STATE OF WISCONSIN

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

DISTRICT II

Case No. 2024AP691-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JODY WILLIAM SOLOM,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

A citizen reported that a red Honda Civic went through a stop sign, crashed into a snowbank and sustained damage to its front end, that the Civic's driver appeared intoxicated, and that the Civic was headed westbound on Main Street in Waukesha. Within two to three minutes of receiving the dispatch, Officer Bryce Butryn saw a red Honda Civic westbound on Main Street, approximately a mile from the crash location. As he followed the Civic, Officer Butryn observed it weaving within its lane at varying speeds. Although he did not observe any traffic violations, Officer Butryn stopped the Civic, later arresting its driver, Jody William Solom, for felony operating while under the influence.

Did Officer Butryn have reasonable suspicion under the totality of the circumstances to stop the Civic that Solom was driving?

The circuit court answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

A. The State charged Solom with operating while under the influence and several other offenses.

The State charged Solom with felony operating while under the influence as either a fifth or sixth offense. (R. 5:1.) It also charged him with several misdemeanors, including failure to install an ignition interlock device, operating a motor vehicle while revoked, and obstructing an officer.

(R. 5:2.) Later, by information, the State also charged Solom with operating a vehicle with a prohibited alcohol concentration. (R. 16:3.)

According to the complaint, a citizen reported to a dispatcher that the driver of a red Honda Civic ran a stop sign and crashed into a snowbank, that the Civic's front end was smashed up, and that the Civic was on Main Street. (R. 5:3.) Officer Bryce Butryn observed a red Honda Civic on Main Street travelling at various speeds and weaving within its lane. (R. 5:3.) Officer Butryn activated his emergency lights, but the Civic's driver did not stop until after the driver turned from Main Street onto another street and Officer Butryn activated his emergency siren. (R. 5:3.) When he made contact with the Civic's driver, Solom, Officer Butryn smelled a strong odor of intoxicants coming from the Civic. (R. 5:3.) Based on his observations of Solom's condition, Officer Butryn arrested him. (R. 5:3–4.)

B. The circuit court denied Solom's suppression motion after an evidentiary hearing.

Solom moved to suppress the evidence, alleging that Officer Butryn unlawfully stopped him. (R. 21:1.) Solom contended that the citizen's tip was insufficiently particular to justify Officer Butryn's decision to stop the red Honda Civic. (R. 21:4–5.) Solom asserted that Officer Butryn lacked reasonable suspicion or, alternatively, probable cause, to believe that he had violated the traffic code. (R. 21:3–6.)

At a hearing, Officer Butryn testified that he had been an officer for five years, had been trained to investigate operating under the influence offenses, and had investigated between 55 and 100 intoxicated driving offenses. (R. 59:5–6.) Officer Butryn identified several driving patterns indicative of impaired driving, including disregarding traffic signals,

driving at varying speeds, and weaving within a lane. (R. 59:7.)

Officer Butryn testified that, on January 28, 2022, at approximately 5:33 p.m., he received a dispatch concerning an intoxicated or reckless driver. (R. 59:10–11.) The dispatch originated from a citizen, who reported that the driver of a red Honda Civic appeared intoxicated. (R. 59:11.) The citizen told the dispatcher that the Civic went through a stop sign, that it hit a snowbank, and that its front was smashed-up. (R. 59:11, 20–21.) The dispatch did not include the Civic's plate number. (R. 59:21.) The dispatcher first reported that the Civic was travelling eastbound on Main Street, but later updated the direction to westbound on Main Street. (R. 59:12.)

Officer Butryn testified that he first observed the Civic approximately two to three minutes after the dispatch and approximately one mile from the location initially reported to the dispatcher. (R. 59:14.) Officer Butryn had not seen any other red Honda Civics until he saw a red Honda Civic travelling westbound on Main Street. (R. 59:13.) Officer Butryn, who was travelling eastbound on Main Street, only saw the Civic's front end on the driver's side and did not see any damage to the Civic's front end until after Solom's arrest. (R. 59:21–22, 24, 26.)

Officer Butryn testified that he made a U-Turn to get behind the Civic. (R. 59:14.) Officer Butryn decided to make independent observations of the Civic, following it with his squad's lights and sirens off. (R. 59:14–15.) Officer Butryn observed the driver operate the Civic at "varying speeds, increasing speed, decreasing speed, as well as weaving within its own lane," but he did not observe any speed violations. (R. 59:15, 23.) Officer Butryn estimated that the Civic travelled approximately a quarter mile when he first saw it to the time that it stopped. (R. 59:16.) The Civic's driver did not immediately pull over when Officer Butryn first activated his lights. (R. 59:16–17.) Officer Butryn identified Solom as the

Civic's driver. (R. 59:17–18.) Based on the citizen's reported information and his own observations, Officer Butryn believed that Solom was impaired. (R. 59:18.)

The circuit court denied Solom's suppression motion, determining "that there was probable cause to stop." (R. 59:42.) It made several factual findings in its decision. A citizen reported that "a red Honda Civic crash[ed] into a snowbank, turn[ed] around and [left] the scene," that the Civic's front end was damaged, and provided information about the Civic's direction. (R. 59:38.) The information was provided to the officer, who travelled in a direction to meet the Civic. (R. 59:38.) The officer located the Civic, travelling in the opposite direction, two to three minutes after the alert. (R. 59:38.) The officer did not see any damage to the Civic's front end. (R. 59:38.) The officer believed that he had the right car based on its color, make, and location. (R. 59:38–39.)

The court also found that the officer turned to get behind the red Honda Civic, and with his emergency lights and siren off, he followed it. (R 58:39.) The officer noted that the Civic deviated within its lane and had varying speeds. (R. 59:39.) Based on these observations, the court believed that "an officer could make a judgment call that there's a control issue with the vehicle." (R. 59:40–41.) When the officer activated his lights, it took approximately 30 seconds for the Civic to stop. (R. 59:39.)

In its decision, the court determined that it was not necessary to see damage to the Civic's front end before the officer initiated the stop. (R. 59:41.) The officer was able to gauge the tip's reliability based on the car's make, color, direction of travel, and approximate location. (R. 59:39.) Based on the tip and the officer's observations of the Civic deviating within its lane and operating at varying speeds, the officer had sufficient information to stop it. (R. 59:40–41.)

C. Solom pleaded guilty and was sentenced.

After the circuit court denied his suppression motion, Solom pleaded guilty to operating while under the influence, and the court dismissed the other charges. (R. 65:1, 3.) The circuit court sentenced Solom to a seven-year term of imprisonment, consisting of a three-year term of initial confinement and a four-year term of extended supervision. (R. 65:1.) It ordered Solom to serve his sentence consecutively to any other sentence. (R. 65:2.)

Solom appeals.

ARGUMENT

A. This Court independently reviews circuit court decisions granting or denying suppression motions.

"Whether evidence should be suppressed is a question of constitutional fact." *State v. Wright*, 2019 WI 45, ¶ 22, 386 Wis. 2d 495, 926 N.W.2d 157. An appellate court uses a two-step inquiry when it reviews a question of constitutional fact. First, it applies the clearly erroneous standard to the circuit court's findings of historical facts. *Id*. Second, the appellate court independently applies the relevant constitutional principles to those facts. *Id*.

B. Courts assess warrantless searches for reasonableness.

Both the United States and the Wisconsin Constitutions protect "against unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. I, § 11. "The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted).

Courts assess reasonableness, weighing the governmental interest that justifies the search against the invasion that the search entails. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Courts have "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *State v. Scott*, 2017 WI App 74, ¶ 14, 378 Wis. 2d 578, 904 N.W.2d 125 (citation omitted).

While a warrantless search is presumptively unreasonable, a court will uphold the search if it falls within an exception to the warrant requirement. *Tullberg,* 359 Wis. 2d 421, ¶ 30. Under the *Terry* exception, officers may conduct a brief investigatory stop if they have a "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *State v. Genous*, 2021 WI 50, ¶ 7, 397 Wis. 2d 293, 961 N.W.2d 41 (citation omitted). Courts assess reasonable suspicion under the totality of the circumstances. *Id.* ¶ 9. The *Terry* exception extends to traffic stops, allowing an officer to temporarily and briefly detain a car and its driver based on a reasonable suspicion that a traffic law has been violated. *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143.

To justify a particular intrusion, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. "The 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, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634.

That said, "the required showing of reasonable suspicion is low." *State v. Eason*, 2001 WI 98, ¶ 19, 245 Wis. 2d 206, 629 N.W.2d 625. "[S]uspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity." *State*

v. Anderson, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). It is the essence of good police work for an officer to freeze the situation until the officer can sort out the ambiguity. *State v. Begicevic*, 2004 WI App 57, ¶ 7, 270 Wis. 2d 675, 678 N.W.2d 293. Due to the nature of investigatory stops, "*Terry* accepts the risk that officers may stop innocent people." *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

C. Based on the totality of the circumstances, reasonable suspicion supported Officer Butryn's decision to stop Solom.[1]

The totality of the circumstances provided Officer Butryn with reasonable suspicion to temporarily stop the red Honda Civic to determine whether its driver, Solom, was committing a traffic offense, i.e., to see if his reported and independently observed erratic driving was due to intoxication. The totality of the circumstances included:

- The tip originated from an identifiable citizen (R. 59:9, 11);
- The tip's details, including a specific description of the car's make, model, and color, i.e., a red Honda Civic, the citizen's observations of the driver's

[1] In its decision, the circuit court determined that the facts gave "the officer sufficient *probable cause* to make a stop for further investigation" and "that there was *probable cause* to stop." (R. 59:41–42 (emphasis added).) In its response to Solom's motion and in its argument at the suppression hearing, the State argued that the circumstances supported reasonable suspicion for the stop and not probable cause. (R. 28:1–2; 59:25, 30, 36.) Consistent with the hearing evidence and its argument below, the State argues that the totality of the circumstances supported reasonable suspicion. It does not ask this Court to affirm the stop on probable cause grounds. The circuit court's reasoning does not bind this Court, which may affirm the judgment even if it disagrees with the circuit court's reasoning. *Weyenberg Shoe Mfg. Co. v. Seidl*, 140 Wis. 2d 373, 383, 410 N.W.2d 604 (Ct. App. 1987).

inability to control the Civic, i.e., going through a stop sign and crashing into a snowbank, its direction of travel, i.e., westbound on Main Street, and the citizen's suspicion that the driver appeared intoxicated (R. 59:11–12);

- Officer Butryn's training and experience related to investigating OWI offenses, i.e., "between 55 and 100" investigations, awareness of OWI indicators, i.e., driving through stop signs, "varying speeds, weaving within its own lane," and failing to immediately stop after being signaled to stop (R. 59:6–7, 17);
- Officer Butryn's corroboration of the details of the citizen's tip, including his observation of a red Honda Civic, its proximity both in time and place to its first reported location, i.e., within two to three minutes of the dispatch and about a mile away, and its direction of travel, westbound on Main Street (R. 59:14);
- Officer Butryn's observations of Solom's operation of the Civic, including "varying speeds, increasing speed, decreasing speed, as well as weaving within its own lane" (R. 59:15);
- Solom's failure to stop immediately, travelling another 30 seconds after Officer Butryn activated his lights and siren (R. 59:16–17).

In assessing reasonable suspicion under the totality of the circumstances, this Court views these factors together rather than in isolation from each other. *Genous*, 397 Wis. 2d 293, ¶ 12. That said, the State briefly addresses the significance of several of these factors.

To begin, the tip originated from an identifiable citizen rather than an anonymous source. (R. 59:11, 38.) An anonymous source's tip, if sufficiently corroborated, may establish probable cause, *Illinois v. Gates*, 462 U.S. 213, 243–

46 (1983), or reasonable suspicion, "a less demanding standard than probable cause," *Alabama v. White*, 496 U.S. 325, 330 (1990). And in assessing reasonableness under the Fourth Amendment, courts place even greater weight on the reliability of tips from citizens who place their anonymity at risk, thereby exposing themselves to criminal liability. *State v. Williams*, 2001 WI 21, ¶¶ 35, 38, 241 Wis. 2d 631, 623 N.W.2d 106. Accordingly, courts apply a "relaxed test of reliability" to tips from citizens, focused on observational reliability even when "other indicia of reliability have not yet been established." *Id.* ¶ 36.

Courts have applied these principles for assessing a citizen's reliability to *Terry* investigatory stops, including those precipitated by a citizen's report of erratic driving. *State v. Rutzinski*, 2001 WI 22, ¶¶ 16–38, 241 Wis. 2d 729, 623 N.W.2d 516. In *Rutzinski*, the citizen provided information to the dispatcher about the driver's handling of a truck, i.e., weaving in its lane, varying its speed, and tailgating, a description of the truck, i.e., a black pickup, and a description of its path of travel. *Id.* ¶¶ 4–6, 38. The Wisconsin Supreme Court found the citizen's tip was sufficiently reliable to provide reasonable suspicion and, therefore, to justify a *Terry* traffic stop even though the officer did not independently observe erratic driving before initiating the stop. *Id.* ¶¶ 7, 38.

After *Rutzinski*, the United States Supreme Court reached a similar conclusion, determining that an officer had reasonable suspicion to stop a truck after a caller reported to a dispatcher that the truck had run the caller off the road 18 minutes earlier. *Navarette v. Californi*a, 572 U.S. 393, 395, 399, 404 (2014). Even assuming that the caller was anonymous, the Supreme Court concluded that the caller's allegation, which included the truck's make, model and plate number, "bore adequate indicia of reliability for the officer to credit the caller's account" and justified the officer's belief the caller was reliable. *Id.* at 398–99. It also concluded "that the

behavior alleged by the 911 caller, 'viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion' of drunk driving" and that the stop was "proper." *Id*. at 401–02 (alteration in original) (citation omitted). The Supreme Court also noted that "the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, [did not] dispel the reasonable suspicion of drunk driving." *Id*. at 403.

What *Terry* requires is that the officer "point to specific and articulable facts" that justify the officer's investigatory stop. *Rutzinski*, 241 Wis. 2d 729, ¶ 14. As in *Rutzinksi*, *id*. ¶ 4, the citizen's tip here included specific and articulable facts about the driver's handling of the Civic. Those other articulable details included the citizen's observations that the driver went through a stop sign and hit a snowbank with sufficient force to cause front end damage. (R. 59:10–11.) These observations reflected on the driver's inability to safely control the Civic and were relevant to Officer Butryn's assessment that the Civic's driver may be impaired. (R. 59: 6–7, 11, 20.) As in *Rutzinski*, 241 Wis. 2d 729, ¶¶ 4–5, the citizen provided additional pieces of information that enhanced the tip's reliability, including: (1) a detailed description of the car, including the make, model, and color, i.e., a "red Honda Civic" (R. 59:11); and (2) information about the Civic's direction of travel, i.e., westbound on Main Street (R. 59:12).

True, unlike in *Rutzinski*, 241 Wis. 2d 729, ¶¶ 5–6, there is no indication that the citizen remained on the phone with the dispatcher relaying ongoing information about the Civic's movement or reporting that Officer Butryn stopped the correct car. But the absence of these facts is not fatal to the tip's reliability. Consistent with the citizen's report, Officer Butryn located a red Honda Civic within two to three minutes of the dispatch travelling westbound on Main Street and within a mile of the location the citizen reported. (R. 59:13–14.) And here, Officer Butryn did something that

the officer in *Rutzinski* did not do to significantly corroborate the tip. In *Rutzinski*, 241 Wis. 2d 729, ¶ 16, the officer initiated the stop without personally observing erratic driving. Here, by contrast, Officer Butryn did not immediately initiate a stop of the Civic. Instead, he followed it and made independent observations about Solom's driving. Officer Butryn noted two indicators of intoxicated driving, including Solom increasing and decreasing the Civic's speed and weaving within its lane. (R. 59:6–7, 15.)

To justify his *Terry* stop of Solom, Officer Butryn had "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. He did that. To require him continue to make additional observations about Solom's driving before initiating a traffic stop "ignores the tremendous potential danger presented by drunk drivers." *Rutzinski*, 241 Wis. 2d 729, ¶ 35. "[A]llowing a drunk driver a second chance for dangerous conduct" while the officer continues to watch a car "could have disastrous consequences." *Navarette*, 572 U.S. at 404.

Here, the significant public interest in enforcing intoxicated driving laws based on the grave consequences of impaired driving weighs in favor of the State's need for the seizure against the intrusion that the seizure entails. *Terry*, 392 U.S. at 21; *Rutzinski*, 241 Wis. 2d 729, ¶ 35 (collecting cases in impaired driving context). Officer Butryn's temporary seizure of Solom significantly advanced that public interest, allowing him to assess whether the driving that the citizen reported and Officer Butryn observed resulted from an impaired condition. Further, Officer Butryn's intrusion into Solom's liberty was relatively slight, involving an investigatory stop of Solom, who was operating the Civic on a public roadway, and not an intrusion into his home. *See Caniglia v. Strom*, 593 U.S. 194, 199 (2021) ("What is

reasonable for vehicles is different from what is reasonable for homes.").

To be sure, Solom's conduct may have been ambiguous in that there may have been innocent explanations for the driving that the citizen reported and that Officer Butryn observed. But a *Terry* stop's principal function "is to quickly resolve that ambiguity." *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). Under the circumstances, it was "[t]he essence of good police work" for Officer Butryn to freeze the situation and "to briefly stop [Solom] in order to maintain the status quo temporarily while obtaining more information." *Id.* at 61. Based on the totality of information, including the citizen's report, Officer Butryn's experience, and his independent observations of the Civic, Officer Butryn "would have been remiss in his duty to have acted otherwise." *Id.* Officer Butryn's decision to temporarily seize Solom was constitutionally reasonable.

D. Solom's arguments notwithstanding, reasonable suspicion supported the stop.

In asserting that Officer Butryn lacked reasonable suspicion, Solom attempts to "isolat[e] various factors, attacking them one by one, and then excluding each factor from the totality-of-the-circumstances analysis. . . . '[T]his sort of divide-and-conquer analysis'" is inappropriate. *Genous*, 397 Wis. 2d 293, ¶ 12 (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

Citing *State v. Richey*, 2022 WI 106, ¶ 1, 405 Wis. 2d 132, 983 N.W.2d 617, Solom contends that the citizen's description of the red Honda Civic was akin to an officer's "generic description of a Harley-Davidson motorcycle recently seen driving erratically." (Solom's Br. 9–11.) In *Richey*, the Wisconsin Supreme Court characterized the issue of reasonable suspicion as "a close question." *Richey*, 405 Wis. 2d 132, ¶ 11. It determined that the first officer's "generic

description of a Harley-Davidson motorcycle" provided an insufficient basis for a second officer to stop Richey, whom she saw driving a Harley-Davidson within five minutes and a half mile of the first officer's report. *Id.* ¶¶ 1, 11–12. In contrast to *Richey*, where the first officer only provided a vehicle make, i.e., a Harley-Davidson motorcycle, the citizen here not only provided the make, but also a model and color, i.e., a red Honda Civic. Unlike *Richey*'s generic description of a "Harley-Davidson motorcycle,"[2] the additional model and color information narrowed the focus of Officer Butryn's search.

Other factors distinguish Solom's case from *Richey*. In contrast to the five minutes between the first officer's report and the second officer's observation of Richey, *id.* ¶ 2, Officer Butryn observed the red Honda Civic within two to three minutes, further increasing the probability that he was pulling over the same Civic that the citizen reported. (R. 59:14.) Finally, unlike in *Richey*, where the second officer made no observations of erratic driving, 405 Wis. 2d 132, ¶ 3, Officer Butryn observed Solom operating the Civic erratically, noting that its speed varied and it deviated within its lane, both indicators of impaired driving. (R. 59:6–7, 15.) In sum, *Richey* does not control Solom's case, as Officer Butryn had more information available to him before he stopped Solom than the officer had before she stopped *Richey*.

Relying on *State v. Rissley*, 2012 WI App 112, 344 Wis. 2d 422, 824 N.W.2d 853, Solom suggests that the absence of a continued running description of a vehicle's direction of movement on a busy street weighs against reasonable

[2] In 2020, Harley-Davidson offered 24 different motorcycle models in as many as 13 different colors. *Search results for 2020 motorcycles*, Harley-Davidson, https://www.harley-davidson.com/us/en/search.html?format=json;i=1;locale=en_US;q=2020%20motorcycles;q1=bikes;sp_c=48;sp_cs=UTF-8;x1=primaryCategoryCode (last visited July 30, 2024). *See* Wis. Stat. § 902.01(2)(b) (judicial notice).

suspicion. (Solom's Br. 12–13.) True, *Rissley* concerned a situation where a citizen provided updates on a beige Chevy van's location late at night on a lightly travelled rural roadway until an officer stopped it. *Rissley*, 344 Wis. 2d 422, ¶¶ 4–5, 12–13. But nothing in *Rissley* suggests that a responding officer can only act on a citizen's tip when the citizen provides a running description of a suspect's conduct. To impose such a requirement essentially creates a bright-line rule and runs contrary to assessing Fourth Amendment reasonableness based on a case's facts. *Scott*, 378 Wis. 2d 578, ¶ 14. *Rissley* is distinguishable from Solom's case for another reason. There, as in *Richey*, the officer stopped the van at the dispatcher's direction and did not observe any traffic violations before he stopped it. *Rissley*, 344 Wis. 2d 422, ¶ 5. In contrast, Officer Butryn saw Solom engage in erratic driving, potentially indicative of intoxicated driving. (R. 59:6–7, 15.)

Quoting *Post*, 301 Wis. 2d 1, ¶ 21, Solom suggests that deviating within a lane is "conduct that many innocent drivers commit." (Solom's Br. 13–14.) *Post* does not help Solom. There, the Wisconsin Supreme Court declined "the bright-line rule proffered by the State that weaving within a single lane may *alone* give rise to reasonable suspicion, [or] the bright-line rule advocated by Post that weaving within a single lane must be erratic, unsafe, or illegal to give rise to reasonable suspicion." *Post*, 301 Wis. 2d 1, ¶ 26 (emphasis added). Instead, it reiterated the rule that courts assess reasonable suspicion for a stop under the totality of the circumstances and found reasonable suspicion based on the officer's testimony. *Id.* ¶¶ 27–37. Here, the totality included the citizen's observation that the Civic went through a stop sign and crashed into a snowbank and Officer Butryn's observation of a Civic that matched the citizen's description shortly thereafter and nearby, weaving within its lane at varying speeds. (R. 59:6–7, 11, 15.)

True, Officer Butryn did not observe Solom drive in a manner that violated the traffic code. (Solom's Br. 9.)[3] And there might have been an innocent explanation for Solom's operation of the Civic. But Officer Butryn was not required to rule out the possibility of an innocent explanation before initiating a *Terry* stop. *See Williams*, 241 Wis. 2d 631, ¶ 46. That said, the absence of a readily apparent innocent explanation for Solom's driving would weigh in favor of reasonable suspicion. While Officer Butryn reported that the traffic was heavy based on the time of day (R. 59:21), the record is devoid of an alternative, innocent explanation, like slippery or icy road conditions or other traffic, that accounts for Solom's disregard of a stop sign, crashing into a snowbank, weaving within his lane, and varying his speed (R. 59:6–7, 11, 15). Under the circumstances, it was certainly reasonable for Officer Butryn to resolve the ambiguity quickly by initiating a traffic stop of Solom. *Anderson*, 155 Wis. 2d at 84.

Solom suggests that Officer Butryn's inability to see damage to the Civic before he stopped it undermines reasonable suspicion. (Solom's Br. 14.) As the circuit court aptly noted, had Officer Butryn observed damage to the Civic before he stopped it, "that obviously would have been further evidence. You might say frosting on the cake, but I don't think he has to see that based upon the information that the officer had." (R. 59:41.)

Further, there is a reasonable explanation for Officer Butryn's inability to see the damage to the front end until after he initiated the stop. (R. 59:24, 26.) When Officer Butryn first saw the Civic, he was travelling in the opposite direction as the Civic on Main Street in dark and heavy traffic conditions, and he "was able to observe the

[3] If he had witnessed that, it would have given him not only reasonable suspicion but probable cause to initiate a stop without more.

driver's side of the front of the vehicle." (R. 59:14, 21–22.) In other words, Officer Butryn was unable to see the Civic's right front passenger quarter panel. It would be unreasonable to expect Officer Butryn to maneuver his squad in a manner that allowed him to view the erratically operated Civic on all sides before stopping it. In assessing the reasonableness of Officer Butryn's behavior, this Court is mindful that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

Finally, as Solom correctly notes, the circuit court discounted the citizen's observation that the driver appeared intoxicated. (Solom's Br. 5 n.1 (citing R. 59:11, 41).) But, in assessing reasonable suspicion, this Court need not discount the citizen's opinion that Solom appeared intoxicated like the circuit court did. In *Navarette*, the Supreme Court noted that the caller did more than simply report "a minor traffic infraction" or make "a conclusory allegation of drunk or reckless driving." *Navarette*, 572 U.S. at 403. Rather, the caller "alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness." *Id.* Similarly, the citizen's observation that Solom's Civic went through a stop sign and crashed into a snowbank provided a reasoned basis for the citizen's observation that the driver was intoxicated. (R. 59:10–11.) And under these circumstances, including his independent observations, Officer Butryn acted reasonably "in stopping a driver whose alleged conduct was a significant indicator of drunk driving." *Navarette*, 572 U.S. at 403.

* * * * *

Based on the totality of the circumstances, Officer Butryn had reasonable suspicion to temporarily stop Solom to determine whether he was operating while under the influence.

E. If this Court finds a Fourth Amendment violation, it should issue a remand order limited in scope.

Should this Court find a Fourth Amendment violation, Solom asks this Court to "reverse the judgment of conviction, allow [him] to withdraw his guilty plea, and remand with instructions to suppress any evidence obtained pursuant to the unlawful stop." (Solom's Br. 15.) That would not be appropriate.

An appellate "court's role in a conventional appeal is limited to addressing the issues briefed by appellate counsel." *State v. Tillman*, 2005 WI App 71, ¶ 18, 281 Wis. 2d 157, 696 N.W.2d 574. The only issue before this Court is whether the circuit court erred when it found no Fourth Amendment violation. The circuit court did not address whether the exclusionary rule should apply if there were a violation or whether it should grant Solom plea withdrawal.

Indeed, if this Court finds a Fourth Amendment violation occurred when the circuit court did not, this Court will remand the case to the circuit court to determine whether an exception to the exclusionary rule applies. *See, e.g.*, *State v. Anker*, 2014 WI App 107, ¶ 27, 357 Wis. 2d 565, 855 N.W.2d 483; *State v. Marquardt*, 2001 WI App 219, ¶¶ 23, 53, 247 Wis. 2d 765, 635 N.W.2d 188. And even when suppression is the remedy, plea withdrawal is not automatic. Rather, the circuit court grants plea withdrawal only if the State cannot meet its burden of demonstrating that the circuit court's error in refusing to suppress evidence was harmless, guided by the factors this Court identified in *State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376.

On remand, the State may well be unable to identify an applicable exception to the exclusionary rule that applies or demonstrate that the refusal to suppress evidence was harmless. But this Court cannot decide these issues without a proper record or arguments.

CONCLUSION

This Court should affirm the judgment.

Dated this 2nd day of August 2024.

Respectfully submitted,

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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 5032 words.

Dated this 2nd day of August 2024.

Electronically signed by:

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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.

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