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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DONTE QUINTELL MCBRIDE,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

This is a fact-dependent appeal, presenting the routine application of well-settled precedents governing warrantless seizures and searches of individuals by law enforcement officers. The resulting decision is unpublished and uncitable; it creates no precedent and cannot feasibly have any impact on any case other than this one. A careful review of the record makes clear that the outcome is supported by well-settled, binding precedent.

Instead of accepting the outcome from the Court of Appeals, the State has now asked this Court for the legal equivalent of a do-over. Unhappy with the result below, and unwilling to admit its own errors, the State has invented reasons for this Court to grant review which, when closely examined, are merely thinly veiled requests for “error correction.” Such a request is not worthy of this Court’s review and should be rejected.

STATEMENT OF FACTS

Mr. McBride was sitting in the passenger seat of a parked car in the alleyway behind his own house with another person, when two City of Milwaukee Police Officers on routine patrol drove down the alley and shone a spotlight into the vehicle. (Pet. App. 4; (40:6-7; 43 at 0:00:22). The officers observed the two individuals, approached, ordered Mr. McBride to put

his hands up, opened the car door, handcuffed him and removed him from the vehicle. (Pet. App. 4). All of this occurred within a matter of seconds. (Pet. App. 4; 40:23).

Mr. McBride challenged the constitutionality of the encounter at a suppression hearing. (Pet. App. 4; 40). At the suppression hearing, the State presented a sole witness, Officer Rivera. (Pet. App. 48; 40:3).

Officer Rivera acknowledged that police had no reports of a “ShotSpotter” call or other suspicious activity in the area, nor were they provided any information regarding Mr. McBride or the vehicle he was in specifically. (Pet. App. 64-65; 40:19-20).

Officer Rivera testified the way the vehicle was parked could have obstructed traffic, resulting in being ticketed and towed. (Pet. App. 52, 65; 40:7, 20). On cross-examination, however, Officer Rivera acknowledged he was able to maneuver around the vehicle and did not take measurements to indicate that it in fact obstructed traffic. (Pet. App. 65; 40:20).

Officer Rivera testified that upon shining the spotlight into the vehicle, he saw the passenger “bend down towards his waist area and begin to reach around in the vehicle.” (Pet. App. 52-53; 40:7-8). According to Officer Rivera, Mr. McBride’s movement prompted him to believe that “something illegal was going on.” (Pet. App. 65; 40:20). Officer Rivera’s body camera footage, which was played at the suppression hearing, reflected it was difficult to see whether Mr.

McBride made a furtive movement. (43 at 0:00:22 - 0:00:29; Pet. App. 86; 40:41).

The officers got out of their squad car and immediately ordered the vehicle's occupants to put their hands up. (Pet. App. 54; 40:9; 43 at 0:00:28-0:00:34). Mr. McBride complied with the command to keep his hands up and Officer Rivera handcuffed him while asking what he was reaching for and what he was doing there. (43 at 0:00:28-0:00:55; Pet. App. 11, 67-69; 40:11, 22-24). Mr. McBride denied reaching for anything and responded that "this is my house right here." (43 at 0:00:53-0:00:58; Pet. App. 76; 40:31).

After handcuffing Mr. McBride, Officer Rivera pulled him out of the vehicle. (43 at 0:00:57-0:01:02; Pet. App. 56; 40:11). As he did so, Officer Rivera noticed an orange pill bottle without a label on the floor of the front passenger area, in plain view. (Pet. App. 56-57, 70; 40:11-12, 25). Upon removing Mr. McBride from the vehicle, Officer Rivera searched him and found another unlabeled pill bottle in his right front jacket pocket. (Pet. App. 57, 118; 40:12; 46:21; 43 at 0:00:1:10). He subsequently found a baggie containing suspected heroin, later confirmed to contain a combination of heroin and fentanyl, in Mr. McBride's left front jacket pocket. (1:2; Pet. App. 37; 32:6). Officer Rivera conceded that he did not believe the pill bottle was a weapon. (Pet. App. 70; 40:25).

The circuit court denied the suppression motion, finding Officer Rivera credible and giving weight to his testimony that he observed Mr. McBride make a

furtive movement (Pet. App. 87; 40:42). The court found the combination of Mr. McBride's furtive movement and presence in a "high-crime area" created reasonable suspicion which justified the seizure. Additionally, the court found suspicious Mr. McBride's presence in an improperly parked vehicle without lights on in an alley. (Pet. App. 91-92; 40:46-47).¹

ARGUMENT

I. This case is fact-based and not appropriate for this Court's review under Wis. Stat. § 809.62(1)(r).

While a party may file a petition for review of an adverse decision, review by this Court is a matter of judicial discretion, and "will be granted only when special and important reasons are presented." Wis. Stat. (Rule) 809.62(1r).²

Here, the State asserts that review is warranted under the "question of law" criteria of Wis. Stat. (Rule) 809.62(1r)(c)3. That rule states:

¹ The circuit court also found the presence of pill bottles on the floorboard of the car was unusual and related to Officer's Rivera's inference of suspicious activity. (40:49). As the Court of Appeals correctly noted, however, reasonable suspicion "must be facts and information known to the police officer before the seizure." *State v. Genous*, 2021 WI 50, ¶10, 397 Wis. 2d 293, 961 N.W.2d 41. (Pet. App. 8, n.5).

² All references to the Wisconsin Statutes refer to the version in effect 2021-2022.

The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and...

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

Wis. Stat. (Rule) 809.62(1r)(c)3.

The State purportedly requests clarification of the “clearly erroneous” standard of appellate review of a circuit court’s factual findings. But the scope of an appellate court’s review of a circuit court’s determination of the facts has long been settled law in Wisconsin. *See e.g. State v. Brooks*, 2020 WI 60, ¶7, 392 Wis. 2d 402, 944 N.W.2d 832, *citing State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). In reality, the State wants this Court to delve into the facts of this case simply to reverse the Court of Appeals. This Court does not engage in error correction – that is the Court of Appeals’ job. *See Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 50, 326 Wis. 2d 729, 786 N.W.2d 78. This Court should reject the State’s invitation to engage in error correction.

The State urges this court to find that the Court of Appeals’ review of the record, including body camera evidence admitted into evidence at the suppression hearing, exceeded the scope of its review. (Pet. Br. 13). At the same time, the State posits that it is incumbent

upon a reviewing court to search the record, including review of a preliminary hearing transcript which was never offered into evidence to find additional facts not testified to by the State's witness at the suppression hearing in order to support the State's argument and the circuit court's findings. (Pet. Br. 13-14). These inapposite claims are glaring and further demonstrate why the State's petition should be denied.

II. The Court of Appeals appropriately reviewed the circuit court's findings of fact under the applicable "clearly erroneous" standard of review and properly applied the facts to constitutional principles.

Whether one's constitutionally-protected right against unreasonable searches and seizures was violated is a mixed question of fact and law. Therefore, a reviewing court must apply a two-step standard of review. *State v. Brown*, 2020 WI 63, 392 Wis. 2d 454, 945 N.W.2d 587. The circuit court's findings of fact will be accepted unless clearly erroneous, and the application of those facts to constitutional principles shall be reviewed independently. *Id.*

The State bears the burden of proving the constitutionality of a warrantless seizure. *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634. Where an unconstitutional seizure occurred, the appropriate remedy is to suppress the evidence it produced. *State v. Washington*, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305; *Wong Sun v. United States*, 371 U.S. 471, 484-85, 487-88 (1963).

At the suppression hearing in the circuit court, both the State and Mr. McBride agreed that a seizure occurred when Officer Rivera asked Mr. McBride to put up his hands. (Pet. App. 7; 40:34-35). Thus, the issue on appeal that the Court of Appeals decided was whether the police had reasonable suspicion to seize Mr. McBride. (Pet. App. 7).

The Court of Appeals considered the totality of the circumstances, noting first “what this case is *not* about.” (Pet. App. 7, ¶ 15). Officers, on routine patrol, were not responding to a call or tip about suspicious or criminal activity. (Pet. App. 7, ¶ 15). Nor was this a case of officers developing a hunch and upon observation determined that criminal activity was afoot. *Cf. Terry v. Ohio*, 392 U.S. 1 (1968).

Contrary to the State’s assertion, the Court of Appeals in fact considered the totality of the circumstances. It weighed each of the factors argued by the State in total: the location, in a “high crime area;” the fact that the encounter occurred late at night and that the vehicle did not have lights on (a fact which is only relevant if it is dark or difficult to see); and that two individuals were sitting inside the parked vehicle. (Pet. App. 8-9, ¶ 17-18). Citing to *State v. Waldner*, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996), the Court of Appeals reflected that “the inference of unlawful conduct must be reasonable.” (Pet. App. 9, ¶ 18). After considering the circumstances in total, the Court of Appeals properly concluded that an inference two individuals sitting in a parked vehicle at night without lights on in a “high crime area,” without more,

are engaging in unlawful conduct is not reasonable. (Pet. App. 9, ¶ 18).

The Court of Appeals also considered Mr. McBride's movement in response to a police spotlight being shone into the car in which he was sitting, in a "high-crime area" at night, without lights on, in an alley. (Pet. App. 9-10, ¶ 19-20) (*citing State v. Gordon*, 2014 WI App 44, ¶ 15, 353 Wis. 2d 468, 846 N.W.2d 483, in which the seizure of an individual walking at night in a "high crime area" who made a "security adjustment" upon seeing police was not justified by reasonable suspicion). The Court properly concluded all of those factors were "not enough to establish reasonable suspicion." (Pet. App. 10, ¶ 20).

In its petition, the State asserts that the vehicle's position in the alleyway violated the traffic laws of both the State of Wisconsin and the City of Milwaukee, citing Wis. Traffic Code 101-24.2. (Pet. Br. 15). This claim overstates the testimony in the record. Officer Rivera testified that the manner in which the vehicle was parked in the alleyway would have interfered traffic "if there was a large vehicle or two-way traffic."³ (Pet. App. 52; 40:7). Additionally, the subsequent testimony and body camera video further controvert the State's assertion. The officer testified he was able to maneuver around the parked vehicle. (Pet.

³ But see Wis. Stat. § 340.01(2), which defines "alley" as "every highway within the corporate limits of a city, village, or town primarily intended to provide access to the rear of property fronting upon another highway and not for the use of through traffic."

App. 65; 40:20). The body camera video shows that the vehicle was *not* parked in such a manner that it obstructed traffic. (43 at 0:00:20-29). Finally, the circuit court found the manner in which the vehicle was parked was “unusual” and “improper” but did not go so far as to find the vehicle was illegally parked. (Pet. App. 91-92; 40:46-47).⁴

The State contends that the officer’s testimony at a preliminary hearing, which was not offered into evidence at the suppression hearing, supports a finding that the circuit court’s ruling at the suppression hearing was not clearly erroneous. Framing the issue under the guise of “searching the record” thinly veils the State’s attempt to re-open the suppression hearing record to include additional evidence it failed to submit during the hearing on Mr. McBride’s suppression motion.

The State asserts Officer Rivera’s testimony at the preliminary hearing regarding the manner in which the vehicle was parked explains the officer’s reasonable suspicion to seize the vehicle. (Pet. Br. 14). This assertion ignores the fact that Officer Rivera testified at that prior hearing that the manner in which the vehicle was parked would violate the city’s traffic laws if *parked overnight*. (Pet. Br. 13; 32:4). Once the officers detected occupants inside the vehicle,

⁴ The circuit court later, in analyzing the challenge to the officer’s search of Mr. McBride, stated the vehicle was parked “in the middle of the alley.” (Pet. App. 111; 46:14). Yet the video recording clearly contradicts this finding. (43 at 0:00:20-29).

any potential reasonable suspicion of violating an overnight parking ordinance dissipated.

The State's position presents an obvious quandary. A vehicle parked in an alley late at night in a "high crime area" without lights on is suspicious for violating a parking ordinance. But the same vehicle, occupied by a driver and passenger is also suspicious.

The State also argues that the manner in which the vehicle which Mr. McBride was sitting blocked or parked in another car which was parked on a concrete slab, perpendicular to his vehicle. (Pet. Br. 12-14). The argument, seemingly, is that the vehicle in which Mr. McBride was sitting, parked at his own house, obstructed or impeded another parked, unoccupied vehicle, at the same location. This stretches the conduct covered by an ordinance prohibiting the obstructing of *traffic*, if traffic includes a parked car.⁵ The Court of Appeals correctly found that, based on the testimony and the body camera video submitted at the suppression hearing, the "circuit court's finding that the SUV 'obstructed traffic' was clearly erroneous." (Pet. App. 11, ¶ 22).

Despite the State's assertion that the Court of Appeals weighed the factors individually and in a "divide and conquer" manner, review of its opinion reflects that the Court in fact considered the totality of

⁵ See Wis. Stat. § 340.01(68), which defines "traffic" as "pedestrians, ridden or herded or driven animals, vehicles and other conveyances, either singly or together, *while using any highway for the purpose of travel*." (Emphasis added.)

the circumstances in determining that police lacked reasonable suspicion to seize Mr. McBride. (Pet. App. 9, ¶ 23).

In sum, the State's mere disagreement with a reasoned result by the Court of Appeals, which applied the appropriate standard of review in this fact-intensive case, does not provide a basis for review by this Court.

CONCLUSION

For all of the reasons set forth above, Mr. McBride asks this Court to deny the State's petition for review.

Dated this 30th day of January, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,508 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 30th day of January, 2023.

Signed:

JILL M. SKWOR
Assistant State Public Defender