STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP1656-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE E. BODIE,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING SUPPRESSION AND A JUDGMENT OF CONVICTION ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Assisted by:
Braden Kundert
Law Student Extern

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

TABLE OF CONTENTS

Page

ISSUE PRESENTED 5

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 5

INTRODUCTION 6

STATEMENT OF THE CASE 7

ARGUMENT 10

The circuit court did not err in denying Bodie's suppression motion. 10

A. Standard of review. 10

B. A frisk for weapons is lawful when it is supported by an objectively reasonable suspicion that the person is armed and dangerous. 10

C. Officer safety weighs heavily in a frisk analysis. 11

D. A person's "unusual response to an interaction with law enforcement" is a fact that supports reasonable suspicion for a frisk. 12

E. It was objectively reasonable under the circumstances here for the trooper to suspect that Bodie might be armed. 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Adams v. Williams,
407 U.S. 143 (1972) 12

Maryland v. Buie,
494 U.S. 325 (1990) 12

Michigan v. Long,
463 U.S. 1032 (1983) 12

Pennsylvania v. Mimms,
434 U.S. 106 (1977) 12

State v. Buchanan,
2011 WI 49, 334 Wis. 2d 379, 799 N.W.2d 775..... 13, 16

State v. Dearborn,
2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97..... 10

State v. Guy,
172 Wis. 2d 86, 492 N.W.2d 311 (1992) 12

State v. Kyles,
2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449..... 5, 11, 13

State v. McGill,
2000 WI 38, 234 Wis. 2d 560, 609 N.W.2d 795..... 11

State v. Morgan,
197 Wis. 2d 200, 539 N.W.2d 887 (1995) 9, 13, 15

State v. Nesbit,
2017 WI App 58, 378 Wis. 2d 65,
902 N.W.2d 266 .....5, *passim*

State v. Vorburger,
2002 WI 105, 255 Wis. 2d 537, 648 N.W.2d 829..... 10

Terry v. Ohio,
392 U.S. 1 (1968) 11, 14

United States v. Monsivais,
848 F.3d 353 (5th Cir. 2017) 15

United States v. Simpson,
609 F.3d 1140 (10th Cir. 2010) 9, 13, 15

Other Authorities

WisPolitics,
https://www.wispolitics.com/2021/aaa-recent-roadside-tragedies-underscore-need-for-protect-emergency-responders/ (last visited Aug. 8, 2022) 9

ISSUE PRESENTED

A frisk is a reasonable search if it is supported by an objectively "reasonable suspicion that [the] person may be armed and dangerous to the officer or others."[1] The state trooper who frisked Defendant-Appellant Jesse Bodie suspected that Bodie was concealing a handgun. This suspicion was based on two facts: the knowledge that Bodie had an active warrant and was driving while revoked, and Bodie's sudden change of demeanor when the trooper, who'd been assisting at the scene of the car fire that destroyed Bodie's vehicle, suggested that he wait inside the squad car for his ride to arrive. The trooper frisked Bodie after Bodie agreed to get into the squad.

In finding a frisk lawful under similar circumstances, this Court stated in *Nesbit* that "[o]ne who reacts to a question [from an officer] by quieting down, becoming deflated, and responding demurely does so for a reason" and noted that "[i]t is well established that an abnormal nervousness or unusual response to interaction with law enforcement is a relevant factor in whether a person is armed and dangerous."[2]

Was the frisk here lawful?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither.

---

[1] *State v. Kyles*, 2004 WI 15, ¶ 7, 269 Wis. 2d 1, 675 N.W.2d 449

[2] *State v. Nesbit*, 2017 WI App 58, ¶ 12, 378 Wis. 2d 65, 902 N.W.2d 266.

INTRODUCTION

In this frisk case, the parties agree on the facts and the legal framework. The parties disagree about whether the facts known to the trooper support a reasonable inference that Bodie was armed and dangerous. The parties also disagree about what this Court's decision in *Nesbit* means for the analysis. In that case, there was "nothing suspicious" about the officer's interaction with Nesbit and "nothing was out of the ordinary or concerning"—"[*u*]*ntil* the conversation turned to getting in the squad car," at which point, Nesbit's demeanor changed.[3] It's true that this Court considered *Nesbit* "a close case" and said the "key fact" there was "Nesbit's response to the question of whether he had any weapons on his person."[4] Bodie argues that the emphasis is on what the question was about. But the State reads that language as emphasizing the significance of the *response*—after all, that sentence is followed by citations to two authorities that referenced nervousness and did not involve questions about weapons.

Here, the officer offered Bodie a safer place to wait so he would not be hit by a car. There's no evidence that this concern was a ruse. Even if it was warm and sunny instead of cold and dark, Bodie's immediate refusal (before he changed his mind and agreed to wait in the squad) would have been suspicious because standing on the side of I-94 is so risky.

Bodie's argument is that if a trooper frisks a man he is trying to protect—before getting into a squad alone with him on a dark highway—the Fourth Amendment allows the State to use any resulting evidence if the man has an odd reaction to a question about weapons, but not if he has an odd reaction to a question about something else. But *Nesbit* shows that a change in demeanor is a factor on which reasonable suspicion

---

[3] *Id.* ¶ 10.

[4] *Id.* ¶¶ 10, 11.

can be based regardless of the question posed to the defendant. It even stated, "It is well established that an abnormal nervousness or *unusual response to interaction with law enforcement* is a relevant factor in *whether a person is armed and dangerous*."[5] In refusing to suppress the evidence there, this Court also noted, "Cases addressing this area of law are littered with deference toward law enforcement's safety concerns due to the unusually dangerous nature of the work."[6] This Court should affirm.

STATEMENT OF THE CASE

The trooper responded to the scene of a car fire on I-94.

Bodie's vehicle caught fire on the side of the interstate outside Madison just before midnight on January 27, 2018. (R. 1:2.) A trooper who responded to the scene discovered that Bodie's license was revoked due to an OWI conviction. (R. 1:2.) As Bodie was about to get into the squad, the trooper frisked him and found an illegal weapon and drugs. (R. 1:2.)

Bodie was arrested and charged.

Based on the discovery of the gun and methamphetamine, Bodie was arrested and charged with possession of a firearm by a felon and possession of methamphetamine. (R. 1:1.)

Bodie moved to suppress the evidence from the search and the circuit court held a hearing.

Bodie moved to suppress the gun and drug evidence, arguing that the frisk was unlawful because it was not supported by reasonable suspicion. (R. 33:1; 101:29.)

At the suppression motion hearing, Trooper Sou Xiong testified that he responded to a call and met Bodie at the

---

[5] *Id.* ¶ 12 (emphasis added).

[6] *Id.* ¶ 15 (collecting cases).

scene. (R. 101:4–5.) Bodie's car had caught fire on the highway shoulder, fire fighters and other state troopers were present, and two lanes had been closed. (R. 101:5.) After the fire was put out, the lanes were reopened to traffic. (R. 101:6–8.) The trooper testified that the other responders were leaving, and his role was to "wait[ ] on scene with Mr. Bodie until the tow truck and second party arrived on scene to transport him." (R. 101:7.) He testified that "it's all farm fields out there. There's no external light. It's very dark, unlit and it was approximately 30, 35 degrees that day, that night." (R. 101:9.) The speed limit there was 70 miles per hour, and as the lanes were being reopened cars were "accelerating" to get past the scene. (R. 101:9–10, 23.) Bodie had been standing outside for almost an hour at that point. (R. 101:7, 15, 17.) The trooper also knew before he approached Bodie that Bodie's license had been revoked due to an OWI and he had a nonservable warrant for arrest from Indiana. (R. 101:20.) He testified that "[his] security sense [was] already heightened with Mr. Bodie due to him not being the most law-abiding citizen." (R. 101:20.)

The five-minute interaction that occurred at that point is the focus of this appeal. (R. 101:9.) After talking with Bodie for a couple of minutes, the trooper asked Bodie if he would like to wait in his squad car. (R. 101:9.) At that point, Bodie's demeanor changed. (R. 101:18.) Up to that point, Bodie had been "laid back," but after the trooper asked if he would like to wait in the squad car, he became "more serious." (R. 101:10.) Bodie at first declined the offer, saying, "I would rather not." (R. 101:9.) The trooper thought this was "odd" because it was cold and Bodie "appeared to be cold." (R. 101:10.) After the trooper explained his safety reasons[7]

[7] According to information from AAA available online, "Since 2015, over 1,600 people have been struck and killed while outside

and urged Bodie to get in the squad, Bodie "agreed" to do so. (R. 101:20.)

The trooper testified that he searched Bodie before he let Bodie get into his squad car. (R. 101:10, 20.) He found a handgun in Bodie's front waistband. (R. 101:11.) He also located two bags of marijuana and methamphetamine. (R. 1:2.)

The circuit court denied the motion.

In a written order denying the motion, the circuit court concluded that Bodie's change of demeanor, his record, and his warrant status together gave the trooper reasonable suspicion for the frisk. (R. 43:4.) The circuit court cited *Nesbit*[8] for the proposition that "such reactions are telling, and do justify officers' actions." (R. 43:4.) The circuit court included the portion of *Nesbit* citing authority for the proposition that defendants' reactions, unusual responses, and possible deception are all factors that can support reasonable suspicion for a frisk. (R. 43:4.) *See State v. Morgan*, 197 Wis. 2d 200, 214–15, 539 N.W.2d 887 (1995) (holding that unusual nervousness can be a factor that supports reasonable suspicion); *United States v. Simpson*, 609 F.3d 1140, 1149 (10th Cir. 2010) (explaining that it is "noncontroversial" that "lies, evasions or inconsistencies about any subject while being detained may contribute to reasonable suspicion").

The circuit court concluded, "Together with his knowledge of Bodie's record and warrant status, the change justified Trooper Xiong in taking precautionary measures in

---

of a disabled vehicle." WisPolitics, https://www.wispolitics.com/2021/aaa-recent-roadside-tragedies-underscore-need-for-protect-emergency-responders/ (last visited Aug. 8, 2022).

[8] *Nesbit*, 378 Wis. 2d 65.

choosing to search Bodie before hav[ing] Bodie enter his squad car."[9] (R. 43:4.)

Bodie entered no contest pleas to both counts and was convicted. (R. 50; 64:8–9.) This appeal follows.

ARGUMENT

The circuit court did not err in denying Bodie's suppression motion.

A. Standard of review.

In reviewing the denial of a motion to suppress evidence, a court upholds a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829. It reviews de novo the circuit court's application of constitutional principles to those facts. *Id*.

B. A frisk for weapons is lawful when it is supported by an objectively reasonable suspicion that the person is armed and dangerous.

"The right to be secure against unreasonable searches and seizures is protected by both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution." *State v. Dearborn*, 2010 WI 84, ¶ 14, 327 Wis. 2d 252, 786 N.W.2d 97.

A frisk for weapons is reasonable if the frisk is supported by reasonable suspicion that the suspect is armed

---

[9] The circuit court's order includes a comment that the trooper was "conducting a community caretaker function in placing Bodie in the back seat of the squad as he waited for his ride." (R. 43:5.) The State had argued that the search was lawful both under *Nesbit* (R. 101:34), and under the community caretaker exception. (R. 101:27.) The State does not advance a community caretaker argument on appeal.

and dangerous. *State v. Kyles*, 2004 WI 15, ¶ 7, 269 Wis. 2d 1, 675 N.W.2d 449. In making these determinations, officers are allowed to draw reasonable inferences from the circumstances. *Id.* ¶ 4. "In *Terry* [*v. Ohio*], the Court authorized a protective search of an individual suspected of criminal activity in order 'to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.'" *Id.* ¶ 9 (quoting *Terry v. Ohio*, 392 U.S. 1, 24 (1968)). To justify a frisk, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry*, 392 U.S. at 21. "[D]ue weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27.

"The reasonableness of a protective search for weapons is an objective standard, that is, 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger' because the individual may be armed with a weapon and dangerous." *Kyles*, 269 Wis. 2d 1, ¶ 10. "In determining whether a frisk was reasonable, a court may look 'to any fact in the record, as long as it was known to the officer at the time he conducted the frisk and is otherwise supported by his testimony at the suppression hearing." *Id.* (quoting *State v. McGill*, 2000 WI 38, ¶ 24, 234 Wis. 2d 560, 609 N.W.2d 795).

C. Officer safety weighs heavily in a frisk analysis.

A frisk analysis incorporates facts relevant to officer safety. Whether an officer has "protection from a second law enforcement officer" is also relevant to whether a reasonably prudent officer would be concerned for his or her safety. *State v. Nesbit*, 2017 WI App 58, ¶ 14, 378 Wis. 2d 65, 902 N.W.2d

266. The Wisconsin Supreme Court stated in *State v. Guy* that "[t]he constant refrain in these [protective search] cases has been that the need for police to protect themselves can justify a limited frisk for weapons." *State v. Guy*, 172 Wis. 2d 86, 94–95, 492 N.W.2d 311 (1992). *Guy* cited the following cases. *Buie* held that officers have an interest in self-protection that can justify a protective sweep. *Maryland v. Buie*, 494 U.S. 325, 335 (1990). *Long* stated, "Our past cases indicate . . . that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). *Mimms* stated, "We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty," and "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 111 (1977). And *Adams v. Williams*, 407 U.S. 143, 146 (1972), stated that the purpose of a frisk is limited: it is "not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."

D. A person's "unusual response to an interaction with law enforcement" is a fact that supports reasonable suspicion for a frisk.

"It is well established that an abnormal nervousness or *unusual response to interaction with law enforcement* is a relevant factor in *whether a person is armed and dangerous*." *Nesbit*, 378 Wis. 2d 65, ¶ 12 (emphasis added). In support of this proposition, *Nesbit* cited a case that did not involve a question from the officer to the suspect about weapons. *Morgan*, a case where the defendant reacted nervously when he was asked for his driver's license, held that a court "can use [defendant's] nervousness as a factor in its de novo determination of the legality of . . . [the] pat-down search."

Morgan, 197 Wis. 2d at 214–15. "Moreover, possible deception or untruthfulness is also one of many factors that may legitimately contribute to a reasonable suspicion." *Nesbit*, 378 Wis. 2d 65, ¶ 12. *Nesbit* also cited *Simpson*, 609 F.3d at 1149, a vehicle search case that explained that it is "noncontroversial" that "lies, evasions or inconsistencies about any subject while being detained may contribute to reasonable suspicion." *Id.* An officer's testimony that he found a defendant's response to a question "noteworthy, untrustworthy, and concerning" is thus relevant to a frisk analysis. *Nesbit*, 378 Wis. 2d 65, ¶ 13.

E. It was objectively reasonable under the circumstances here for the trooper to suspect that Bodie might be armed.

The context of the interaction between the trooper and Bodie is a relevant factor. *See Kyles*, 269 Wis. 2d 1, ¶ 39 ("The officer's fear or belief that the person may be armed is but one factor in the totality of the circumstances that a court may consider in determining whether an officer had reasonable suspicion to effectuate a protective weapons frisk."). The unrefuted testimony was that the trooper was assigned to stay with Bodie alone on the side of the highway in a rural area. (R. 101:7, 9.) After surprising the trooper by balking at getting into the squad car, Bodie agreed to do so (R. 101:20), putting the trooper into the position of getting into a squad alone with a possibly armed man late at night.

The trooper's knowledge of Bodie's revoked license, OWI charge, and arrest warrant is also relevant to the frisk analysis. The trooper testified that these facts were in mind when he approached Bodie. (R. 101:9.) A trooper is "not required to ignore that information" about a prior record, and it can be a part of the totality of the circumstances frisk analysis. *See State v. Buchanan*, 2011 WI 49, ¶ 18, 334 Wis. 2d 379, 799 N.W.2d 775.

Bodie's "odd" reaction, (R. 101:10), to the invitation to get into the squad car rather than stand on the side of the dark highway in cold weather is relevant to the frisk analysis. *See Nesbit*, 378 Wis. 2d 65, ¶ 12. The trooper testified that Bodie appeared to be cold after waiting on the side of the road in near-freezing temperatures for an hour. (R. 101:10.) The trooper testified the two lanes that had been shut down during the fire, (R. 101:6), were being reopened and first responders were leaving. (R. 101:9.) He testified that cars were accelerating past (R. 101:23), the speed limit was 70 mph there (R. 101:9), that on the interstate, "people don't move over" to a further lane for disabled vehicles (R. 101:22), and that he did not want "to risk [Bodie] getting hit or [himself] getting hit on the side of the Interstate." (R. 101:9.)

From these facts, in these circumstances, the trooper could draw the "specific, reasonable inference[ ]," *see Terry*, 392 U.S. at 27, that there was a reason for Bodie's sudden change in demeanor and inexplicable refusal, at first, to take shelter in the squad car, and that the reason was that Bodie did not want the officer to discover the weapon he was carrying. The frisk was therefore lawful.

Bodie argues that "[w]ithout a link between Bodie's shift in tone and the issues of whether he was armed or dangerous, any inferences [the trooper] drew about the latter were mere hunches." (Bodie's Br. 13.)

Bodie primarily relies on this Court's analysis in *Nesbit*, zeroing in on its conclusion that "[a] reasonably prudent officer seeing this response"—a visible change of demeanor—"to a question about weapons would be suspicious and wonder if the answer was truthful." *Nesbit*, 378 Wis. 2d 65, ¶ 12. He adds emphasis to "a question about weapons" (Bodie Br. 10), and argues that the Court's specification of the type of question is significant. He argues that "the context of Nesbit's shift in tone (a question about weapons) just barely gave rise to reasonable suspicion." (Bodie's Br. 11.) The problem with

that reading of *Nesbit* is that the authority this Court used to support its holding were two cases that held searches lawful based on a suspect's demeanor without any reference to weapons. *Nesbit*, 378 Wis. 2d 65, ¶ 12 (first citing *Morgan*, 197 Wis. 2d at 214–15; and then citing *Simpson*, 609 F.3d at 1149). In *Nesbit*, the question happened to be about a weapon, so it was natural for the court to reference it. In light of the authorities cited, which involve unusual nervousness as a factor and don't involve weapon-specific questions, it is reasonable not to view the question asked as dispositive of the lawfulness of the search,

Bodie also cites *United States v. Monsivais*, 848 F.3d 353 (5th Cir. 2017) to show "how subtle factual differences can lead a reviewing court to a different conclusion" in a frisk analysis. (Bodie's Br. 10.) In *Monsivais*, an individual was walking away from his disabled truck on the side of an interstate during daylight when two police officers in a squad car drove up, then got out of the car and detained him. *Monsivais,* 848 F.3d at 356. After a four-minute conversation, one officer announced that he was going to search him and proceeded to frisk him. *Id*.

But contrary to Bodie's assertion that *Monsivais* is "another side-of-the-interstate frisk case" (Bodie's Br. 10), it did not actually involve a frisk analysis. The court there concluded that *the stop* was bad ("[T]he officers lacked a basis to reasonably suspect him of a criminal act *before seizing him*.") and it therefore did not reach or address the question of *the frisk*—whether "the officers also lacked reasonable suspicion that Monsivais was armed and dangerous." *Monsivais*, 848 F.3d at 357 (emphasis added). Bodie's brief misreads the *Terry* stop analysis in *Monsivais* as a frisk analysis. (Bodie's Br. 10–11.) Because that case was resolved on the grounds that there was no basis for the investigatory stop, and this case does not raise that question, *Monsivais* has no relevance here.

Bodie minimizes the significance of his unwillingness to get into the squad car, stating that it "is not inherently suspicious" because "30-35 degrees is comfortable for many Wisconsinites." (Bodie's Br. 13–14.) But the trooper's unrefuted testimony, which the circuit court found credible (R. 43:4), was that Bodie did appear to be cold after waiting outside for an hour. (R. 101:10.) Bodie also minimizes the significance of the trooper's knowledge of his OWI-related license revocation and the outstanding warrant. (Bodie's Br. 14.) He does not acknowledge either; he offers only that "[his] poor driving record shows he has had trouble following the rules of the road." (Bodie's Br. 14.) But the law says such knowledge is part of the totality of the circumstances considered in a frisk analysis. *See Buchanan*, 334 Wis. 2d 379, ¶ 18. So the circuit court correctly considered the fact that the trooper knew before the frisk that Bodie was not "the most law-abiding citizen." (R. 101:20.)

The factors here, taken together, and the reasonable inferences from them, gave the trooper reasonable suspicion that Bodie was armed and dangerous. The circuit court therefore correctly denied his motion to suppress.

CONCLUSION

This Court should affirm.

Dated this 8th day of August 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Assisted by:
Braden Kundert
Law Student Extern

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@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 3,307 words.

Dated this 8th day of August 2022.

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
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 8th day of August 2022.

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
Assistant Attorney General