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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP0691-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JODY WILLIAM SOLOM,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction and an  
Order Denying Motion to Suppress Entered in the  
Waukesha County Circuit Court, the Honorable  
Michael Bohren, Presiding.

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BRIEF OF  
DEFENDANT-APPELLANT

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### **ISSUE PRESENTED**

Officer Butryn of the Waukesha Police Department was told by police dispatch that a red Honda Civic was reported to have run a stop sign and crashed into a snowbank before driving away with a “smashed up” front end. Officer Butryn subsequently saw a red Honda Civic driven by Mr. Solom in the same area but did not observe damage to the front of the vehicle. Nonetheless, Officer Butryn stopped Mr. Solom.

1. Did Officer Butryn have reasonable suspicion that Mr. Solom had committed a crime despite not observing damage to Mr. Solom’s vehicle?

The trial court answered yes.

### **POSITION ON ORAL ARGUMENT AND PUBLICATION**

Mr. Solom does not request oral argument. Because this case involves the application of settled law to undisputed facts, publication is likely not warranted.

### **STATEMENT OF THE CASE**

On January 28, 2022, Officer Butryn pulled over and arrested Mr. Solom. (1:3). Mr. Solom was subsequently charged with operating while intoxicated as a sixth offense, failure to install an

ignition interlock device, operating while revoked, and obstructing an officer. (1:1-2). On June 17, 2022, Mr. Solom filed a motion to suppress arguing that he was unlawfully stopped and that all evidence obtained as a result of the unlawful stop should be suppressed. (21). The trial court held an evidentiary hearing and denied Mr. Solom's motion. (59; App. 7). Mr. Solom subsequently pleaded guilty to operating while intoxicated as a sixth offense with the remaining charges dismissed and read in. (61:3, 8). This appeal follows.

### STATEMENT OF THE FACTS

On January 28, 2022, a witness reported a reckless driver to the Waukesha Police Department. (59:11; App. 17). The witness reported seeing a car run a stop sign and hit a snowbank before leaving the scene.<sup>1</sup> *Id.* The witness described the car as a red Honda Civic but was unable to provide a license plate number. *Id.* The witness did, however, report that the front of the vehicle was "smashed up." (59:20; App. 26). After the crash, the witness reported seeing the vehicle drive away, traveling westbound on Main Street in Waukesha. (59:12; App. 18).

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<sup>1</sup> The witness also reported that the driver appeared intoxicated. (59:11; App. 17). However, the trial court found this information unreliable, explaining "I don't know how the people would know that the driver was intoxicated, other than they assumed because he hit a snowbank that he must be intoxicated." (59:41; App. 47). Accordingly, the trial court discounted this information. (59:41-42; App. 47-48).

Officer Butryn was dispatched to search for the reckless driver. (59:10-11; App. 16-17). Approximately five minutes after the witness report, while traveling eastbound on Main Street, Officer Butryn saw what appeared to be a red Honda Civic going in the opposite direction, about a mile from where the witness had previously seen the reckless driver. (59:13-14; App. 19-20). Officer Butryn testified that he “was able to observe the driver’s side of the front of the vehicle” and that it did not appear to be damaged. (59:22; App. 28).<sup>2</sup> Butryn then performed a U-Turn and followed the red car. (59:22-23; App. 28-29). This was the first red sedan he had seen and he did not look for other cars that may have matched the description. *Id.* At the suppression hearing, Officer Butryn did not specifically remember whether there was heavy traffic, but testified that it was reasonable to believe so based on the fact that it was 5:30 p.m. on a Friday evening. (59:21; App. 27). While following the vehicle, he observed some minor deviations within the lane of traffic and varying speeds, but did not observe the car leave its lane or commit a speeding violation. (59:23; App. 29). He then stopped the vehicle. *Id.*

At the suppression hearing, the court concluded that the minor deviations within a lane and varying

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<sup>2</sup> Later in the hearing, Officer Butryn appeared to give conflicting testimony. When the State asked him, “So you did not see the front of the car; is that fair to say?” he replied “Prior to initiating the stop, no.” (59:26). The trial court did not make a specific finding as to whether Officer Butryn saw the front of the vehicle, but concluded that “as he passes the vehicle, he doesn’t observe any damage to the front of the vehicle.” (59:38).

speeds would not have been sufficient on their own to provide probable cause or reasonable suspicion. (59:40; App. 46). However, the court concluded the minor deviations and varying speed could indicate a “control issue,” and that Officer Butryn had reason to believe it was the same car which had crashed into a snowbank and therefore had “sufficient probable cause to make a stop for further investigation.” (59:40-41; App 46-47). Although the court acknowledged that Officer Butryn did not observe damage to the front of the vehicle before making the stop, the court concluded that such an observation would be “frosting on the cake” but was not necessary to provide reasonable suspicion to stop Mr. Solom’s vehicle. (59:41; App. 47).

## ARGUMENT

**I. The police stop violated Mr. Solom’s Fourth Amendment rights because the officer lacked a sufficient basis to believe that his vehicle was the same one reported to have crashed into a snowbank.**

The facts found by the circuit court were not sufficient, under the totality of the circumstances, to give rise to a reasonable suspicion that Mr. Solom was operating while intoxicated. Accordingly, the traffic stop violated his Fourth Amendment rights.

**A. Legal principles and standard of review.**

The Fourth Amendment provides “the right of the people to be secure in their persons ... against

unreasonable searches and seizures.” U.S. CONST., AMEND. IV. “A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed.” *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (citations and quotations omitted). The state bears the burden of establishing the reasonableness of the stop. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. The remedy for a Fourth Amendment violation is exclusion of the evidence obtained therefrom. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *Popke*, 2009 WI 37, ¶10. The circuit court’s findings of historical facts are upheld unless clearly erroneous but the application of those facts to constitutional principles is reviewed *de novo*. *Id.*

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*, 2009 WI 37, ¶23. Reasonable suspicion must be founded on concrete, particularized facts warranting suspicion of a specific individual. *State v. Richey*, 2022 WI 106, ¶9, 405 Wis.2d 132, 983 N.W.2d 617. An officer’s inchoate and unparticularized suspicion or hunch will not give rise to a reasonable suspicion. *Popke*, 2009 WI 37, ¶23.



- B. The totality of the circumstances did not amount to a reasonable suspicion that Mr. Solom was operating while intoxicated.

When he initiated his stop of Mr. Solom's car, Officer Butryn knew the following facts:

- A witness had reported that a red Honda Civic had run a stop sign and hit a snowbank, leaving it with smashed up front end.
- The witness reported last seeing that vehicle driving westbound on Main Street.
- Officer Butryn saw a red Honda Civic driving westbound on Main Street but did not observe any damage to the front end.
- It was 5:30 p.m. on a Friday evening, when traffic is typically heavy.
- The car Officer Butryn saw made minor deviations which did not amount to any traffic violation.

Based on this information, Officer Butryn lacked reasonable suspicion that Mr. Solom's car had been involved in a crime or traffic violation, because he lacked particularized reasons to believe it was the same vehicle that had crashed into a snowbank.

*State v. Richey* is instructive. In that case, an officer was told to be on the lookout for a Harley-Davidson motorcycle driving erratically and speeding

at around 11:00 p.m. *Richey*, 2022 WI 106, ¶2. About five minutes later, the officer spotted a Harley-Davidson half a mile from the reported location of the speeding Harley. *Id.* at ¶3. Although the second officer did not observe any traffic violations, she stopped the Harley-Davidson based on her suspicion that it was the same vehicle that had previously been seen driving erratically. *Id.* The Court noted that traffic had been light that night and that the officer had seen relatively few motorcycles out that early in the year. *Id.* at ¶10.

Based on these facts, the Wisconsin Supreme Court determined that stop was not based on reasonable suspicion, explaining that “[t]o clear the reasonable-suspicion threshold, Officer Meier’s suspicions had to be particularized; she needed *concrete reasons* for believing that Richey’s Harley-Davidson and the one seen five minutes earlier speeding north on Alderson Street were one and the same.” *Id.* at ¶11 (emphasis added). Because the basic description of a “Harley-Davidson motorcycle” could “apply to a large number of vehicles,” the officer’s hunch did not rise to the level of reasonable suspicion. *Id.*; see also *United States v. Street*, 917 F.3d 586, 594 (7th Cir. 2019) (“*Terry* does not authorize broad dragnets ... Without more, a description that applies to large numbers of people will not justify the seizure of a particular individual.”).

Here, the descriptor “red Honda Civic” applies to a large number of vehicles. Honda Civics are one of the most popular cars in America, and red cars are not

uncommon.<sup>3</sup> Moreover, while the stop in *Richey* occurred late at night when traffic was relatively light, the stop here took place during rush hour on a Friday evening – meaning more vehicles were on the road. And while the officer in *Richey* did not know the color or model of the motorcycle she was searching for, motorcycles in general are significantly less common than passenger cars. Because red Honda Civics are common, and because it was 5:30 on a Friday evening, the description given to Officer Butryn applied to a fair number of vehicles and, accordingly, he lacked concrete reasons for believing the first red Honda Civic he saw was the same one which had reportedly hit a snowbank.

This is especially true because Officer Butryn *had* a more detailed description than simply a “red Honda Civic.” He had been told the front end of the vehicle was “smashed up.” But Officer Butryn did not observe any damage to the front of Mr. Solom’s vehicle, nor did he investigate further before stopping the vehicle, making his suspicion that it was the same car even less reasonable under the circumstances.

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<sup>3</sup> In February of 2022, shortly after Mr. Solom was stopped, Honda reported that the Civic had been the best-selling passenger car in America for each of the previous six years. Civic Leadership: Honda Civic is America’s Best-Selling Retail Passenger Car for 6<sup>th</sup> Straight Year (February 8, 2022), <https://hondanews.com/en-US/honda-automobiles/releases/release-b50efa689496a1943cdccc4649284099-civic-leadership-honda-civic-is-americas-best-selling-retail-passenger-car-for-6th-straight-year/>.

The fact that the witness lost sight of the vehicle in rush hour traffic also makes Officer Butryn's suspicions less particularized. In contrast, in *State v. Rissley*, a homeowner reported watching a beige Chevy van driving in a certain direction after committing a crime. 2012 WI App 112, ¶3, 433 Wis. 2d 422, 824 N.W.2d 853. While still on the phone with the homeowner, the dispatcher sent a patrol car to the area. *Id.* at ¶4. The homeowner continued to update dispatch on the location of the vehicle, reporting that it had turned south onto a rural road. *Id.* at ¶16. Shortly thereafter, an officer spotted taillights going south on the same road and determined that they belonged to a beige Chevy van, which he then stopped. *Id.*

This Court noted that because the witness in *Rissley* gave a running description of where the van was going, "this is not a situation where a citizen simply reports the make and color of the car and the direction initially traveled and then loses sight of the vehicle so that the pursuing officer has to use some combination of logic and guesswork to locate the fleeing vehicle." *Id.* at ¶16. The Court also relied on the fact that the stop took place on a rural road at 3:00 a.m. with very little traffic.<sup>4</sup> Accordingly, it found

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<sup>4</sup> Although there was no testimony specifically stating how many other vehicles were on the road, the Court "infer[red] from the fact that it was nearly three o'clock in the morning and by the officer's ability to spot the van's taillights at a distance that other cars were not a factor." *Rissley*, 2012 WI App 112 at ¶17.

there was reasonable suspicion to stop the van because “the chances of there being another beige Chevy van on Middle Road in such a short time span at about 3:00 a.m. going in a certain direction of travel are slim.” *Id.* at 17.

Here, the witness *did* simply provide a description of the car and the direction initially travelled before losing sight of the vehicle, and thus Officer Butryn had to rely on “some combination of logic and guesswork” to determine the first red Civic he saw must be the same car. And in contrast to *Rissley*, the chances of another red Honda Civic driving on Main Street in Waukesha during rush hour on a Friday evening are significantly higher than the chances of there being two beige Chevy vans on a rural road at 3:00 a.m. Because the witness lost sight of the vehicle during rush hour and because red Honda Civics are relatively common cars, Officer Butryn lacked a particularized suspicion that the car he saw was the same one which had crashed into a snowbank. And, again, Officer Butryn *had* a more specific description which Mr. Solom’s car did not appear to match; he observed no damage to the front of Mr. Solom’s vehicle and did not investigate the front of the vehicle before making the stop. Accordingly, his suspicion that it was the same vehicle was even less reasonable.

The observations that the vehicle made minor variations within its lane and varied its speed were not a sufficient basis for reasonable suspicion on their own and did not provide a concrete reason for believing it

was the same vehicle that had run a stop sign and crashed into a snowbank. Making slight variations in the direction of travel within a lane is not only innocent conduct, it is “conduct that many innocent drivers commit.” *State v. Post*, 2007 WI 30, ¶21, 301 Wis.2d 1, 733 N.W.2d 634. It certainly does not indicate that a driver is so out of control that he would run a stop sign and crash into a snowbank. Varying speeds without exceeding the speed limit is also innocent conduct that many drivers engage in. It does not indicate a loss of control of a vehicle and, when driving in traffic on a road with stop lights, is often necessary to drive safely.

That Mr. Solom’s car was stopped near to the location of the reckless driving a few minutes later adds little particularity to Officer Butryn’s suspicions. Certainly, proximity in time and place to a report of criminal activity can, under some circumstance, contribute to reasonable suspicion. But here, given the the time of day and the heavy traffic, and the fact that Officer Butryn had a specific description of damage to the car which Mr. Solom’s car did not appear to match, he lacked particularized reasons to believe the car he spotted was the same one that crashed into a snowbank. Consequently, he lacked reasonable suspicion that Mr. Solom had committed a crime or a traffic violation.

## CONCLUSION

For these reasons, this Court should reverse the judgment of conviction, allow Mr. Solom to withdraw his guilty plea, and remand with instructions to suppress any evidence obtained pursuant to the unlawful stop.

Dated this 7th day of June, 2024.

Respectfully submitted,

*Electronically signed by*  
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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,541 words.

### **CERTIFICATION AS TO APPENDIX**

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of June, 2024.

Signed:

*Electronically signed by*

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