

FILED
03-21-2025
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2024AP931-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH PAUL MORELLO,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

Joseph Paul Morello seeks this Court's review of an unpublished one-judge decision of the court of appeals affirming his convictions for OWI (second) and failure to install an ignition interlock device. Both the court of appeals and the circuit court (when denying both the original suppression motion and a motion for reconsideration) held that police had reasonable suspicion to stop Morello's vehicle the night of his arrest.

The issues Morello presents in his petition do not warrant this Court's limited attention and resources. At bottom, Morello seeks an additional and unnecessary round of fact-intensive error correction on decisions that are consistent with well-established case law and the facts in the record.

I. The issues presented do not implicate the criteria for review.

Morello says that the issues he presents implicate two criteria for review:

- The first and third issues under Wis. Stat. § (Rule) 809.62(1r)(a), because whether there is reasonable suspicion to stop is a real and significant constitutional question, (Pet. 6); and
- The second issue under Wis. Stat. § (Rule) 809.62(1r)(c)3., because a decision by this Court will help clarify and develop the law on a legal question that is likely to recur), because the question regarding reasonable suspicion to stop based on an illegal window tint sometimes arises in Wisconsin. (Pet. 6.)

This case satisfies neither criterion.

As for the real-and-significant criterion, if being a constitutional question were enough to support the grant of a petition, this Court would be overwhelmed with criminal cases, particularly with Fourth, Fifth, and Sixth Amendment

issues. As is, this case does not present this Court with an opportunity to apply novel facts or address a confusing or new facet of Fourth Amendment jurisprudence. At bottom, Morello asks this Court to take another pass at the question whether the facts support reasonable suspicion to stop Morello's truck, where the courts below found two reasonable factual bases: (1) excessive window tint; and (2) involvement in an active shooting. Thus, Morello's petition is solely a request for this Court to engage in error correction, which is not this Court's function. *See State ex rel. DNR v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 43, 380 Wis. 2d 354, 909 N.W.2d 114 ("We are not, primarily, an error-correcting tribunal, and we normally hear only those cases that present something more than just an error of law.") (footnote omitted).

As for the second criterion, Morello does not identify any conflict or confusion requiring this Court's clarification or guidance. He claims that because police will continue to enforce violations of the vehicular code, including window tint violations, that this issue will recur without this Court's input. (Pet. 5–6.) Again, if that reasoning were enough, it would justify review of virtually every Fourth Amendment case. Further, police will continue to stop vehicles for observed code violations regardless of whether this Court takes review. To that end, Morello does not identify any confusion, conflict, or inconsistency in the court of appeals or circuit courts when a stop involves reasonable suspicion based on a window-tint violation. As is, Wisconsin state and federal courts evaluating suppression motions in window-tint stops are having no apparent difficulty applying *State v. Conaway*, 2010 WI App 7, ¶ 7, 323 Wis. 2d 250, 779 N.W.2d 182, and other Fourth Amendment cases.¹

¹ *See, e.g., State v. Gillie*, No. 2020AP372, 2021 WL 191766, *4–*5 (Wis. Ct. App. Jan. 20, 2021) (unpublished) (Pet-App. 39–42)

Likewise, Morello's second issue, faulting the court of appeals' reliance on implicit credibility findings does not implicate the criterion under Wis. Stat. § (Rule) 809.62(1r)(c)3. (Pet. 6, 15–17). That aspect of the court of appeals' decision is not incompatible with controlling law and is not clear error on this record.

Well-established case law clearly allows appellate courts to assume that a circuit court implicitly found a witness credible when its decision relies on that witness's testimony. *State v. Quarzenski*, 2007 WI App 212, ¶ 23, 305 Wis. 2d 525, 739 N.W.2d 844. That is exactly what happened here. The circuit court relied on Officer Asilis's testimony at the motion hearing and on reconsideration to hold that there was reasonable suspicion to believe that Morello was involved in nearby shootings. Even though the circuit court did not make any express findings regarding the suspicious window tint, it did not expressly find incredible Asilis's testimony on those points. Accordingly, the court of appeals was free to understand the court to have implicitly found Asilis credible on those points.

Morello argues that the court of appeals could not find Asilis's testimony regarding the window tint credible because the circuit court was silent on whether the officer's

(reversing holding that window tint violation supported stop that was wholly based on after-the-fact testing); *Vu v. Tolvstad*, 2023 WL 8185517, *3–*4 (W.D. Wis. Nov. 23, 2023) (requiring only reasonable belief, not certainty, of window tint violation).

Morello cites and includes a copy of a summary disposition from the court of appeals applying *Conaway* to a window-tint stop. (Pet. 5; Pet-App. 36–38.) That case does not assist Morello; in all events, is not citable as persuasive authority or for res judicata purposes under Wis. Stat. § (Rule) 809.23(3), or to show any arguable conflict between appellate districts under *State v. Higginbotham*, 162 Wis. 2d 978, 998, 471 N.W.2d 24 (1991). Accordingly, the State does not address it.

observations of Morello's excessive window tint established reasonable suspicion to stop. (Pet. 16–17.) He argues that the court of appeals should have assumed that the circuit court implicitly found Asilis's testimony on those points incredible, since the lower court did not rule on that ground. (Pet. 17.)

But the record reflects that the circuit court relied on Asilis's testimony that he observed Morello's window tint and noted that that observation contributed to the reasons for the stop. (R. 47:15, 18–19.) And the circuit court never held that Asilis's observations of the window tint could not be a stand-alone basis for the stop; it simply held that those observations contributed to the reasonable suspicion to stop based on the shootings. (Pet-App. 28–29.) Under those facts and well-established law, the court of appeals soundly relied on the circuit court's implicit credibility findings in this case. Morello's second issue fails to implicate the criteria for review.

II. A reasonable suspicion analysis from this Court on these facts will not develop the law.

In all, Morello seeks one more round of a fact-specific reasonable suspicion analysis from this Court. This is at its heart a request for error correction, which is not a basis for this Court's review.

Nor does this case present an opportunity to break new legal ground or apply a novel factual situation to Fourth Amendment jurisprudence. As an initial matter, the issues in this case are limited to whether there was reasonable suspicion of criminal activity or a violation of the vehicle code to stop Morello. They do not expand into the reliability of tips supporting the stop, reasonableness of the duration or scope of the stop, when the reasonable suspicion transitioned to probable cause, or any other more-fertile areas for Fourth Amendment law development.

And while this Court has accepted review of multiple reasonable-suspicion-to-stop cases in the last decade, those

cases involved unique scenarios allowing this Court to address conflicts in the law, meaningfully clarify the reasonable-suspicion standard, and fine-tune the analysis for lower courts.²

This case does not present an opportunity to clarify or develop the law. At most, it involves a difference in opinion between the circuit court and the court of appeals as to which of two reasonable bases for the stop of Morello was stronger. Any disagreement on that point, however, is not a reason for this Court to take review, especially given both bases were reasonable.

To wit, the stop was supported by reasonable suspicion that Morello's truck's window tint violated the vehicle code: Asilis had training and experience in gauging tint values, he

² See, e.g., *State v. Wiskowski*, 2024 WI 23, ¶¶ 12–15, 412 Wis. 2d 185, 7 N.W.3d 474 (unreasonable stop supported by mere hunches with respect to criminal activity and community caretaker concerns); *State v. Richey*, 2022 WI 106, ¶ 12, 405 Wis. 2d 132, 983 N.W.2d 617 (unreasonable stop based solely on report of Harley motorcycle driving erratically without any other observations of suspicious activity); *State v. Nimmer*, 2022 WI 47, ¶¶ 27–34, 402 Wis. 2d 416, 975 N.W.2d 598 (reasonable stop based on ShotSpotter report and officer's observations and other circumstances); *State v. VanBeek*, 2021 WI 51, ¶¶ 53–62, 397 Wis. 2d 311, 960 N.W.2d 32 (unreasonable stop based on vague claims of suspicious behavior and defendants' criminal records); *State v. Genous*, 2021 WI 50, ¶ 13, 397 Wis. 2d 293, 961 N.W.2d 41 (reasonable stop based on officer's observation of and circumstances suggesting an apparent drug deal); *State v. Anderson*, 2019 WI 97, ¶¶ 48–52, 389 Wis. 2d 106, 935 N.W.2d 285 (addressing reasonable suspicion to conduct an Act 79 search); *State v. Smith*, 2018 WI 2, ¶ 1, 379 Wis. 2d 86, 905 N.W.2d 353 (addressing situation where reasonable suspicion dissipated while the officer approached a stopped car); *State v. Iverson*, 2015 WI 101, ¶ 44, 365 Wis. 2d 302, 871 N.W.2d 661 (addressing reasonable suspicion to stop based on violation of nontraffic civil forfeiture law); *State v. Houghton*, 2015 WI 79, ¶ 32, 364 Wis. 2d 234, 868 N.W.2d 143 (clarifying conflict in law regarding whether reasonable mistake of law can justify a stop).

has used tint meters to verify his visual assessments of window tint values, and the level of tinting on Morello's front side windows was so dark he could not see the driver or other possible occupants. (R. 24:35, 37; Pet-App. 16–17.) Taking together Asilis's training and experience and his description of how dark Morello's windows were, under *Conaway* and other Fourth Amendment cases, there was reasonable suspicion to stop Morello based on the window tint. (Pet-App. 15–17.)

And as the circuit court determined, the stop was also supported by reasonable suspicion that Morello's truck was involved in the shots-fired reports based on the following facts: (1) police received a report of shots fired on a particular street after midnight; (2) a witness saw a dark pickup truck shining a laser just before those first shots were heard; (3) about 15 minutes later, there was second shots-fired report from a second, nearby street; (4) a witness saw a black Chevy Avalanche leaving from near where those shots were allegedly fired; (5) shell casings were found at the second location; (6) there was little traffic in the area; (7) about 45 minutes later, and in the same general area of the shots-fired reports, Asilis saw Morello's black Chevy Avalanche; and (8) Asilis noted the heavily tinted front windows on the Avalanche. (R. 24:50–55; 47:14–20; Pet-App. 16–31.)

In sum, this case presents nothing more than an opportunity for fact-specific review of a correct decision in Morello's individual case. This Court should deny his petition for review.

Dated this 21st day of March 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@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 1,847 words.

Dated this 21st day of March 2025.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY

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 this 21st day of March 2025.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY