STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

MICHAEL GENE WISKOWSKI,

Defendant – Appellant - Petitioner.

DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF

Review of a Decision of the Court of Appeals, District II,
Appellate Case No. 2021AP2105-CR, Dated March 15, 2023,
Affirming the Judgment of the Circuit Court for Sheboygan County,
The Honorable Kent R. Hoffmann Presiding
Trial Court Case No. 2019 CF 628

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ARGUMENT

I. Officer Simon lacked reasonable suspicion to conduct the traffic stop.

The Fourth Amendment to the United States Constitution and Article 1, Section 11, of the Wisconsin Constitution protect an individual's right to be free from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶ 18, 292 Wis. 2d 1, 717 N.W.2d 729. Reasonable suspicion requires more than a mere hunch. *Id*. at ¶ 21. At a minimum, to justify a traffic stop, "police must have a reasonable suspicion, grounded in specific articulable facts and inferences from those facts, that an individual is violating the law." *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623; see also *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S.Ct. 1868 (1968).

When analyzing whether reasonable suspicion for a traffic stop existed, "[t]he crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 9, 733 N.W.2d 634. To answer this question, courts are to examine "the totality of the facts and circumstances." *Id*. "This approach views the quantity and the quality of the information as inversely proportional to each other." *State v. Williams*, 2001 WI 21, ¶ 22, 241 Wis. 2d 631, 623 N.W.2d 106.

Citizen informants "who purport to have witnessed a *crime"* are viewed as reliable, and police are allowed to act accordingly, even though other indicia of reliability have not been established." *Id*. at ¶ 36 (emphasis added). "[P]olice corroboration of innocent, although significant, details of an informant's tip lend reliability to the informant's allegations of

criminal activity." *State v. Robinson*, 2010 WI 80, ¶ 27, 327 Wis. 2d. 302, 786 N.W.2d 463 (emphasis added).

Here, the McDonald's employee reported that Mr. Wiskowski had fallen asleep at the wheel while in the drive thru lane. Importantly, this is not a crime. This lone observation of innocent behavior was not at all corroborated by Officer Simon's personal observations. There is a complete absence of any specific articulable facts and inferences from those facts to suspect that Mr. Wiskowski had committed, was committing, or was about to commit a crime.

In arguing that this lone statement is enough to support a finding of reasonable suspicion, the State first relies on *Rutzinski*. *See* State's Br. 13. In *Rutzinski,* this Court found that an informant's lone statement and observation of erratic driving established reasonable suspicion of driving while intoxicated. *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, ¶¶ 1-4, 623 N.W.2d 516. In so finding, this Court first found that, because the informant risked identification and could be held criminally liable for providing false information, the informant's statement was reliable. *Id*. at ¶ 32. Next, this Court found that the informant's reliability was enhanced because they were an eyewitness to the erratic driving. *Id*. at ¶ 33.

The State next relies on *Navarette v. California*. 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014). In *Navarette*, an anonymous caller reported the license plate of a truck who had run her off the road at a particular mile marker on a state highway. *Id*. at 395. Officers located the truck and followed it for five miles without observing any traffic violations but stopped the truck anyway. *Id*. at 395, 403. Ultimately, it was determined that the driver was not intoxicated but had been transporting 30 pounds of marijuana. *Id*. The United States Supreme Court held that the anonymous call established reasonable suspicion of driving while intoxicated. *Id*. In so holding, the Court found the caller reliable because she provided an eyewitness account which allowed officers to contemporaneously locate the truck. *Id*. at

398-400. Additionally, the Court found that the call established reasonable suspicion because "running another car off the highway….bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness." *Id*. at 403. The Court went on to state that "the absence of additional suspicious conduct did not dispel the reasonable suspicion of drunk driving. Officers were not obligated to give a drunk driver a second chance for dangerous conduct." *Id*. at 404.

Unlike the State's suggestion, *Rutzinski* and *Navarette* do not "illustrate that the circumstances in the present case provided an objectively reasonable basis for suspecting that Wiskowski was driving while intoxicated." State's Br. 15. The most important and distinct difference between *Rutzinski*, *Navarette*, and the present case is that the callers in *Rutzinski* and *Navarette* reported *criminal* activity while the caller in the present case did not. A call reporting innocent activity, supported by no other corroborating observations, cannot support a finding of reasonable suspicion.

II. Officer Simon was not acting in a community caretaking function when conducting the traffic stop.

A. Officer Simon was not engaged in bona fide community caretaker activity at the time of the traffic stop.

To lawfully engage in bona fide community caretaker activity, an officer must have an objectively reasonable basis to believe there was a member of the public who needed assistance. *State v. Maddix*, 2013 WI App 64, 348 Wis. 2d 179, ¶ 20, 831 N.W.2d 778. When analyzing whether community caretaker activity is lawful, courts must consider whether police conduct is "totally divorced from the detection, investigation, or acquisition of evidence relating to violation of a criminal statute." *State v. Kramer*, 2009 WI 14, 315 Wis. 2d

414, ¶ 23, 759 N.W.2d 598; *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). An officer can be engaged in a community caretaker function if any subjective law enforcement concerns exist, so long as "under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." *Id*. at ¶ 30.

In this case, Officer Simon had no objectively reasonable basis for seizing Mr. Wiskowski. While Officer Simon was dispatched to a McDonalds to address a person sleeping in a car in the drive thru, Officer Simon observed no such conduct. Additionally, this call was void of any other information that would lead a person to be concerned for the driver such as the driver exhibiting signs of some medical emergency or type of impairment. Approximately one minute after receiving the dispatch call, Officer Simon arrived at the McDonalds. (R. 32 at 6-7). What he did observe was the suspect vehicle appropriately navigate through the drive thru window toward the exit of the parking lot. (*Id*. at 8). He further observed the vehicle make a proper, safe, and legal turn onto the roadway and into the correct lane of travel. (*Id*. at 17-18). Any concerns reported to dispatch were negated by Officer Simon's personal observations. In other words, there was no need for a welfare check and any concern that Mr. Wiskowski would fall back asleep while driving is unfounded.

There was no reason for Officer Simon to fear that Mr. Wiskowski would fall asleep again. Officer Simon's fishing expedition to determine whether he was "missing" something that impaired Mr. Wiskowski's ability to drive was not Officer Simon engaging in a community caretaker function but rather Officer Simon investigating whether there was evidence of a crime being committed. If Officer Simon was engaged in any community caretaking function, it certainly ended the moment he was provided with a reasonable explanation for what had occurred in the drive thru which was coupled by his own

observations of Mr. Wiskowski safely and lawfully operating his vehicle.

B. Mr. Wiskowski's privacy outweighed the public need and interest.

In this case, the public need to be protected was minimal and certainly did not outweigh Mr. Wiskowski's privacy interests.

The State first argues that the circuit court was correct to recognize that "there was a high degree of public interest to ensure that the defendant was safe in operating the motor vehicle." (State's Br. 23). This assurance, however, was provided to Officer Simon via his own personal observations prior to him initiating a seizure. At the time of the seizure, the only indication that Mr. Wiskowski may have posed a public safety concern was the dispatch call. This call only broadly stated that Mr. Wiskowski had fallen asleep in the drive-thru. Any potential concerns associated with this non-descriptive call were eliminated when Officer Simon observed the suspect vehicle being safely operated just one minute after the call was received.

Unlike the State's assertion and circuit court's belief, there was no reason to think Mr. Wiskowski would fall asleep while driving. This is especially true because Officer Simon did not even observe Mr. Wiskowski sleeping behind the wheel and never confirmed that he had been. What was known to Officer Simon, that an individual in a truck had fallen asleep in the drive thru, was contradicted by observations Officers Simon personally made when he arrived just one minute later. What Officer Simon observed was Mr. Wiskowski safely navigating the drive thru and properly turning on to the roadway. (R. 32 at 8, 17-18). There was no observation of the drive thru line being impeded, no observation of traffic being interrupted, and no observation of the public being placed in harm's way.

Second, the State argues that "the attendant circumstances show that only a minor intrusion on Wiskowski's privacy interests was required to secure the significant public interest in safe roads." (State's Br. 24). After 1:00 p.m., Mr. Wiskowski legally operated his car on the road and in a parking lot when suddenly he was being pulled over. At least one officer approached his car and questioned him as they stood next to his window. (R. 32, 69; App. 18, 74). Mr. Wiskowski's privacy interests were violated when he was stopped while lawfully and safely operating his vehicle by an Officer who lacked any corroboration to a statement that Mr. Wiskowski was previously asleep in a drive thru. Any reasonable person who, like Mr. Wiskowski, is safely and lawfully operating a vehicle would be surprised and concerned if an officer initiated a stop on them.

Third, the State believes that Mr. Wiskowski's privacy rights were minimally intruded upon because he was in his vehicle rather than his home. (See State's Br. 24). While it is true that "[w]hat is reasonable for vehicles is different from what is reasonable for homes", there is nothing to support the State's assertion that this difference in the reasonableness standard increased the public interest in the stop of Mr. Wiskowski's truck. *Id*. A seizure is not reasonable simply because it is of a vehicle and not of a home. An individual still maintains a right to privacy within their vehicle and when that individual is abiding by the law, that person should have an expectation that their privacy rights will not be invaded based simply on an uncorroborated statement.

Last, there were obvious alternatives to Officer Simon seizing Mr. Wiskowski. In addition to moving on after observing no violations or concerns, Officer Simon could have chosen to follow Mr. Wiskowski's vehicle. Instead, he chose to seize Mr. Wiskowski while relying on the possibility that Mr. Wiskowski could fall asleep while driving. This decision was made without ever confirming Mr. Wiskowski had been

asleep and cannot be enough to overcome Mr. Wiskowski's privacy interests that are constitutionally guaranteed.

If Officer Simon was legitimately concerned that Mr. Wiskowski was going to fall asleep while driving, Officer Simon was able to dispose of that concern by observing the vehicle and speaking with and visually observing Mr. Wiskowski. There simply was no need for Officer Simon to order him to step out of his vehicle. Mr. Wiskowski was able to appropriately converse with Officer Simon and answer all his questions. (R. 32) Further, Mr. Wiskowski provided his driver's license and proof of insurance without exhibiting signs of impairment. (*Id*. at 8). If, after speaking with Mr. Wiskowski, Officer Simon believed he was at risk of falling asleep, Officer Simon should have had him call for a ride rather than exit his vehicle. Doing so was nothing less than a violation of Mr. Wiskowski's constitutionally protected rights.

CONCLUSION

It is respectfully requested that this Court reverse the circuit court's denial of the motion to suppress in this matter and remand with directions that the circuit court issue an order suppressing all evidence obtained consequent to the unlawful extension of the traffic stop.

Dated this 16th day of November 2023.

Respectfully Submitted,

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CERTIFICATION OF FORM AND LENGTH

I, Kirk B. Obear, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,079 words.

Dated this 16th day of November 2023.

Electronically signed by:

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CERTIFICATION OF ELECTRONIC BRIEF

I, Kirk B. Obear, hereby certify in accordance with Sec. 801.18(6) that 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 16th day of November 2023.

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