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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP1754

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY D. KOSMOSKY,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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Plaintiff-Respondent State of Wisconsin opposes Defendant-Appellant-Petitioner Jeffrey D. Kosmosky's Petition for Review on the following grounds:

1. At its core, Kosmosky's Petition asks this Court to grant review so that this Court can determine whether the facts specific to his case are tantamount to reasonable suspicion of operating while intoxicated. While he attempts to elucidate broad constitutional issues present in his case, the reality is that Kosmosky simply disagrees with the weight that both the circuit court and court of appeals gave certain facts when conducting the reasonable suspicion analysis. His Petition is a call for this Court to correct that perceived error in an area of law that is already well-understood. This Court is generally not an error-correcting court, *see State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93–94, 394 N.W.2d 732 (1986), and review is typically not appropriate when a case involves “the application of well-settled principles to the factual situation.” Wis. Stat. § (Rule) 809.62(1r)(c)1.

2. Kosmosky acknowledges the settled law that police officers need not consider potentially innocent explanations for otherwise suspicious behavior when determining whether there is a basis to extend a traffic stop. (Pet. 8–10.) His solution to this problem is simple: he asks this Court to change the law. In this regard, Kosmosky's Petition can at least be understood to raise a legal issue rather than simply a factual issue. But Kosmosky's argument in support of a change in the law is unavailing.

The basic premise behind Kosmosky's argument is that the reasonableness requirement underpinning the Fourth Amendment requires a court to afford “due weight” to “innocent facts” rather than assessing reasonable suspicion based solely on incriminating facts. (Pet. 5–6.) In other words, Kosmosky wants reviewing courts to weigh certain facts against the incriminating facts present in his traffic stop in order to determine whether police had reasonable suspicion

to extend the stop. But the reasonable suspicion test has long been settled: it asks whether a police officer has a “reasonable, articulable suspicion that criminal activity is afoot.” *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Kosmosky offers no compelling reason why this Court should depart from that test.

3. Kosmosky argues that this Court needs to “make a clear and unequivocal statement to courts below that the facts which are part of the totality of the circumstances test fall on a *spectrum* which requires them to be given a particular weight *in context*.” (Pet. 17.) To the extent his argument suggests that reasonable suspicion requires a substantial showing, he is mistaken. “[T]he requirement of reasonable suspicion is not a requirement of absolute certainty: ‘sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.’” *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985) (citation omitted).

4. Moreover, the law already contemplates the possibility that an officer’s awareness of certain facts can weigh against a finding of reasonable suspicion. In *State v. Newer*, 2007 WI App 236, ¶ 2, 306 Wis. 2d 193, 742 N.W.2d 923, the Wisconsin Court of Appeals adopted the view that “an officer’s knowledge that a vehicle’s owner’s license is revoked will support reasonable suspicion for a traffic stop so long as the officer remains unaware of any facts that would suggest that the owner is not driving.” *Id.* (emphasis added). None of Kosmosky’s proffered facts, however, pull the same weight as the exception contemplated in *Newer*. Kosmosky says, for example, that he had no trouble producing his driver’s license and that a lot of people smoke. (Pet. 14.) He notes that he was not confused, did not exhibit any “problems with his physical mannerisms,” and that no odor of alcohol was observed while he was in his car. (Pet. 14.) Of course, there were myriad facts that could have given rise to an

inference of drunk driving that were not observed; Kosmosky did not swerve out of his lane, or run a red light, or pass out in the drive-thru lane of a fast food establishment. That is all irrelevant; an officer need not observe every single possible indicia of intoxication in order to suspect an individual of operating while intoxicated. All that is necessary is a reasonable, articulable basis for the officer's suspicion. The officer who stopped Kosmosky had that here: Kosmosky was speeding; he lit a cigarette as the officer approached, possibly to mask an odor of alcohol; he had slow speech; he had trouble locating his insurance information; he had watery, bloodshot eyes; and he admitted to drinking. (Pet-App. 3.) Those facts were more than enough for the officer to extend the stop and investigate further. The circuit court and court of appeals arrived at the correct conclusion with no difficulty. This Court's review is unnecessary.

For the reasons discussed, the State respectfully requests that this Court deny Kosmosky's petition for review.

Dated this 28th day of April 2023.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 814 words.

Dated this 28th day of April 2023.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
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 the Wisconsin Supreme 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 28th day of April 2023.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General