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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP691-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JODY WILLIAM SOLOM,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Waukesha County Circuit Court, the Honorable Michael O. Bohren, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

The State argues that the totality of the circumstances provided Officer Butryn with reasonable suspicion to stop Mr. Solom. (State's Br. at 12). Because the officer lacked particularized reasons to believe Mr. Solom's car was the same vehicle which previously ran a stop sign and crashed into a snowbank, the State is incorrect.

The State argues that because Mr. Solom's car matched some information from a reliable tip (i.e., the make, model, color and direction of travel), Officer Butryn had reason to believe it was the same car the witness had observed. But because red Honda Civics are common cars, and because it was 5:30 p.m. on a busy Friday evening, this generic description applied to a fair number of vehicles and, accordingly, Officer Butryn lacked concrete reasons to believe the first red Honda Civic he saw was the same one which had reportedly hit a snowbank. Officer Butryn also failed to corroborate that the car matched the only unique description that the witness provided, that it had a "smashed up" front end, making his belief that they

were the same car even less reasonable. And, Officer Butryn's observations that Mr. Solom made minor deviations within his lane and varied his speed was not indicative of a driver who was so out of control that he was likely to be the same driver who ran a stop sign and crashed into a snowbank. Varying speeds and minor deviations in a lane of travel are not only innocent conduct, they are "conduct that many innocent drivers commit." *State v. Post*, 2007 WI 30, ¶21, 301 Wis. 2d 1, 733 N.W.2d 634.

Further, *State v. Rutzinski* is distinguishable because there the witness who reported erratic driving followed the vehicle in question and confirmed the officer was about to pull over the correct vehicle. 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. In that case, the Wisconsin Supreme Court upheld the stop of a vehicle after an anonymous witness reported a black pickup truck driving erratically. *Id.* at ¶¶16–38. But although the witness initially only provided the truck's color and a description of its direction of travel, the caller then stayed on the line and followed the pickup truck. *See id.* at ¶6. When an officer pulled behind the suspected truck, the witness then confirmed that the officer was indeed following the correct truck. *Id.*

In contrast, here, the witness did not follow the red Honda Civic he saw crash into a snowbank. Rather, he provided a description of a common car type along with its direction of travel and then lost sight of it in rush hour traffic "so that the pursuing officer [had] to use some combination of logic and guesswork

to locate the fleeing vehicle." *State v. Rissley*, 2012 WI App 112, ¶16, 433 Wis. 2d 422, 824 N.W.2d 853.

Additionally, *Navarette v. California* is distinguishable because there, the witness provided the license plate number of the car which had allegedly run her off the road. 572 U.S. 393, 395 (2014). Here, however, the reporting witness was unable to provide a license plate and instead only provided a description of a common car along with its direction of travel before losing sight of it in rush hour traffic.

The State argues that because the witness reported erratic and dangerous driving, i.e. running a stop sign and crashing into a snowbank, Officer Butryn had reason to believe the driver may have been impaired. (State's Br. at 15). This may be true as regards the car the witness saw, but because Officer Butryn lacked a sufficient basis to believe Mr. Solom's car was the same one which crashed into a snowbank, the witness's observations did not provide reasonable suspicion to stop Mr. Solom's specific vehicle.

The State also argues that this case is distinguishable from *State v. Richey*, 2022 WI 106, 405 Wis. 2d 132, 983 N.W.2d 617, because there the witness provided only a vehicle's make, i.e. a Harley-Davidson motorcycle, where as the witness here provided a make, model and color, i.e. a red Honda Civic. (State's Br. at 17-18). But regardless of the number of descriptors the witness gave, the question is whether the officer had concrete reasons to believe he had found the vehicle the witness reported. In

Richey, an officer stopped the first Harley-Davidson motorcycle he identified at 11:00 p.m. in light traffic during a time of year when relatively few motorcycles were on the road. *Richey*, 2022 WI 106 at ¶3. Based on those facts, the Wisconsin Supreme Court found the officer did not have concrete reasons to believe it was the same motorcycle. *Id.* at ¶11.

Similarly, here Officer Butryn stopped the first red Honda Civic he saw in rush hour traffic at 5:30 p.m. on a Friday evening. Because the traffic was heavier, because it took place earlier in the night, and because cars are much more common than motorcycles on the road, Officer Butryn had even less of a reason to believe he had located the correct car. This is especially true because he failed to corroborate the one unique descriptor the witness provided: that the car had a "smashed up" front end.

The State next argues that this case is distinguishable from *Richey* and *Rissley* because the officers in those cases stopped the vehicle at a dispatcher's direction and did not personally observe any traffic violations beforehand. (State's Br. at 19). Simply put, this fact does not distinguish *Richey* and *Rissley* from the present case because Officer Butryn *also* did not observe a traffic violation; the State acknowledges elsewhere in its brief that "Officer Butryn did not observe Solom drive in a manner that violated the traffic code." (State's Br. at 20; *See also* 59:23; App. 29). And although the State suggests that Officer Butryn "saw Solom engage in erratic driving, potentially indicative of intoxicated driving," the trial

court found that the driving Officer Butryn observed was not sufficient to give rise to reasonable suspicion of operating while intoxicated. (59:40; App 46).

The State claims that the lack of an alternative and innocent explanation for running a stop sign and crashing into a snowbank weighs in favor of reasonable suspicion. But because Officer Butryn did not have a sufficient basis to believe Mr. Solom's car was the same one that the witness reported, this point is irrelevant and adds nothing to the reasonable suspicion analysis.

The State also argues that there was a reasonable explanation for Officer Butryn's failure to observe the damage to the front of the vehicle before initiating the stop. (State's Br. at 20-21). Specifically, the State argues that because Officer Butryn was driving in the opposite direction as Mr. Solom in the dark, he was only able to see the driver's side of the front of the vehicle and "was unable to see the Civic's right front passenger quarter panel." *Id.* First, no evidence or testimony was offered at the motion hearing indicating that the damage to the car was confined to the passenger side of the front of the vehicle. Rather, Officer Butryn had only been told that the front end was "smashed up." But even if the damage to the car was limited to the passenger side of the vehicle, failing to corroborate the sole unique identifying feature provided by the witness made Officer Butryn's belief that he had the correct car less reasonable.

The State urges this Court to remand the case to the circuit court if it concludes that a Fourth Amendment violation occurred, so that the State can there attempt to marshal an argument that "an exception to the exclusionary rule applies." (State's Br. at 22). To support this proposition, it cites to *State v. Anker*, 2014 WI App, 357 Wis. 2d 565, 855 N.W.2d 483 and *State v. Marquardt*, 2001 WI App 219, 247 Wis. 2d 765, 635 N.W.2d 188. But these cases are distinguishable.

In *Anker*, the State argued for the first time on appeal that the evidence which Anker sought to suppress could be admitted through either the independent source doctrine or the inevitable discovery doctrine. *Anker*, 2001 WI App 219 at ¶¶ 25-27. Because those arguments had not been presented to the trial court, and the evidence supporting the arguments had not been vetted for admissibility, the case was remanded for further fact-finding. *Id.* And, in *Marquardt,* this Court noted that the Wisconsin Supreme Court had adopted the good faith exception to the exclusionary rule after the parties had completed their briefing, and therefore remanded to the circuit court for a hearing on whether that new exception should apply. 2001 WI App 219 at ¶22.

In contrast, here the State does not and has never argued that an exception to the exclusionary rule applies, nor is there any recently-adopted new exception that did not previously exist. If the State had wished to raise such arguments, its opportunity to do so was in its response brief. Not only has the State

made no attempt to do so, it goes so far as to acknowledge that it "may well be unable to identify an applicable exception to the exclusionary rule" on remand. (State's Br. at 23). Because the State has failed to properly raise and argue that any exception to the exclusionary rule applies, this Court should find such claims forfeited, and reject its proposed remand.

Finally, the State cites to *State v. Semrau* for the proposition that even if this court finds the stop was illegal and that the evidence resulting from it should be suppressed, plea withdrawal is not automatic. 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376. While it is true that in some Fourth Amendment violation situations, suppression of evidence may not result in plea withdrawal, the State does not argue that this is one of those situations. In *Semrau* the State argued, and this Court agreed, that even though some evidence should arguably be suppressed, there was no reasonable probability that Semrau would have refused to plead. 2000 WI App 54 at ¶ 26. The State has not made that argument here and therefore has forfeited this claim as well.

CONCLUSION

For the reasons stated in this brief, Mr. Solom requests that this Court reverse the judgment of conviction in this case, and remand with instructions to suppress any evidence obtain pursuant to the unlawful search and subsequent search warrant and permit plea withdrawal.

Dated this 13th day of August, 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 1,767 words.

Dated this 13th day of August, 2024.

Signed:

Electronically signed by
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