STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DONTE QUINTELL MCBRIDE,

Defendant-Appellant.

ON REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING AND REMANDING THE CIRCUIT COURT'S DECISION AND ORDER DENYING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JONATHAN D. WATTS, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

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

Attorneys for Plaintiff-Respondent-Petitioner

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

**Constitutional Provisions**



**Statutes**



**Other Authorities**

## INTRODUCTION

As an intermediate appellate court with no conferred power to make factual findings, the court of appeals is required to uphold a circuit court's findings of historical fact and credibility determinations unless they are clearly erroneous. The court of appeals must search the record for reasons to affirm a circuit court's findings and must uphold those findings if there is support for them in the record. This is true even if the court of appeals' independent review would lead it to disagree with the circuit court's findings.

Here, in reviewing the circuit court's decision to deny Defendant-Appellant-Respondent Donte Quintell McBride's motion to suppress, the court of appeals failed to properly apply that well-settled standard. Stepping into the shoes of an independent fact finder, the court disagreed with the circuit court's finding that McBride's SUV was obstructing traffic, which provided reasonable suspicion for the officer to stop the vehicle. The court of appeals simply reviewed portions of the record and replaced its conclusions for those of the circuit court. It compounded its improper application of the clearly erroneous standard by failing to explain *why* the circuit court's findings were unsupported by the record and subject to reversal.

This Court should reverse the decision of the court of appeals, reaffirm that mere disagreement is insufficient to reverse a circuit court's findings, and reinstate the circuit court's finding that the SUV that McBride occupied obstructed traffic. With that finding reinstated, this Court should conclude that Officer Rivera had reasonable suspicion to stop the SUV based simply on the traffic code violation that Rivera witnessed. A reasonable officer's ability to investigate a traffic code violation remains true regardless of the court of appeals' misunderstanding of the ordinance at issue.

Further, even if there was not reasonable suspicion to detain the SUV based on the traffic code violation, Rivera witnessed an accumulation of facts that would lead any reasonable officer to conclude that criminal activity was afoot. Rivera was conducting routine patrol late at night in a dark alley in a high-crime area. Rivera observed the SUV parked suspiciously, if not unlawfully. When he illuminated the dark SUV's interior with his spotlight, Rivera realized that it was occupied by two passengers, one of whom (McBride) began immediately bending and reaching toward the floor of the vehicle. Rivera acted on those facts and temporarily detained McBride.

The court of appeals failed to consider the totality of the circumstances and failed to explain why it was unreasonable for Rivera to infer unlawful conduct. Those two failures are directly contrary to this Court's precedent. That decision must also be reversed.

Moving beyond the court of appeals' decision, Rivera's reasonable suspicion to conduct a traffic stop and seize McBride meant he could also remove McBride from the SUV and seize the drugs he found. While removing McBride from the SUV, Rivera observed an unlabeled pill bottle filled with pills on the floor where he had just seen McBride reaching. Together with the already accumulated facts, that gave Rivera probable cause to arrest and search McBride; even if Rivera did not have probable cause to arrest, the search was still justified as a protective search based on the officer's objectively reasonable belief that McBride might be armed. Rivera could then seize the contraband based on the plain touch doctrine.

Because the court of appeals improperly applied the clearly erroneous standard when evaluating the circuit court's factual findings, and because the seizure, removal, and

search of McBride were constitutional, this Court should reverse the decision of the court of appeals.

## STATEMENT OF THE ISSUES

1. Did Officer Rivera have reasonable suspicion to seize the SUV occupied by McBride based on the totality of the circumstances?

Answered by the circuit court: Yes.

Answered by the court of appeals: No, Rivera lacked reasonable suspicion to conduct a temporary detention.

This Court should answer: Yes, Rivera could seize McBride based on the traffic code violation he observed or based on the totality of the circumstances that led him to conclude criminal activity was afoot.

2. Could Rivera remove McBride from the SUV, search him, and seize the contraband he uncovered from McBride's person?

Answered by the circuit court: Yes.

The court of appeals did not reach the removal, search, or seizure of contraband because of its conclusion that Rivera did not have reasonable suspicion to initiate the stop.

This Court should answer: Yes.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case that this Court accepts for review, oral argument and publication are appropriate.

## STATEMENT OF THE CASE

*Factual Background and Charges*

While on routine patrol, Officer Jose Rivera and his partner, Officer Kradecki, observed a Nissan SUV in the alley

behind 416 East Locust Street in Milwaukee, an area known for "drug dealing and gunshots." (R. 1:2; 40:4.) The SUV did not have its lights on. (R. 1:2.) Rivera "illuminated the inside of the car [and] saw the person in the front passenger seat reach down around his waist with both hands and then move his hands around." (R. 1:2.) Rivera knew, based on his training and experience, that the passenger's movements were "consistent with someone attempting to conceal or retrieve a weapon." (R. 1:2.)

Rivera exited his squad car to make contact with the passenger, later identified as McBride. (R. 1:2.) Fearing that McBride was armed, Rivera removed McBride from the SUV. (R. 1:2.) While removing McBride from the car, Rivera "saw . . . an orange pill bottle without a label" on the floor of McBride's side of the car. (R. 1:2.) The pills later proved to be oxycodone hydrochloride for which McBride did not have a prescription. (R. 1:2.)

Rivera searched McBride's person after removing him from the car. (R. 1:2.) In McBride's left jacket pocket, Rivera uncovered a clear plastic bag containing a tan chunky substance, which Rivera believed to be heroin. (R. 1:2.) In McBride's other jacket pocket Rivera found another unlabeled pill bottle with pills, which later testing revealed to be oxycodone hydrochloride. (R. 1:2.) McBride also had three cell phones and nearly $2000. (R. 1:2.) Rivera also uncovered a digital scale in the center console of the SUV. (R. 1:2.)

The State charged McBride with one count of possession with intent to deliver heroin (>3–10 grams) as a second and subsequent offense and two counts of possession with intent to deliver narcotic drugs as a second and subsequent offense. (R. 6.)

*Suppression Hearing, Plea, and Sentencing*

McBride moved to suppress the drug evidence. (R. 7.) McBride argued (1) Rivera did not have reasonable suspicion to stop the SUV; (2) Rivera did not have reasonable suspicion to seize McBride; and (3) Rivera did not lawfully search McBride. (R. 7:4–7.) The State responded, arguing that Rivera had reasonable suspicion to seize McBride and probable cause to search him. (R. 8:2–4.)

The circuit court held a hearing on McBride's motion to suppress and heard testimony from Rivera. Rivera testified that he and Kradecki were on routine patrol the night of the interaction. (R. 40:4–5.) He explained that he and Kradecki are members of the Milwaukee Police Department's Anti-Gang Unit. (R. 40:5.) Rivera classified the area as high-crime, testifying that he has "taken many calls for service regarding shootings, shots fired, [and] drug dealings" in the area they were patrolling. (R. 40:5.) He further testified that he has made "[a]t least over two dozen" arrests for "illegal drugs and firearms possessions" in the area. (R. 40:6.)

Regarding the interaction with McBride, Rivera testified that the "vehicle parked in the alley . . . with no lights on" caught his attention because "it was [parked] in the alleyway so traffic would have had to get around it, and [he] could not tell . . . if anyone was inside of the vehicle due to it being dark out." (R. 40:6.) Rivera explained that "[a]lleys typical in Milwaukee are very narrow, so it caught [his] attention because it wasn't parked off to the side, it was parked right in the alley." (R. 40:6–7.) Rivera testified that the SUV would interfere with two-way traffic. (R. 40:7.) Later in the hearing, the State played Rivera's body camera footage. During that playback, the State pointed out a vehicle that was blocked in by the SUV and asked Rivera "this is how you were

describing that the car was impeding the alley?" Rivera answered affirmatively. (R. 40:16; 43 at 00:00:25.)[1]

When asked what he did next, Rivera explained that he "illuminated [his] squad spotlight at the vehicle, and [he] observed it was occupied by two people." (R. 40:7.) When the spotlight hit the SUV, Rivera saw "McBride . . . start[ ] to bend down towards his waist area and begin to reach around in the vehicle." (R. 40:7.) Rivera testified that, based on his training and experience, McBride's movements were "consistent with someone having illegal narcotics or weapons on their person. Upon seeing police, they try to hide those items." (R. 40:8.)

Seeing McBride reach towards his waist and around the vehicle, Rivera "exited [his] vehicle [and] ordered [McBride] to show . . . his hands." (R. 40:9.) During the playback of his body camera footage, Rivera agreed that the video did not pick up movement because of the discrepancy between what his body camera could capture at its fixed angle and what one can see from being able to move his or her head at different angles. (R. 40:17.) Rivera testified that McBride was still reaching around in the vehicle as he approached. (R. 40:10.) Accordingly, Rivera opened the door, pulled McBride out, and handcuffed him. Rivera explained that this was "for [his] safety because [McBride's] movements made [Rivera] fear that [McBride] might have a weapon on his person." (R. 40:11.)

When Rivera pulled McBride from the SUV, he saw that "[w]here [McBride] was seated [there] was an orange pill bottle without a label that contained several green pills of oxycodone." (R. 40:11.) The absence of a label indicated to

[1] R. 43 contains the video file of Rivera's body camera footage played at the suppression hearing. The State utilizes the (hours:minutes:seconds) format to cite to specific portions of the video.

Rivera that McBride "was possessing a controlled substance without a prescription" because based on his "training and experience, people who normally carry prescription bottles, they have a label with their name on it, and there was no label on this pill bottle." (R. 40:12.) Rivera "conducted a search/pat-down of [McBride's] person" after removing him from the SUV. (R. 40:12.) Rivera testified that the pat-down was "[f]or safety purposes. [McBride's] reaching movements made [Rivera] feel that [McBride] could possibly be armed." (R. 40:13.) During the pat-down, Rivera uncovered another unlabeled pill bottle containing pills. (R. 40:12.)

On cross-examination, Rivera acknowledged that he was able to maneuver his squad car around the SUV and that he did not take any measurements of the alley, but he stated that the SUV "would get ticketed or towed if it's obstructing traffic." (R. 40:20.)

Following Rivera's testimony and argument from the parties, the circuit court denied McBride's motion. The circuit court preliminarily found that "the credibility of the officer is good" based on his experience and the fact that his testimony "did not appear to have any contradictions or conflict." (R. 40:40–41.) The court also found that "[t]he lack of seeing the furtive movements on the video doesn't necessarily . . . impeach Officer Rivera" because "a body camera of an officer presents one perspective and view of the circumstances." (R. 40:41.) The court continued, "the fact that the body camera did not apparently show the defendant's furtive movements does not mean that the [c]ourt disbelieves Officer Rivera." (R. 40:41.) The circuit court made the specific finding that "Officer Rivera is credible in his reciting of his testimony about [McBride's] furtive movements." (R. 40:43.)

The court then found that the area was a high-crime area based on Rivera's testimony. (R. 40:46.) Explaining that "[i]t's not just the furtive movements [and] it's not just the

high-crime area," the court moved to the next fact, which was "that [Rivera] sees a vehicle with the lights off parked in the alley." (R. 40:46.) In addition to the lights being off, the court acknowledged that the "vehicle is in an unusual place" where there was "the consideration" of ticketing or towing it because it was "partially blocking the alley." (R. 40:46–47.) The circuit court also stated more specifically that the SUV was "parked in the middle of the alley, obstructing traffic in the alley." (R. 46:14.)

Adding to the circuit court's reasonable suspicion analysis was the fact that "when the squad illuminates the vehicle with the spotlight, they discover that there are occupants." (R. 40:47.) The court explained that "the discovery of occupants in an unilluminated vehicle parked in the middle of the alley is suspicious." (R. 40:47.) Finally, the court again highlighted McBride's movements in response to Rivera's spotlight, reiterating that the movements "occur[red] within moments or seconds . . . of the vehicle being illuminated." (R. 40:48–49.)

With those facts and the full picture that they created in mind, the circuit court concluded that there was reasonable suspicion to seize McBride and conduct the pat down search. (R. 40:50.) The circuit court also concluded that Rivera's seizure of the first pill bottle was justified under the plain view doctrine and that Rivera had probable cause to arrest McBride. (R. 46:19–22.) Accordingly, based on the totality of the circumstances, the circuit court denied McBride's motion to suppress. (R. 46:23.)

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

*Court of Appeals Decision and Dissent*

McBride appealed his judgment of conviction and the circuit court's decision and order denying his motion to suppress. The court of appeals reversed in a split decision. *State v. McBride*, No. 2021AP311-CR, 2022 WL 17814269 (Wis. Ct. App. Dec. 20, 2022) (unpublished). The majority decision concluded that Rivera did not have reasonable suspicion to seize McBride. *Id.* ¶¶ 10–23. The majority reasoned that McBride's presence in a high-crime area could not justify the stop, nor could two people sitting in a parked car or McBride's movements in response to Rivera's spotlight. *Id.* ¶¶ 17–20.

The majority did not consider the SUV's positioning within the alley because it concluded that the circuit court's finding that the SUV obstructed traffic was clearly erroneous. *Id.* ¶¶ 21–22. The majority based that conclusion on its "review of the testimony and the body camera video." *Id.* ¶ 22. Contrary to the circuit court's findings, the majority concluded that "the SUV was not in fact parked in the middle of the alley, but rather off to the side with the driver behind the wheel and available to move the SUV." *Id.* The majority also based its decision on Rivera's testimony that he could maneuver around the SUV and that he did not take any measurements of the alley. *Id.* Because the court of appeals concluded there was not reasonable suspicion to stop the SUV or seize McBride, the majority did not address the remaining issues. *Id.* ¶ 10.

Judge Dugan dissented. *Id.* ¶¶ 24–63. (Dugan, J., dissenting). Judge Dugan first highlighted Rivera's testimony at the suppression hearing because "his testimony is critical in the analysis of the issues on appeal." *Id.* ¶¶ 25–33. Citing *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394, and *State v. Neal*, No. 2017AP1397-CR, 2018 WL 1633577 (Wis. Ct. App. Apr. 3, 2018) (unpublished), Judge

Dugan concluded that Rivera's testimony and the circuit court's findings that the SUV obstructed traffic in the alley justified the initial seizure as a traffic stop. *McBride*, 2022 WL 17814269, ¶¶ 37–38 (Dugan, J., dissenting).

Judge Dugan also concluded that (1) removing McBride from the vehicle during that traffic stop was reasonable under United States Supreme Court precedent and (2) the search of McBride's person was constitutional as a search incident to lawful arrest. *Id.* ¶¶ 39–63. To that end, based on the totality of the circumstances, Judge Dugan concluded that the officers had probable cause to arrest McBride when Rivera conducted the pat-down of McBride's person. *Id.* ¶¶ 49–58.

Importantly, Judge Dugan reminded the majority that the court is *required* to uphold the circuit court's findings unless clearly erroneous. *Id.* ¶¶ 36 n.4, 56 n.10. Judge Dugan would uphold the circuit court's findings that the SUV obstructed traffic and that McBride made furtive movements in response to Rivera's spotlight. *Id.*

The State petitioned this Court for review, which this Court granted.

## STANDARD OF REVIEW

"Whether evidence should have been suppressed is a question of constitutional fact." *State v. VanBeek*, 2021 WI 51, ¶ 22, 397 Wis. 2d 311, 960 N.W.2d 32. This Court will uphold a circuit court's factual findings unless clearly erroneous, and it independently applies those facts to constitutional principles. *Id.*

## ARGUMENT

### I. Officers had reasonable suspicion to temporarily detain McBride.

#### A. Temporary detentions, including traffic stops, are constitutional if they are supported by reasonable suspicion.

"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. Charles E. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729 (footnotes omitted). 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 traffic stop is a seizure within the meaning of the Fourth Amendment and "is more analogous to a so-called *Terry* stop . . . than to a formal arrest." *State v. Floyd*, 2017 WI 78, ¶¶ 20–21, 377 Wis. 2d 394, 898 N.W.2d 560 (alteration in original) (citations omitted).

A *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. A temporary detention in the form of a traffic stop is valid if "under the totality of the circumstances, [a police officer] has grounds to reasonably suspect that a crime or traffic violation has been or will be committed." *State v. Popke*, 2009 WI 37, ¶ 23, 317 Wis. 2d 118, 765 N.W.2d 569.

Whether an officer possessed reasonable suspicion is an objective inquiry: "What would a reasonable police officer reasonably suspect in light of his or her training and

experience?" *State v. Genous*, 2021 WI 50, ¶ 8, 397 Wis. 2d 293, 961 N.W.2d 41 (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.

In considering everything known to an officer at the time of a temporary detention, courts recognize that "conduct which has innocent explanations may . . . give rise to a reasonable suspicion of criminal activity." *State v. Charles D. Young*, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997). In turn, "[i]f a reasonable inference of unlawful conduct can be objectively discerned, the officers may temporarily detain the individual to investigate, notwithstanding the existence of innocent inference[s] which could be drawn." *Id.* And "a series of acts, each of which are innocent in themselves may, taken together, give rise to a reasonable suspicion of criminal conduct." *Id.* Simply put, "officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Genous*, 397 Wis. 2d 293, ¶ 8 (citation omitted).

### B. The illegally parked SUV provided reasonable suspicion.

To begin, the illegally parked SUV itself provided reasonable suspicion to detain McBride. It is well settled that "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143. This rule also applies with equal force to non-traffic civil

forfeiture offenses. *See State v. Iverson*, 2015 WI 101, ¶ 53, 365 Wis. 2d 302, 871 N.W.2d 661.

The court of appeals failed to review the circuit court's finding that the SUV was obstructing traffic with the proper deference under the clearly erroneous standard. It also misunderstood the impact of the ordinance violation at issue.

### 1. In concluding the SUV was not obstructing traffic, the court of appeals ignored the clearly erroneous standard and made independent findings.

#### a. Courts of appeal are not fact finders, and they must affirm findings unless they are clearly erroneous.

The Wisconsin Constitution confers only appellate jurisdiction upon the court of appeals except in limited situations not relevant here. Wis. Const. art. VII, § 5(3). That conferral of jurisdiction "precludes [the court of appeals] from making any factual determinations where the evidence is in dispute." *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). In other words, as the court of appeals itself has recognized, "[t]he court of appeals is not a fact-finding court." *Harwick v. Black*, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998).

Because the court of appeals is not a fact-finding court, "[i]t is axiomatic that trial court findings may not be disturbed on appeal unless they are" clearly erroneous. *Wurtz*, 97 Wis. 2d at 107; *see also Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶ 34, 319 Wis. 2d 1, 768 N.W.2d 615. The clearly erroneous standard applies in cases "[w]here the underlying facts are in dispute" because "the trial court resolves that dispute by exercising its fact-finding function."

*State v. Walli*, 2011 WI App 86, ¶ 14, 334 Wis. 2d 402, 799 N.W.2d 898. This principle remains true even in cases where, like here, "evidence in the record consists of disputed testimony and a video recording." *Id.* ¶ 17.

A circuit court's findings "must . . . strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish" to be clearly erroneous. *United States v. Di Mucci*, 879 F.2d 1488, 1494 (7th Cir. 1989) (first alteration in original) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). As this Court has explained, "[a] finding of fact is clearly erroneous when 'it is against the great weight and clear preponderance of the evidence.'" *Phelps*, 319 Wis. 2d 1, ¶ 39 (citation omitted); *see also Wurtz*, 97 Wis. 2d at 107. In turn, much like an NFL video official upholding an on-field decision absent "clear and obvious visual evidence" that the call on the field was wrong,[2] appellate courts must "affirm [a] circuit court's findings so long as there is evidence in the record that would permit a reasonable person to make the same findings." *Hennessy v. Wells Fargo Bank, N.A.*, 2020 WI App 64, ¶ 16, 394 Wis. 2d 357, 950 N.W.2d 877. Importantly, "a factual finding is *not* clearly erroneous merely because a different fact-finder could draw different inferences from the record." *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417 (emphasis added).

While appellate courts of course must review the record to determine whether a circuit court's factual findings are clearly erroneous, courts "search the record not for evidence opposing the circuit court's decision, but for evidence supporting it." *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006

---

[2] *Rule 15 Instant Replay, Section 2 - Replay Reviews*, 2022 NFL Rulebook, https://operations.nfl.com/the-rules/2022-nfl-rulebook/#section-2-replay-reviews (last visited June 18, 2023).

WI 46, ¶ 12, 290 Wis. 2d 264, 714 N.W.2d 530. And, even if an appellate court's "independent view of the evidence may [lead it] to a different result, [the court is] bound to accept the trial court's inferences unless they are incredible as a matter of law." *Wenk*, 248 Wis. 2d 714, ¶ 8.

**b. The court of appeals improperly employed the clearly erroneous standard and disregarded the circuit court's factual findings despite the record support for those findings.**

Much like the court of appeals' error in *State v. Ruffin*, 2022 WI 34, ¶¶ 39–41, 401 Wis. 2d 619, 974 N.W.2d 432, the court of appeals here correctly identified its standard of review, but it strayed off course when it came time to apply that standard.

In *Ruffin*, this Court admonished the court of appeals for "not conduct[ing] the 'record conclusively demonstrates' inquiry" while reviewing whether a postconviction motion warranted an evidentiary hearing. This Court concluded that the court of appeals "perform[ed] only half of the required analysis" and reversed its decision after conducting the full analysis. *Ruffin*, 401 Wis. 2d 619, ¶¶ 39, 49. The result should be the same here. While the court of appeals correctly identified the standard it *should have* applied, *McBride*, 2022 WL 17814269, ¶ 13, its actual application of the standard was contrary to this Court's requirements.

The circuit court made several factual findings regarding the positioning of the SUV within the alley when it denied McBride's motion to suppress. The court stated that "[t]here's an inference that the vehicle is partially blocking the alley, and there was later testimony that the vehicle could have been towed or ticketed. . . . So the vehicle is in an unusual place with the lights out." (R. 40:46–47.) The circuit

court found "suspicious" "the discovery of [two] occupants in an unilluminated vehicle parked in the *middle* of the alley." (R. 40:47 (emphasis added).) Further, the court found Rivera credible when he testified that there was "a vehicle parked in the middle of the alley, obstructing traffic in the alley, and having no lights on." (R. 46:14.) The court again found those facts to be "suspicious." (R. 46:14.) In summarizing the facts at the close of the suppression hearing, the circuit court again noted that "[t]he . . . vehicle's in an unusual situation in the alley partially obstructing traffic." (R. 46:21.)

Supporting the circuit court's findings was Rivera's testimony that the SUV "wasn't parked off to the side, it was parked right in the alley" and that "it would interfere" with two-way traffic. (R. 40:6–7.) The State also played Rivera's body camera footage during the suppression hearing. During that replay, the State paused the footage at 25 seconds. (R. 40:16.) At that point one can see the SUV parked in the alley; additionally, one can see a car parked on a parking slab perpendicular to the SUV, which would have been physically unable to leave with the SUV in its current position. (R. 43 at 00:00:25.) The State asked Rivera, "So this is how you were describing that the car was impeding the alley?" (R. 40:16.) Rivera answered, "Correct." (R. 40:16.) On cross-examination, Rivera testified that the SUV "would get ticketed or towed if it's obstructing traffic." (R. 40:20.)

Rivera's suppression testimony was also consistent with his testimony at McBride's preliminary hearing, where he explained that "[i]n the city of Milwaukee, you're not allowed to park your vehicle overnight in the alley. If you do park in the alley, you have to allow 15 feet of clearance for other vehicles to get through." (R. 32:4.) He continued, explaining that "[f]rom my experience living in Milwaukee, no alley is that wide that you can technically park in the alley." (R. 32:4.)

Despite the record support for the circuit court's factual findings, the court of appeals declared them clearly erroneous. *McBride*, 2022 WL 17814269, ¶ 22. In doing so, the court of appeals relied on its independent view of Rivera's body camera footage and an isolated portion of Rivera's cross-examination, where Rivera admitted that he could maneuver around the SUV and did not take any measurements of the alley. *Id.* Based on that independent view of the record, the court of appeals derived a different inference than that of the circuit court: that "based on [its] review, . . . [t]he video reflects that the SUV was not in fact parked in the middle of the alley, but rather off to the side with the driver behind the wheel and available to move the SUV." *Id.*

In so doing, the court of appeals inserted itself as the factfinder and simply replaced the circuit court's record supported findings with its own. To make matters worse, the court failed to explain *why* the circuit court's factual findings were clearly erroneous, any competing inferences aside.[3] *Compare McBride*, 2022 WL 17814269, ¶ 22 (providing no explanation of how the circuit court's findings were

[3] Further, while the majority decision stopped short of declaring the circuit court's credibility findings regarding McBride's furtive movements clearly erroneous, it recharacterized those movements as something less than the circuit court found. *State v. McBride*, No. 2021AP311-CR, 2022 WL 17814269, ¶ 20 (Wis. Ct. App. Dec. 20, 2022) (unpublished). This recharacterization rendered the circuit court's finding that Rivera credibly testified that McBride made *furtive* movements in response to his spotlight a nullity and warps the reader's image of the interaction as Rivera encountered it. Judge Dugan recognized the majority's error in his dissent, noting that the circuit court made "extensive findings about why it found Officer Rivera credible about the movements" and reminding the majority that the court of appeals "must accept the circuit court's findings of historical fact unless they are clearly erroneous." *Id.* ¶ 56 n.10 (Dugan, J., dissenting).

unsupported by the record), *with State v. Santiago*, 198 Wis. 2d 82, 94–96, 542 N.W.2d 466 (Ct. App. 1995) (explaining over the span of three pages why the record did not support a factual finding); *see also State v. Santiago*, 206 Wis. 2d 3, 26–27, 556 N.W.2d 687 (1996) (this Court agreeing with the court of appeals that the circuit court's factual findings were clearly erroneous because "[n]o evidence support[ed] [the] finding of fact").

To correct the court of appeals' misapplication of the clearly erroneous standard, this Court should reaffirm that mere disagreement or competing inferences are insufficient to reverse a circuit court's factual findings when those findings are supported by the record. *Wenk*, 248 Wis. 2d 714, ¶ 8.

### 2. Rivera had reasonable suspicion that a traffic ordinance had been or was being violated.

Pursuant to Milwaukee's traffic code, it is "unlawful for any vehicle to be parked or left standing on a highway in such a manner as to obstruct traffic." Milwaukee, Wis. Traffic Code, 101-24.2 (5/31/2023). Here, Rivera testified that the SUV was positioned in such a way that it could have been ticketed or towed for obstructing traffic. The circuit court found that testimony credible, and Rivera's body camera footage confirmed that the SUV was blocking a car in when Rivera encountered it. Accordingly, as Judge Dugan concluded in his dissent, a reasonable officer in Rivera's position could conduct a traffic stop to investigate that suspected traffic code violation. *McBride*, 2022 WL 17814269, ¶¶ 35–38 (Dugan, J., dissenting); *Houghton*, 364 Wis. 2d 234, ¶ 30.

The court of appeals "question[ed]" whether the obstruction ordinance cited above "applies here" because "[t]he plain language of the ordinance addresses vehicles on a

*highway*, not an alley." *McBride*, 2022 WL 17814269, ¶ 21 n.6. The court of appeals' hesitance is unwarranted for two reasons.

First, its interpretation of the ordinance is wrong. The Milwaukee traffic code incorporates all of the State of Wisconsin's statutorily defined terms for the rules of the road. Milwaukee, Wis. Traffic Code, 101-1.2. (5/9/2023) ("The city of Milwaukee adopts s. . . . 340 . . . Wis. Stats., and all subsequent amendments thereto defining and describing regulations with respect to vehicles and pedestrians and traffic . . . ."). The legislature has defined an alley as "every *highway* within the corporate limits of a city . . . primarily intended to provide access to the rear of [the] property fronting upon another highway and not for the use of through traffic." Wis. Stat. § 340.01(2); *see also* Wis. Stat. § 340.01(22) (defining a highway as "all public ways and thoroughfares"). Because an alley is statutorily defined as a highway, the ordinance applies. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[T]echnical or specially-defined words or phrases are given their technical or special definitional meaning.").

The court of appeals has applied the ordinance to a vehicle obstructing an alley on at least one other occasion. *Neal*, 2018 WL 1633577, ¶ 11.[4] Like the SUV here, the vehicle in *Neal* was "parked in the middle of an alley, blocking traffic." *Id.* ¶ 2. There, the court of appeals 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.

[4] Pursuant to Wis. Stat. § (Rule) 809.23(3)(b), an unpublished opinion issued after July 1, 2009, may be cited for its persuasive value.

*Id.* ¶ 11. The court had no issue applying the ordinance there, nor should it have had an issue here.

Second, even if the ordinance did not apply, traffic stops do not lose their validity merely because an officer was mistaken that there was a violation. Instead, it is black-letter law that reasonable suspicion can be found even when based on a reasonable mistake of law. *Heien v. North Carolina*, 574 U.S. 54, 61 (2014); *see also Houghton*, 364 Wis. 2d 234, ¶ 52 (applying *Heien* in Wisconsin). In turn, even if Rivera was wrong that the obstructing ordinance applied to McBride's SUV because it was obstructing an alley rather than a highway, that reasonable mistake of law would not make a traffic stop unconstitutional.

A reasonable officer in Rivera's position would have reasonable suspicion that the SUV was obstructing traffic and therefore violating a traffic ordinance. To be sure, Rivera testified at the suppression hearing that he initiated the stop because "Mr. McBride's actions led me to believe that something illegal was going on." (R. 40:20.) However, the subjective motivation behind the stop is irrelevant where the stop was objectively justified by reasonable suspicion that the traffic code had been violated. *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"). Because a reasonable officer would have objectively possessed reasonable suspicion that a traffic code violation was occurring, a temporary detention to investigate that violation was immediately justified, and this Court should reverse the decision of the court of appeals.

### C. Alternatively, Rivera had reasonable suspicion to stop and detain the SUV and its occupants to investigate criminal activity based on the totality of the circumstances.

Even if this Court concluded that Rivera did not have reasonable suspicion of a traffic violation that justified temporarily detaining McBride, Rivera could still conduct a valid traffic stop to investigate McBride's suspected criminal conduct. *See Popke*, 317 Wis. 2d 118, ¶ 23.

#### 1. Totality of circumstances test

"[T]he reasonable suspicion test is not an exercise in evaluating individual details in isolation." *Genous*, 397 Wis. 2d 293, ¶ 12. Rejecting that "divide-and-conquer analysis," this Court has made clear that "[i]t is the whole picture, evaluated together, that serves as the proper analytical framework." *Id.* (citation omitted). Stated 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." *Id.* ¶ 10.

#### 2. The totality of circumstances provided reasonable suspicion here.

The totality of circumstances provided reasonable suspicion here.

The circuit court heard testimony from 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. 40:4–5.) Rivera testified to making "over two dozen" arrests in the area. (R. 40:6.) The circuit court found Rivera's testimony credible and added the "high-crime area" to the reasonable suspicion calculus. (R.

40:46.) "[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). In concluding that there was not reasonable suspicion, the court of appeals emphasized that "[t]he State cannot justify a warrantless search or seizure with nothing more than a recitation that the person was in a 'high-crime' area." *McBride*, 2022 WL 17814269, ¶ 17. While this is of course true, *see Charles D. Young*, 212 Wis. 2d at 429, this is *not* a case of a car merely idling in a high-crime area; there were several other facts that justified the stop.

Adding to the analysis was the SUV's suspicious, if not unlawful, positioning within the alley. The SUV's suspicious positioning should, like in *Neal*, support the reasonable suspicion analysis here.

This case is unlike *State v. Evans*, No. 2020AP286-CR, 2021 WL 279105 (Wis. Ct. App. Jan. 28, 2021) (unpublished), where the vehicle was parked legally in a parking lot. *Evans*, 2021 WL 279105, ¶ 5. 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. The circuit court in *Evans* relied on general facts to support reasonable suspicion: (1) the stop occurred in a high-crime area; (2) the time of day; and (3) "Evans's conduct in coming from and returning to the hotel and sitting in his parked car." *Id.* ¶ 38. The court of appeals concluded those circumstances did not amount to specific and articulable facts that would lead to reasonable suspicion. *Id.* ¶¶ 39–47. This case is not like *Evans*: here, the SUV was not merely idling in a parking lot. Instead, more like in *Neal*, the SUV was, at the very least, suspiciously parked in a dark and narrow alley located in a high-crime area late at night.

In addition to being suspiciously, if not illegally, parked in an alley in a high-crime area, the SUV had neither its interior nor exterior lights on after 11:00 p.m. (R. 40:6.) Due

to the time of night and darkness of the alley, Rivera did not know whether the SUV was occupied until he illuminated it with 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 law-abiding citizens at that time." *Id.*

Two individuals sitting in a completely 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 law-abiding citizens at that time." *Kyles*, 269 Wis. 2d 1, ¶ 58. Rather, just as Rivera did, any reasonable officer could view this accumulation of facts as suspicious and potentially dangerous.

Finally, after Rivera illuminated the suspiciously parked and completely dark SUV, he witnessed McBride bending down toward his waist and reaching around his seat. (R. 40:7.) 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. Deandre Buchanan*, 2011 WI 49, ¶ 11, 334 Wis. 2d 379, 799 N.W.2d 775. Add the furtive movements to the other facts—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.

In sum, Rivera was patrolling a dark alley late at night in a high-crime area of Milwaukee. He came upon an SUV with an unilluminated interior and no headlights on. Only after he illuminated the SUV's interior with his spotlight did he realize that the SUV was occupied. Rivera then saw the passenger, McBride, bending toward his waist and the floor of the SUV. Based on his training and experience, Rivera understood those movements to be consistent with concealing or retrieving contraband. Any reasonable officer, faced with those facts as a cumulative whole, would be justified in temporarily detaining the SUV's occupants to investigate. Accordingly, this Court can and should reverse the court of appeals' decision even before it addresses that court's myriad misapplications of Fourth Amendment principles.

### 3. The court of appeals failed to conduct a totality-of-the-circumstances analysis.

The court of appeals concluded that Rivera lacked reasonable suspicion to seize McBride. *McBride*, 2022 WL 17814269, ¶¶ 10–23. That decision failed to consider the totality of the circumstances by both isolating some facts and ignoring others. Further, the court failed to explain why the inference of unlawful conduct was unreasonable regardless of any innocent explanations.

First, the court of appeals' analysis was not based on the totality of the circumstances. The court of appeals once again took the "divide-and-conquer" approach that this Court soundly rejected two years ago in *Genous*, 397 Wis. 2d 293, ¶ 12.

Instead of paying heed to this Court's directions, the court of appeals separated out three facts and explained why none of them, alone, could justify reasonable suspicion. For example, when discussing the high-crime area, the court of appeals stated that "[t]he State cannot justify a warrantless search or seizure with *nothing more* than a recitation that the person was in a 'high-crime' area." *McBride*, 2022 WL 17814269, ¶ 17 (emphasis added). But McBride's presence in a high-crime area was *not* the only fact that justified the stop, and the State never argued as much. Instead, that fact was one of many that contributed to Rivera's reasonable suspicion.

Similarly, the court of appeals "d[id] not see how the presence of two people in the parked SUV without its lights on supports a reasonable suspicion that McBride was engaged in criminal activity." *Id.* ¶ 18. Again, that presentation of the facts ignores that there was much more than simply "two people in a parked SUV without its lights on."

In a repeating pattern, the court of appeals concluded that the fact that "Rivera saw movement" in response to his spotlight did not establish reasonable suspicion of criminal activity. *Id.* ¶ 20. For one, Rivera did not merely "see movement." Instead, he testified that he saw furtive movements consistent with concealing or retrieving contraband or a weapon. The circuit court found that testimony credible, but the court of appeals, while stopping short of calling the credibility findings clearly erroneous, seemed unconvinced. Further, perhaps movement in response to a spotlight *alone* is not suspicious. But when that movement is combined with all of the other facts, it can be. *See Charles E. Young*, 294 Wis. 2d 1, ¶ 63 ("The facts were not necessarily unusual, but they were not usual, either.").

The court further failed to conduct a totality of the circumstances analysis even when it attempted to consider the interaction as a whole: instead of building one complete

puzzle, it omitted several pieces. Discussing McBride's movements, the court of appeals stated that those movements, "where the *only other facts* are that the area is high-crime and two people are sitting in a parked car with the lights off in an alley[,] simply [are] not enough to establish reasonable suspicion." *McBride*, 2022 WL 17814269, ¶ 20 (emphasis added). But, as clearly laid out in the dissent, those were not the "only other facts."

Unlike the majority, Judge Dugan considered additional facts: that "(1) the stop occurred late at night; (2) in a high-crime area involving drug trafficking; (3) the SUV was parked in a dark alley obstructing traffic; (4) there were two people sitting in the car with the lights out; (5) when Officer Rivera shined the squad spotlight on the SUV, McBride immediately began to make . . . furtive movements."[5] *Id.* ¶ 56 (Dugan, J., dissenting). The difference in these facts speaks volumes.

The majority failed to consider the time of night, the darkness of the alley, and the fact that the SUV was completely dark, which prohibited Rivera from knowing whether it was occupied until he put the spotlight on it. As discussed above, those were all integral facts that played into the objective reasonableness of the stop and were all valid considerations. *See supra* Section I.C.2. The court of appeals' decision can hardly be said to be based on the totality of the circumstances when it omitted several key facts.

Finally, the court of appeals misapplied the rule that "officers are not required to rule out the possibility of innocent

---

[5] To be sure, Judge Dugan considered these facts in determining whether probable cause existed to arrest McBride. *McBride*, 2022 WL 17814269, ¶ 56. However, those first five facts that Judge Dugan utilized preceded McBride's exiting of the SUV and therefore contributed to the reasonable suspicion to temporarily detain him.

behavior before initiating a brief stop." *Genous*, 397 Wis. 2d 293, ¶ 8 (citation omitted). The court of appeals emphasized that "[t]here are a plethora of innocent reasons that two people may sit in a parked car, such as waiting for a friend or family member." *McBride*, 2022 WL 17814269, ¶ 18. The court disregarded the innocent explanations rule again when it concluded that McBride's movement was merely "movement in response to a bright spotlight being shined into the car." *Id.* ¶ 20. The court of appeals at no point referred to McBride's movements as furtive despite the circuit court's finding and Rivera's testimony, which supported that finding. Implicit in the court of appeals' decision is that McBride's movements, if they existed, were *not* furtive, and instead were reasonable, innocent movements in response to a police spotlight.

It is irrelevant whether there is "a plethora of innocent reasons" why people may do things if it was reasonable for an officer to infer unlawful conduct from the totality of the circumstances. *Charles E. Young*, 294 Wis. 2d 1, ¶¶ 63–64. The court did not explain why it would be unreasonable for Rivera to initiate the stop based on the totality of the circumstances, any innocent explanations notwithstanding. *Compare McBride*, 2022 WL 17814269, ¶¶ 18, 20, *with Young*, 294 Wis. 2d 1, ¶¶ 59, 64. Because police officers are "often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving," *State v. Smith*, 2018 WI 2, ¶ 32 n.18, 379 Wis. 2d 86, 905 N.W.2d 353 (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)), requiring officers to disprove innocent explanations before proceeding would be the antithesis of good police work. *See also Terry*, 392 U.S. at 23 ("[I]t would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."). Rivera was therefore not required to disprove the innocent explanations the court of appeals identified before initiating the stop.

Rivera reasonably explained why he proceeded the way he did based on the totality of the circumstances, and that is all that is required. *Young*, 294 Wis. 2d 1, ¶ 64.

****

The court of appeals' reasonable suspicion analysis contradicted this Court's precedent. As to the illegally parked SUV, the court failed to conduct its review of the findings under the clearly erroneous standard, and then, having made its own finding instead, misunderstood the impact of the relevant ordinance. As to the totality of the circumstances analysis, the court failed to properly apply that test as well by dividing and conquering the facts it wanted to apply while totally ignoring others. This Court should reverse that decision.

## II. Rivera could lawfully remove McBride from the SUV, search him, and seize the drugs he found.

Having established reasonable suspicion to initiate a temporary detention, Rivera approached the SUV, ordered McBride to show his hands, and ordered him out of the car. Under *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977), and *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997), police may remove drivers and passengers from vehicles during investigatory stops. This is because "traffic stops are 'especially fraught with danger to police officers.'" *State v. Wright*, 2019 WI 45, ¶ 25, 386 Wis. 2d 495, 926 N.W.2d 157 (citations omitted). Therefore, "the Fourth Amendment categorically authorizes [a] police [officer] to order the driver and all passengers out of the vehicle for the duration of the traffic stop in order to ensure the safety of the officer." *Id.* (citations omitted).

As already discussed, "a police officer may . . . conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime *or*

traffic violation has been or will be committed." *Popke*, 317 Wis. 2d 118, ¶ 23 (emphasis added). Therefore, regardless of whether this Court concludes that the stop was initiated to investigate the traffic code violation or other suspected criminal activity, the interaction was a traffic stop, the policy of officer safety that underlies *Mimms* and *Wilson* applies, and Rivera could lawfully order McBride out of the SUV.

After Rivera removed McBride from the SUV, Rivera could search him and seize the contraband found on McBride. With all of the other facts that had already accumulated, the search was justified as a search incident to a lawful arrest after Rivera observed an unlabeled prescription pill bottle on the floor of McBride's side of the SUV. Alternatively, even if there was not probable cause to arrest, Rivera had reasonable suspicion that McBride may have been armed, could conduct a protective search based on that reasonable suspicion, and could seize the drug evidence he uncovered.

### A. The search of McBride's person was justified as a search incident to a lawful arrest.

#### 1. Probable cause to arrest is a flexible, common-sense standard based on the totality of the circumstances, and police can search suspects incident to lawful arrests.

"Probable cause to arrest is the sum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *State v. Nieves*, 2007 WI App 189, ¶ 11, 304 Wis. 2d 182, 738 N.W.2d 125. It "does not require 'proof beyond a reasonable doubt or even that guilt is more likely than not.'" *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct.

App. 1994) (citation omitted). Ultimately, probable cause is "a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior'" that is based on "the totality of the circumstances." *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W.2d 551 (citation omitted).

Once an officer has probable cause to arrest a person, "it is entirely reasonable for the 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 on other grounds by Arizona v. Gant*, 556 U.S. 332 (2009). "A *Chimel* search incident to arrest must be contemporaneous to the arrest." *State v. Sykes*, 2005 WI 48, ¶ 15, 279 Wis. 2d 742, 695 N.W.2d 277. However, as long as the officer has probable cause to arrest when the search occurs and does not use items uncovered during the search as justification for the arrest, it does not matter whether the search preceded the arrest or vice versa. *Id.* ¶ 16 (citing *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980)).

### 2. Rivera had probable cause to arrest McBride and therefore could search McBride incident to a lawful arrest.

Here, Rivera had probable cause to arrest McBride and could lawfully search him incident to that arrest. Again, the interaction occurred in a dark alley, late at night in a high-crime area. (R. 40:5–6.) Rivera initially did not know whether anyone was in the SUV, but when he illuminated the SUV, he saw McBride bending toward his waist, which indicated to Rivera that he was attempting to hide *something* whether it be a weapon or contraband. (R. 40:8.)

When Rivera removed McBride from the SUV, he observed an unlabeled pill bottle on the passenger's side floorboard. (R. 1:2.) Rivera 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 Rivera that McBride was "possessing a controlled substance without a prescription." (R. 40:12.) At that point, 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, Rivera could seize the drug evidence that he found on McBride's person.

### B. Even if Rivera did not have probable cause to arrest McBride, the search was valid as a *Terry*-style protective frisk, and seizure of the contraband was valid under the plain touch doctrine.

#### 1. Police may frisk a suspect if they have reasonable suspicion that the suspect is 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 a reasonable suspicion that a suspect may be armed." *Id.* at 209. 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. This is because "[w]here 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." *McGill*,

234 Wis. 2d 560, ¶ 19. To that point, this 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 on the street to observe the encounter." *Id.* ¶ 32 (collecting cases). Moreover, "[a]n officer may place a suspect in restraints in order to protect himself during a *Terry* frisk." *Id.* ¶ 38. Indeed, "[p]olice officers do not need to choose between completing a protective frisk and handcuffing a suspect in a field investigation." *Id.* ¶ 39. Instead, "[t]hey may do both, if the circumstances reasonably warrant it." *Id.*

Whether an officer has reasonable suspicion to conduct a pat-down search is, like most other Fourth Amendment inquiries, 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.* ¶ 23. 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, "a police officer's fear or belief that his or her safety or that of others was in danger" is also relevant. *Kyles*, 269 Wis. 2d 1, ¶ 34.

### 2. Rivera had reasonable suspicion that McBride was armed.

The same factors that justified seizing McBride in the first place also justified handcuffing him and Rivera's protective search. Again, 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 Rivera shined his spotlight into the car, McBride immediately began bending toward his waist and reaching around near his

seat. (R. 40:7–8.) As Rivera approached the SUV, "McBride was still reaching inside of the vehicle." (R. 40:10.) Rivera testified that, based on his training and experience, individuals often conceal weapons in their waistbands. (R. 40:8–9.) McBride's actions led Rivera to suspect that McBride was armed and to 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 this 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, *id.* ¶ 20, 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 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.

### 3. Rivera was permitted to seize the drugs that he found during the protective search.

Because Rivera conducted a permissible protective search of McBride, 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 a 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.* (alterations in original) (quoting *State v. Larry 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.*, *Deandre Buchanan*, 334 Wis. 2d 379, ¶ 26.

Here, all three requirements of the *Applewhite* test are satisfied.

First, the evidence was in plain view. Rivera uncovered the pill bottle and heroin during a protective search for weapons. (R. 32:6; 40:12, 25); *see Applewhite*, 314 Wis. 2d 179, ¶ 15.

Second, as explained above, Rivera had reasonable suspicion, based on the totality of the circumstances, that McBride may have been armed. Therefore, Rivera had prior justification for discovering the drug evidence in plain view. *Id.*

Third, based on the totality of the circumstances, 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 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, Rivera observed an unlabeled orange pill bottle on the floor of the SUV near McBride's seat. (R. 1:2; 40:11–12.) In one of McBride's jacket pockets Rivera uncovered another unlabeled pill bottle. (R. 1:2.) Importantly, 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, after having seen a similar unlabeled pill bottle 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, Rivera lawfully seized the drug evidence that he uncovered during the protective search.

****

Regardless of whether Rivera searched McBride as a search incident to an arrest or whether Rivera searched McBride as a protective *Terry* frisk, the search and the seizure of any evidence derived therefrom were constitutional. This

Court should reverse the decision of the court of appeals and affirm the circuit court's decision to deny McBride's motion to suppress.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals.

Dated this 19th day of June 2023.

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-Petitioner

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

## FORM AND LENGTH 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 10,287 words.

Dated this 19th day of June 2023.

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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 19th day of June 2023.

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General