STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP351-CR

WAYNE L. TIMM,

Defendant-Appellant-Petitioner,

v.

STATE OF WISCONSIN,

Plaintiff-Respondent.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
conwaymj@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The State of Wisconsin opposes Wayne L. Timm's petition for review. Timm seeks review of the Wisconsin Court of Appeals' one-judge decision affirming his judgment of conviction and the order denying his motion for postconviction relief. *State v. Timm*, No. 2023AP351-CR, 2024 WL 208302 (Wis. Ct. App. Jan. 19, 2024) (unpublished); (Pet-App 3–19.)

The appeal concerns Timm's motion to suppress clothing and a canvas bag containing "burglarious tools" recovered from his vehicle during a traffic stop in Marathon County in April 2015. *Timm*, 2024 WL 208302, ¶¶ 2, 9. Two officers from the Village of Spencer police department testified at the suppression hearing—Chief Shawn Bauer and Officer Travis Schuld. *Id.* ¶ 3.

Chief Bauer had been familiar with Timm since 2010 when he arrested him for burglary. *Id.* ¶ 4. He had previously interviewed Timm and his brother and recalled that they "made mention that they've been involved in burglaries in the past and that they weren't going to stop doing this activity." *Id.* Accordingly, when Chief Bauer learned that Timm had been released from prison in 2015 and that burglaries were occurring in both Marathon County and neighboring Clark County, he advised his officers to keep an eye out for Timm's white Pontiac. *Id.* ¶ 5.

With Chief Bauer's instructions in mind and aware of the burglaries in the area, Officer Schuld observed a white Pontiac Grand Prix going 31 miles per hour in a 25 miles-per-hour zone at 11:40 p.m. *Id.* ¶ 6. He stopped the car for speeding, and Timm was the driver. *Id.* He shined a flashlight into the backseat and observed a tire iron partially covered by a pair of jeans. *Id.* ¶ 7. He found it odd for a tire iron to be on the backseat. *Id.*

Officer Schuld ran Timm's driver's license and learned that Timm was "on probation for burglary and had a history

of burglary charges." *Timm*, 2024 WL 208302, ¶ 8. He then returned to Timm, still seated in his car, and asked him if he could search his car. *Id.* ¶ 9. Officer Schuld still had Timm's driver's license. (R. 38:12.) Timm agreed to the search. *Id.* ¶ 9.

A few weeks later, the Clark County Sheriff's Department obtained a warrant to place a GPS tracker on Timm's vehicle. (R. 1:4, 5.)[1] The GPS tracker revealed that Timm regularly stopped at an isolated area on someone else's property that lacked any buildings. (R. 1:6.) Police visited the spot and found a canvas bag and four empty green money bags that had been taken in a prior burglary under a mattress. (R. 1:6.) The canvas bag contained bolt cutters, tin snips, a hammer, a screwdriver, a socket, a flat bar, and a pry bar. (R. 1:6.) In addition, the GPS showed that Timm's vehicle was stationary for two hours within 750 feet of a burglarized building when the burglary occurred. (R. 1:6.)

Timm's charges in the present case arose following that investigation. (R. 1:4–6.) Timm moved to suppress the fruits of the search from the traffic stop with Officer Schuld and argued that those fruits extended to all the evidence recovered from the GPS warrant. (R. 38:18–19.) The State asked the circuit court not to reflexively suppress everything found after the traffic stop because the GPS warrant arose from "a multi-jurisdictional investigation" and had "other factors that went into [it]." (R. 38:19.)

The State also argued that suppression was improper. The State argued that probable cause supported a warrantless search of the vehicle and that the search was consensual. (R. 38:20–21.) Timm claimed that no probable cause existed and that his consent could not have been

[1] Timm accepted the facts in the criminal complaint when he entered his no-contest pleas. (R. 140:10–11.)

voluntary because his driver's license had not yet been returned. (R. 38:24–25.)

The circuit court denied Timm's motion to suppress. It concluded that Timm voluntarily consented to the search of his vehicle because there was no evidence that he was coerced, Officer Schuld's testimony that he agreed to a search was uncontradicted, and Timm had prior experiences with law enforcement. (R. 38:28–29.) Timm later moved for reconsideration, citing an order from a Taylor County circuit court that granted his suppression motion predicated on the same traffic stop. (R. 47:1.) The circuit court denied reconsideration because the Taylor County court received different evidence at the suppression hearing and did not address the issue of consent. (R. 144:5–10.)

Timm eventually pleaded no contest to five misdemeanor charges in the present case. *Timm*, 2024 WL 208302, ¶ 12. He subsequently moved to withdraw his plea based on the ineffective assistance of counsel. *Id.* He alleged that trial counsel was ineffective for refusing to allow him to testify at the suppression hearing. *Id.* The circuit court denied the claim without an evidentiary hearing for lack of prejudice. *Id.*; (R. 180:2).

Timm appealed, challenging the denial of both his suppression motion and his postconviction motion. *Timm*, 2024 WL 208302, ¶ 13. The court of appeals affirmed.

It affirmed the order denying suppression on an alternative ground. It observed that the parties' briefs identified the quantum of suspicion for a warrantless search of Timm's vehicle as reasonable suspicion rather than probable cause. *Timm*, 2024 WL 208302, ¶¶ 17, 21; (*see* Timm's Br. 15–17; State's Br. 8–9). The court of appeals recognized that this switch reflected the fact that 2013 Wisconsin Act 79 ("Act 79") applied to this case. Act 79 reduces the quantum of suspicion for a warrantless search to

reasonable suspicion for any person on "a specified probation, parole, or extended supervision status[.]" *Timm*, 2024 WL 208302, ¶ 18 (alteration in original) (quoting *State v. Anderson*, 2019 WI 97, ¶ 2 & n.2, 389 Wis. 2d 106, 935 N.W.2d 285); *see* Wis. Stat. § 973.09(1d) (specifying that Act 79 covers individuals on probation for a felony like Timm).

Applying Act 79, the court of appeals affirmed the denial of Timm's motion to suppress. *Timm*, 2024 WL 208302, ¶¶ 18–19, 27. Because of Timm's history of and commitment to committing burglaries, the spate of burglaries in the area, the late hour of the stop when the burglaries had been occurring, and the partially covered tire iron in the back seat, the court concluded that Officer Schuld had reasonable suspicion to support a warrantless search. *Id.* ¶ 21–24. The tire iron was particularly probative because it was unusual for it to occupy a seat, it had been partially obscured, and it is a well-recognized implement of burglars. *Id.* ¶ 25.

The court of appeals affirmed the dismissal of Timm's ineffectiveness claim after concluding that Timm's pleadings in his postconviction motion failed to establish prejudice, even if true. *Id.* ¶ 36. It provided two distinct reasons to support that conclusion. First, even if Timm testified, his suppression motion would have failed because the search was valid regardless of whether he voluntarily consented or not. *Id.* ¶ 33. Second, Timm failed to allege facts sufficient to show that he would have *withdrawn his plea* had he been able to testify at the suppression hearing as he was required to do. *Id.* ¶ 34 (citing *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996)). Merely succeeding on the suppression motion did not compel the conclusion that Timm would not have pleaded no contest, because he failed to explain how success on his suppression motion would have necessarily resulted in the suppression of the evidence recovered pursuant to the GPS warrant. *Id.* ¶ 35 & n.6.

Timm now petitions for review.

ARGUMENT

This Court should not grant review. Timm has failed to assert any proper criteria for review under Wis. Stat. § (Rule) 809.62(1r). Rather, he seeks error correction on a factually intensive issue that will not have statewide impact.

I. Timm's petition involves the application of settled law to unique facts and, therefore, does not advance this Court's law development function.

This Court's "primary function is that of law defining and law development." *Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997). It does not grant review "merely to correct error or to examine alleged error." *Vollmer v. Luety*, 156 Wis. 2d 1, 456 N.W.2d 797, 803, (1990). Rather, this Court grants review "because the alleged error in issue has some substantial significance in our institutional law-making responsibility as set forth in the statute and constitution and as reflected in our rules for accepting cases on petition for review." *Id*. The criteria weigh against review when the question is factual rather than legal in nature, or when resolution of the legal question even a novel one, will not have a statewide impact. Wis. Stat. § (Rule) 809.62(1r)(c)2. and 3.

A. Timm seeks mere error correction.

Timm first argues that accepting his case will allow this Court to develop and clarify the law regarding consensual and warrantless searches under Wis. Stat. § (Rule) 809.62(1r)(c). (Timm's Pet. 4.) This argument is infirm at its outset. Subsection (1r)(c) itself is an incomplete criterion; it provides a basis for review *only* when combined with another factor articulated in Wis. Stat. § (Rule) 809.62(1r)(c)1.–3. Timm never mentions any of these three factors. On that basis alone, he fails to provide a basis for review pursuant to Wis. Stat. § (Rule) 809.62(1r)(c).

In addition, Timm's argument cannot reasonably be construed as anything but a request for error correction. He faults the court of appeals for applying *State v. Anderson*, 2019 WI 97, ¶ 2 & n.2, 389 Wis. 2d 106, 935 N.W.2d 285, instead of *State v. Lefler*, 2013 WI App 22, 346 Wis. 2d 220, 827 N.W.2d 650. (Timm's Pet. 9–13.) While he claims this issue concerns the "interplay" between those two doctrines, his argument belies that statement. He simply asserts that the court of appeals should have reversed the order denying suppression pursuant to *Lefler* instead of affirming pursuant to *Anderson*. (Timm's Pet. 4, 9–14.) His argument is not with how the court of appeals interpreted any supposed interplay between those two cases but with the court's recognition of the apparently undisputed fact that Timm was subject to Act 79, which meant that reasonable suspicion (implicating *Anderson*) rather than probable cause (implicating *Lefler*) applied to the search of his vehicle. *Timm*, 2024 WL208302, ¶¶ 16–19. Because Timm disputes only the application of well-settled law to his unique factual circumstances, review will not advance this Court's "law declaring and developing function." *State v. Schumacher*, 144 Wis. 2d 388, 406 & n.13, 424 N.W.2d 672 (1988).

B. Timm's suppression issue cannot develop the law because the court of appeals can be affirmed for multiple reasons.

Another major factor precludes this case from serving as a means of law development. Multiple bases exist to affirm the circuit court's denial of Timm's suppression motion. Rather than develop the law on any matter, this Court would inevitably affirm on the narrowest basis available based on well-established law, just as the court of appeals did. *See Stoughton Trailers, Inc. v. Labor and Indust. Review Comm'n*, 2007 WI 105, ¶ 5 n.3, 303 Wis. 2d 514, 735 N.W.2d 477 ("In general, this court decides cases on the narrowest grounds presented.").

First, this Court could affirm the circuit court's conclusion that the search was consensual. The circuit court reasonably determined that the search was consensual because Officer Schuld's testimony that Timm agreed to a search was uncontested; there was no evidence of threat, trickery, or other coercive means to obtain Timm's consent; and Timm had prior experiences law enforcement. *See State v. Phillips*, 218 Wis. 2d 180, 202, 577 N.W.2d 794 (1998). Under the totality of the circumstances, Timm consented to the search of his vehicle.

Timm advances only a single argument to counter the circuit court's reasoning. He argues that the consent was involuntary because Officer Schuld still had his driver's license and he was, thus, still seized. (Timm's Pet. 10–11.) This Court already rejected that very argument in *State v. Floyd*, 2017 WI 78, ¶ 34, 377 Wis. 2d 394, 898 N.W.2d 560. In *Floyd*, this Court held, "The routine act of retaining an identification card or driver's license during a traffic stop, without more, is insufficient evidence of the type of duress or coercion capable of making consent something less than voluntary." *Id.* ¶ 32. Timm fails to offer anything "more" to support his argument that his consent was involuntary.

Second, this Court could also affirm based on the Act 79-based reasoning utilized by the court of appeals. Timm does not dispute that Act 79 was in effect and applied to him at the time of the traffic stop. (Timm's Pet. 13.) He argues only that Act 79 could not apply to his suppression motion because the parties did not argue it in the circuit court and *Anderson* had not been decided at the time of his traffic stop. (Timm's Pet. 13–14.)

Both arguments are plainly meritless and have nothing to do with law development. (Timm's Pet. 13–14.). An appellate court is free to affirm on grounds other than those relied upon by the circuit court. *See, e.g.*, *State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

Appellate courts may also review suppression issues based on the state of the law at the time of the appeal rather than the time of the stop. *See, e.g.*, *State v. Ware*, 2021 WI App 83, ¶¶ 14–15, 400 Wis. 2d 118, 968 N.W.2d 752. Indeed, the Rules of Appellate Procedure expressly provide for parties to submit supplemental authorities to the appellate court that affect a pending case. Wis. Stat. § (Rule) 809.19(10). The rule would be superfluous if appellate courts were barred from considering cases decided after the incident at issue.

Finally, the State would argue as it did in the circuit court that the circumstances established probable cause to support a warrantless search, even if Act 79 did not apply. In fact, *Lefler* supports this conclusion. There, prying-type tools in plain view, a screwdriver in the driver's pocket, and the defendant's history of burglaries established probable cause. *Lefler*, 346 Wis. 2d 220, ¶¶ 13–14. Here similarly, Officer Schuld saw a prying tool partially covered and oddly placed in the backseat, knew that Timm had a history of burglaries, and knew that several burglaries had recently been committed in the area. *Timm*, 2024 WL 208302, ¶¶ 22–26.

In sum, because the denial of Timm's suppression issue can be affirmed for multiple reasons based on applying well-established law to his unique facts, his claim does not present an issue of statewide importance that requires this Court's review under Wis. Stat. § (Rule) 809.62(1r)(c).

II. Timm's petition does not present a real and significant question of federal or state constitutional law.

Timm also contends that both of his claims "present a real and significant question of federal [or state] constitutional law," requiring review. (Timm's Pet. 5); Wis. Stat. § (Rule) 809.62(1r)(a).[2] He asserts only that his claims satisfy this criterion because both the suppression issue and ineffectiveness claim implicate constitutional rights. (Timm's Pet. 4–5.) That is not sufficient to merit review under Wis. Stat. § (Rule) 809.62(1r)(a).

For one, Timm never actually identifies a "question" presented by either of his claims. He argues only that the underlying constitutional rights at issue are important in the abstract. (Timm's Pet. 5.) But the conceptual importance of a constitutional right does not necessarily establish a real and significant question about that right in a particular case. Because Timm's claims implicate only the application of well-settled constitutional law, there is no real and significant question for this Court to answer.

Moreover, the denial of Timm's ineffectiveness claim did not even turn on the core constitutional principle of attorney performance. Both the circuit court and court of appeals rejected Timm's ineffectiveness claim without a hearing because he failed to plead facts that, if true, could satisfy the prejudice prong of the ineffectiveness standard. (R. 180:2); *Timm*, 2024 WL 208302, ¶ 36. Timm, however, disregards prejudice and argues that he established deficient

[2] Timm cites to Wis. Stat. § (Rule) 809.62(1r)(d), but the State believes this to be an inadvertent mistake. That criterion provides for review of a decision in conflict with prevailing law.

performance. (Timm's Pet. 14–20.) In this posture, deficient performance is irrelevant since Timm's failure on the prejudice prong disposed of the entire ineffectiveness claim. *See State v. Savage*, 2020 WI 93, ¶ 25, 395 Wis. 2d 1, 951 N.W.2d 838.

To the extent that he addresses prejudice (Timm's Pet. 17–20), Timm ignores the pleading deficiencies identified by the court of appeals. He does not reckon with how the court of appeals' resolution of his suppression issue rendered his decision not to testify immaterial. *See Timm*, 2024 WL 208302, ¶ 33. He does not explain why his pleadings are sufficient to demonstrate that, had he testified, he would have insisted on proceeding to trial instead of pleading no contest. *See id.* ¶ 34. Part of that failure is his failure to explain how he could have obtained suppression of the evidence recovered via the GPS warrant even if he had won his motion to suppress the prior search of his vehicle. *See id.* ¶ 35. Timm's silence on these important considerations underscores the fatal shortcomings of his pleadings.

For these reasons, Timm does not present a significant and important issue of constitutional law.

CONCLUSION

This Court should deny review.

Dated: February 29, 2024

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
conwaymj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2926 words.

Dated: February 29, 2024.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
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: February 29, 2024.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General