilluminated car in a dark alley late at night in a high-crime area. (R. 40:5–

6.) He realized that the vehicle was occupied, and, when Officer Rivera shined his spotlight into the car, McBride immediately began bending toward his waist and reaching around his near his seat. (R. 40:7–8.) As Officer Rivera approached the SUV, "McBride was still reaching inside of the vehicle." (R. 40:10.) Officer Rivera testified that, based on his training and experience, individuals often conceal weapons in their waistbands. (R. 40:8–9.) McBride's actions led Officer Rivera suspect that McBride was armed and fear for his safety. (R. 40:11.) The circuit court found that testimony credible. (R. 40:43–45.)

Unlike *State v. Johnson* and *Kyles*, where the traffic stops and subsequent searches occurred on illuminated public streets during the late afternoon or evening, the search here occurred in a dark and narrow alley late at night. *See State v. Johnson*, 2007 WI 32, ¶ 3, 299 Wis. 2d 675, 729 N.W.2d 182; *Kyles*, 269 Wis. 2d 1, ¶¶ 59, 60. Further, unlike in this case, there was no testimony in *Johnson* that the area was a high-crime area. *See Johnson*, 299 Wis. 2d 675, ¶ 42. Even in *Kyles*, where the court ultimately held that there was not reasonable suspicion to conduct a protective search, it emphasized that time of day, darkness, isolation, and visibility can all impact reasonable suspicion. *Kyles*, 269 Wis. 2d 1, ¶ 58. Finally, unlike *Kyles* where the officer testified that he was not particularly threatened by the defendant (*Kyles*, 269 Wis. 2d 1, ¶ 20), Officer Rivera specifically testified that he feared for his safety because McBride may have been armed. (R. 40:11.) The facts of this case are readily distinguishable from both *Kyles* and *Johnson*, and the facts here demonstrate reasonable suspicion to conduct a protective search.

Based upon the totality of the circumstances, a reasonable officer in Officer Rivera's position could suspect that McBride may have been armed; accordingly, a reasonable officer in the circumstances could perform a protective pat-down search for weapons.

2. Officer Rivera was permitted to seize the drugs that he found during the protective search.

Because Officer Rivera conducted a permissible protective search of McBride, Officer Rivera could seize the drug evidence that he uncovered during the search. Under the plain touch exception to the Fourth Amendment warrant requirement, an officer may seize evidence that the officer uncovers during a protective search. *State v. Applewhite*, 2008 WI App 138, ¶ 14, 314 Wis. 2d 179, 758 N.W.2d 181.

"To pass constitutional muster . . . '(1) the evidence must be in plain view; (2) the officer must have prior justification for being in the position from which [he or] she discovers the evidence in "plain view"; and (3) the evidence seized "in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and criminal activity."'" *Id.* (quoting *State v. Buchanan*, 178 Wis. 2d 441, 449, 504 N.W.2d 400 (Ct. App. 1993)). While the plain touch exception requires some connection between the evidence and criminal activity, it "does not demand that the officer be absolutely certain of what specific contraband is present, only that the object is incriminating in nature." *Id.* ¶ 16. Probable cause that what an officer sees in plain view is connected to a crime is based on the totality of the circumstances. *See, e.g., Buchanan*, 334 Wis. 2d 379, ¶ 26.

Here, all three requirements of the *Applewhite* test are satisfied. First, Officer Rivera uncovered the pill bottle and heroin during a protective search for weapons. Because Officer Rivera uncovered the pill bottle and heroin during the protective search, the evidence was in "plain view." (R. 40:12, 25.); *see Applewhite*, 314 Wis. 2d 179, ¶ 15. Second, as explained above, Officer Rivera had reasonable suspicion, based on the totality of the circumstances, that McBride may have been armed. Therefore, Officer Rivera had "prior

justification" for discovering the drug evidence in plain view. *Id.*

Third and finally, based on the totality of the circumstances, Officer Rivera had probable cause that there was "a connection between the evidence and criminal activity." *Id.* ¶ 14 (citation omitted). This entire incident occurred in a dark alley in a high-crime area late at night. (R. 40:5–6.) The SUV's lights were off when the officers arrived. (R. 40:6.) When Officer Rivera illuminated the SUV's interior, McBride began making furtive, reaching movements around his waist and by his seat. (R. 40:7–8.) Immediately prior to the search, Officer Rivera observed an unlabeled orange pill bottle on the floor of the SUV near McBride's seat. (R. 1:2; 40:12.) In one of McBride's jacket pockets Officer Rivera uncovered another unlabeled pill bottle. (R. 1:2.) Contrary to McBride's argument that Officer Rivera could not have immediately ascertained the contents of the pill bottle (McBride's Br. 29), Officer Rivera was not required to be absolutely certain of the specific contraband that the pill bottle contained. Rather, he merely needed to have probable cause that what he uncovered was incriminating in nature. Surely, based on the totality of the circumstances just discussed, a second unlabeled pill bottle, which matched the unlabeled pill bottle he saw mere seconds before, was incriminating in nature. Therefore, the facts of this case also satisfy the third element of the plain touch exception.

Because this case satisfies all three elements of the plain touch exception, Officer Rivera lawfully seized the drug evidence that he uncovered during the protective search.

B. The search of McBride's person and seizure of the drug evidence was also valid as a search incident to a lawful arrest.

1. Officer Rivera had probable cause to arrest McBride based on the totality of the circumstances and could lawfully search McBride.

Alternatively, Officer Rivera's search of McBride was also permissible as a search incident to a lawful arrest. "When an arrest is made, . . . it is entirely reasonable for arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel v. California*, 395 U.S. 752, 762–63 (1969), *overruled in part by Arizona v. Gant*, 556 U.S. 332 (2009)). A lawful arrest is one that is based on probable cause. *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551. "The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances." *Id.* ¶ 20. Like reasonable suspicion, "whether there is probable cause is an objective standard, considering the information available to the officer and the officer's training and experience." *Id.*

The record is unclear when the arrest occurred, though it appears that it occurred after Officer Rivera searched McBride. (*See* R. 43 at 00:01:08–00:01:45.) The State will assume for the sake of argument that the arrest happened subsequent to the search. However, that the arrest occurred after the search is not dispositive to whether a search is one incident to a lawful arrest. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search . . . we do not believe it particularly important that the search preceded the arrest rather than vice versa.") As the supreme court has made clear, "a search may be incident to a subsequent arrest if the officers have probable cause to arrest before the search." *State v.*

Sykes, 2005 WI 48, ¶ 15, 279 Wis. 2d 742, 695 N.W.2d 277 (citation omitted). Because, as explained below, Officer Rivera had probable cause to arrest McBride prior to the search, the search was incident to a lawful arrest.

Once again examining everything that Officer Rivera knew at the time of the search, we know that the search occurred in a dark alley, late at night, in a high-crime area. (R. 40:5–6.) Further, McBride's furtive movements indicated to Officer Rivera that he was attempting to hide *something* whether it be a weapon or contraband. (R. 40:8.) Officer Rivera observed an unlabeled pill bottle. (R. 1:2.) He testified that based on his training and experience "people who normally carry prescription bottles . . . have a label with their name on it." (R. 40:12.) The fact that there was not a label indicated to Officer Rivera that McBride was "possessing a controlled substance without a prescription." (R. 40:12.) At that point, Officer Rivera had probable cause to arrest McBride. *See Sykes*, 279 Wis. 2d 742, ¶ 16. Any search that occurred after establishing probable cause to arrest was therefore lawful. *Id.* Accordingly, as a search incident to a lawful arrest, Officer Rivera could seize the drug evidence that he found on McBride's person.

McBride contends that "Officer Rivera lacked probable cause to arrest Mr. McBride for the unlawful possession of a prescription drug based simply upon the unlabeled pill bottle in the vehicle." (McBride's Br. 31.) McBride also urges this Court to "join the majority [of courts] and find [that] the presence of an unlabeled pill bottle fails to give rise to probable cause for a seizure and search of Mr. McBride." (McBride's Br. 31.)

But this Court does not need to address whether an unlabeled pill bottle *alone* constitutes probable cause because Officer Rivera's probable cause here was not based on only the pill bottle. McBride's argument ignores that probable cause, like reasonable suspicion, is an objective standard that

considers the totality of the circumstances and the reasonable inferences formed therefrom. *See Lange*, 317 Wis. 2d 383, ¶ 20. And as explained above, Officer Rivera had probable cause to arrest McBride based on all the surrounding circumstances, including the presence of an unlabeled pill bottle on the vehicle floor. Therefore, the foreign cases cited by McBride are inapposite.

2. Even if this Court holds that an unlabeled pill bottle alone cannot establish probable cause and that Officer Rivera's probable cause was based solely on the unlabeled pill bottle, the good faith exception to the warrant requirement counsels against suppression.

Even if this Court agrees with McBride that an unlabeled pill bottle alone cannot serve as the basis for probable cause, in order for that decision to have any impact on this case, the Court would also have to decide that Officer Rivera's probable cause *was* based on only the pill bottle. If this Court held as such, the good faith exception to the exclusionary rule would still counsel against suppression.

"The exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (citing *Herring v. United States*, 555 U.S. 135 (2009). The exclusionary rule's remedial objective is deterring police misconduct. *Id.* To that end, "the exclusionary rule cannot deter objectively reasonable law enforcement activity, and therefore it should not apply in those circumstances." *Id.* ¶ 37. This is the good faith exception to the exclusionary rule. *Id.* ¶ 36.

The good faith exception has precluded exclusion when, among other instances,[10] police reasonably rely on a faulty warrant, case law that is later overruled, or statutes that are later deemed unconstitutional. *State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625; *State v. Ward*, 2000 WI 3, ¶¶ 52, 63, 231 Wis. 2d 723, 604 N.W. 2d 517; *Illinois v. Krull*, 480 U.S. 340, 349–50 (1987). At bottom, good faith depends not upon the circumstances that have led to its application in the past, but whether "a reasonably well trained officer would have known the search was illegal in light of 'all of the circumstances.'" *Dearborn*, 327 Wis. 2d 252, ¶ 36 (citation omitted).

Here, there is little difference between the application of good faith to a later deemed unconstitutional statute or since overruled case law and its application to a completely new legal principle. A reasonable officer in Officer Rivera's shoes would not know that the search that occurred here was unconstitutional based upon a legal principle that an appellate court announces later in the case. Rather, Officer Rivera operated under the current state of the law, which, in Wisconsin, says nothing of whether an unlabeled pill bottle can amount to probable cause. Further, there is no evidence in the record that he engaged in any misconduct, let alone the misconduct that warrants the exclusionary rule. Accordingly, even if this Court does agree with McBride and hold that an unlabeled pill bottle alone cannot establish probable cause, this Court can still affirm the decision of the circuit court based on good faith. *See Kafka v. Pope*, 186 Wis. 2d 472, 476,

[10] The Supreme Court has also applied good faith when an officer reasonably relies on a clerical error in a court's record system or a clerical error in a police department database. *See Arizona v. Evans*, 514 U.S. 1, 14–16 (1995); *see also Herring v. United States*, 555 U.S. 135, 147 (2009) ("[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'").

521 N.W.2d 174 (Ct. App. 1994) (acknowledging that this Court "can affirm for reasons not stated by the trial court even if the reasons were not argued before the trial court").

CONCLUSION

For the foregoing reasons, this Court should affirm McBride's judgment of conviction and the order denying his motion to suppress.

Dated this 11th day of August 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2065
(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7176 words.

Dated this 11th day of August 2021.

Electronically signed by:

Kieran M. O'Day

KIERAN M. O'DAY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of August 2021.

Electronically signed by:

Kieran M. O'Day

KIERAN M. O'DAY
Assistant Attorney General