No. _____

In the

Supreme Court of the United States

ANDREW H. ZOELLICK,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the absence of any jurisprudential definition of the term "totality," as applied to the totality of the circumstances test under the Fourth Amendment, has led to the degradation of the test to the point where innocent factors which mitigate *against* findings of reasonable suspicion and probable cause are, despite their countervailing and counter-indicative nature, wholly discounted leaving only incriminating facts to be weighed?

PARTIES

The parties identified in the caption are all those involved in the proceedings in the court from whose judgment review is sought.

CORPORATE DISCLOSURE

Corporate disclosure pursuant to SCR 14.1(b)(ii) is not warranted as there are no corporations which are a party to this action.

DIRECTLY RELATED PROCEEDINGS

Pursuant to SCR 14.1(b)(iii), the following are the list of directly related proceedings relative to this case:

Wisconsin Supreme Court
Appellate Case No. 2021AP2204-CR
State of Wisconsin v. Andrew H. Zoellick
Date of Entry of Judgment: April 18, 2023

Wisconsin Court of Appeals
Appellate Case No. 2021AP2204-CR
State of Wisconsin v. Andrew H. Zoellick
Date of Entry of Judgment: November 23, 2022

Circuit Court for Winnebago County
Circuit Court Case No. 20-CF-637
State of Wisconsin v. Andrew H. Zoellick
Date of Entry of Judgment: December 16, 2021

No other matters arose from, or are pending in, any related action or proceeding.

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A. Wortham, *The Reclaiming of Hugo Black*, Tuscaloosanews.com (May 16, 2004) https://www.tuscaloosanews.com/story/news/2004/05/16/the-reclaiming-of-hugo-black/27864731007/ 24

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CITATION OF REPORTS

State of Wisconsin v. Andrew H. Zoellick, Case No. 2021AP2204-CR (Wis. Sup. Ct. Apr. 18, 2023)

State of Wisconsin v. Andrew H. Zoellick, Case No. 2021AP2204-CR, 2022 WL 17173107 (Wis. Ct. App. Nov. 23, 2022) (unpublished)

State of Wisconsin v. Andrew H. Zoellick, Case No. 20-CF-637

BASIS FOR JURISDICTION

The date of the entry of the judgment of the Wisconsin Supreme Court sought to be reviewed is April 18, 2023. This petition is not a matter filed pursuant SCR 11.

No orders regarding rehearing nor extensions of time have been issued in the instant case.

Jurisdiction of the Court over this matter is conferred by 28 USC § 1257.

No notifications are required pursuant to SCR 29.4(b) or (c).

CITATIONS OF AUTHORITY

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stat. § 340.01(46m) (2019-20)

"Prohibited alcohol concentration" means one of the following:

(a) If the person has 2 or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

(c) If the person is subject to an order under s. 343.301 or if the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

Wis. Stat. § 346.63(1) (2019-20)

No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(am) The person has a detectable amount of a restricted controlled substance in his or her blood.

(b) The person has a prohibited alcohol concentration.

(c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a), (am) or (b) for acts arising out of the same incident or occurrence. If the person is charged

with violating any combination of par. (a), (am) or (b), the offenses shall be joined. If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1g) and 343.305. Paragraphs (a), (am), and (b) each require proof of a fact for conviction which the others do not require.

(d) In an action under par. (am) that is based on the defendant allegedly having a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol in his or her blood, the defendant has a defense if he or she proves by a preponderance of the evidence that at the time of the incident or occurrence he or she had a valid prescription for methamphetamine or one of its metabolic precursors, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol.

STATEMENT OF THE CASE

Mr. Zoellick was arrested on October 12, 2020, for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a) (2019-20). R3.[1] While he was initially charged with a sixth offense operating while intoxicated violation, based upon his successful collateral attack against the counting of one of his prior convictions as a penalty enhancer, the charge against him was ultimately prosecuted as a fifth offense. Because this was Mr. Zoellick's fifth offense for operating while intoxicated, he was subject to Wisconsin's restricted prohibited alcohol concentration standard of .02 pursuant to Wis. Stat. § 340.01(46m) (2019-20).

Mr. Zoellick retained private counsel who filed a pretrial motion challenging whether his Fourth Amendment right against unreasonable searches and seizures was violated when law enforcement officers expanded the scope of his initial detention, which was premised upon a citizen complaint that he was allegedly driving "recklessly." to include an investigation for an operating while intoxicated-related offense.

[1]References to the record developed throughout the state courts' proceedings are identified herein by the State's official designation of the same in the docket entries with the letter "R[Item #]."

An evidentiary hearing was held on Mr. Zoellick's motion on March 22, 2021.[2] At the hearing, the State offered the testimony of the law enforcement officers who arrested Mr. Zoellick. R37. Apart from making numerous observations during their contact with Mr. Zoellick which served to undercut an inference of impairment, and despite the officers' admissions that "[t]here were literally no signs of impairment present with Mr. Zoellick," and "there was no sign of even consumption of alcohol,"[3] the Circuit Court for Winnebago County denied Mr. Zoellick's motion, finding that because Mr. Zoellick was subject to a restricted alcohol concentration and that the court was addressing a "lower standard" under *Terry v. Ohio*, 392 U.S. 1 (1968), the officers' observations of (1) Mr. Zoellick not retrieving his insurance information immediately, (2) a complaint that his vehicle failed to stop at a controlled intersection, and (3) Mr. Zoellick covering his face with a towel because he did not have his N95 mask with him during the height of the COVID-19 pandemic, together conspired to render the expansion of his detention constitutional. P-App.[4] at p.121; R37 at 32:18-23. Thereafter, Mr. Zoellick changed his plea to one of no

[2]For a description of the specific facts adduced at the evidentiary hearing which are relevant to the question of constitutional law which Mr. Zoellick raises in this petition, refer to the Argument, Section II.A. & B., pp. 34-38, *infra*.

[3]R37 at 20:12-17.

[4]The designation "P-App" refers to the Petitioner's Appendix.

contest and he was found guilty by the court on December 13, 2021. R115.

Mr. Zoellick subsequently filed a Notice of Appeal on December 23, 2021. R80. On November 23, 2022, the Wisconsin Court of Appeals issued a summary disposition in which it only examined the facts that allegedly inculpated Mr. Zoellick without regard to the facts which countervailed the same, concluding that "'innocent' behavior frequently will provide the basis for a showing of probable cause." P-App. at 115.

Within the time prescribed by law, Mr. Zoellick petitioned the Wisconsin Supreme Court for review based upon the fact that the court of appeals wholly discounted or ignored the "totality" of the facts known to the officers which were counter-indicative of impairment, and therefore, a reasonable suspicion that a violation of the law was afoot. By order dated April 18, 2023, the Wisconsin Supreme Court declined to accept Mr. Zoellick's case for review. P-App. at 101-02.

ARGUMENT

For the reasons set forth below, Mr. Zoellick seeks review in this Court pursuant to SCR 10(c) based upon a decision of the court of last resort in Wisconsin addressing "an important question of federal law that has not been, but should be, settled by this Court."

I. THE TOTALITY OF THE CIRCUMSTANCES TEST HAS BEEN TRANSMOGRIFIED INTO NOTHING MORE THAN AN EXAMINATION OF INCULPATING FACTS WITHOUT CONSIDERATION OF THOSE FACTS WHICH MITIGATE AGAINST REASONABLE SUSPICION OR PROBABLE CAUSE.

A. Introduction.

Doubtless, whenever this Court publishes a decision on any point of law, the rights of thousands of citizens, if not those of the entire nation, are affected. Mr. Zoellick presents an issue for this Court's review which is cut from the same fabric, but in perhaps a more practical, day-to-day way because it centers about a question involving the "typical" manner by which a private individual comes face-to-face with the monolith that is "the Law": namely, the investigatory detention. Whether it be for a speeding violation, drug possession, entering a crosswalk illegally, disorderly conduct, loitering, frequenting a house of ill fame, illegally possessing a firearm, pandering, reckless driving, *etc*.,

before a law enforcement officer may constitutionally detain a person upon any of the foregoing suspicions, he or she must first have a "reasonable suspicion" to believe that wrongdoing is afoot. The test for determining whether a reasonable suspicion exists is otherwise known as the "totality of the circumstances" test.

Despite the plethora of decisions involving the totality of the circumstances test and how it is applied, it is remarkable that there exists no clear, direct, and unambiguous definition of the concept of "*totality*" as it is implicated in the test which bears its name. Due to this lack of direction, the totality of the circumstances test, as it is applied in practice by courts throughout the United States, has devolved into a one-sided examination of facts which constitute only a *part* of the "totality" of the information known to law enforcement officers at the time they decide to detain an individual. In effect, it is the equivalent of looking at only one side of a balance scale to see whether it has moved, rather than noticing that the other side of the scale is also weighted and may be tipped more significantly.

This case presents a substantial question of constitutional law because legal determinations under the "*totality* of the circumstances" test which are premised on an utter disregard for innocent facts that weaken a finding of reasonable suspicion—and instead support an alternate conclusion of innocence—is constitutionally specious and violates the Fourth

Amendment's "reasonableness" standard as well as the commonly accepted definition of the word "totality."

At some point, even though it is well settled that "innocent behavior" may support a conclusion that a reasonable suspicion exists to believe a crime is afoot,[5] there must come a moment when a line is impermissibly crossed by construing the "innocent" facts as supporting an incriminating inference—rather than evaluating them for their *counter-indicative* nature—and is so forced and artificial, action must be taken by a court of supervisory jurisdiction to clarify precisely what an examination of the *totality* of the circumstances entails.

This petition affords the Court an opportunity to address how the innocent-behavior standard is to be applied to Fourth Amendment questions when the circumstances do not merely involve facts that are inherently innocent, but involve facts which *contradict* conclusions of wrongdoing. How must these facts be considered as part of the "totality of the circumstances" test? There are no decisions of this Court which directly address at what point inferences from "innocent conduct" in Fourth Amendment analysis become so strained that they impugn the neutrality and detachment of a tribunal. There needs to be some direction—some standard—by which a line is drawn that keeps a reviewing court from ignoring the patently obvious conclusion that the innocent behavior it

[5] *See, e.g., United States v. Arvizu,* 534 U.S. 266 (2002).

contrives as supporting a reasonable suspicion determination is more correctly viewed as undermining it.

Until such time as this Court establishes a clear standard that "totality" means *totality* in the relevant test, courts throughout this country will continue to cherry-pick facts from an officer's testimony which tend only to support an inculpating inference. Because literally *millions* of citizens every year come into contact with law enforcement officers and the judicial system under the guise of any number of violations such as those enumerated above, a clarification by this Court on the question presented will have wide-ranging impact.

B. The Unreasonableness of Weighing Only Those Facts Which Support an Inculpating Inference Without Considering Countervailing Facts Under What Should Be the "Totality" of the Circumstances.

1. The Fourth Amendment Standard in General.

Clearly, Mr. Zoellick's petition implicates the Fourth Amendment. As a starting point for his analysis, therefore, it is important to give some context to the general relationship between the rights secured by the

Fourth Amendment and the government action against which it was designed to protect.[6]

The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *See Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). This Court has observed that:

> A close and literal construction [of the Fourth Amendment] deprives [its protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**.

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)(emphasis added). As the Court has repeatedly noted, the Fourth Amendment "guaranties are to be liberally construed to prevent impairment of the protection extended." *Grau v. United States*, 287 U.S. 124, 127 (1932). It is well settled that "[c]onstitutional provisions for the security of persons and property should be liberally construed." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961).

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[6]The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25 (1949); *see also*, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

The Court has admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Ultimately, "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added).

Apart from its liberal construction, it must also be recalled that "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), citing *Katz v. United States*, 389 U.S. 347 (1967). Thus, it is constitutional "reasonableness" which must form the yardstick by which the issue raised in the instant case must be measured. *See generally*, *Ohio v. Robinette*, 519 U.S. 33, 38 (1996).

2. The "Totality of the Circumstances" Test.

With the foregoing providing the backdrop against which all government actions are evaluated, attention may now be turned to the specific standard at issue in this case, *i.e.*, the "totality of the circumstances" test.

In order to justify the investigatory detention of an individual, a law enforcement officer must first have a reasonable suspicion to believe that a violation of the law is afoot. *Terry v. Ohio*, 392 U.S. 1 (1968). An

investigatory stop must be justified by some "objective" manifestation that the individual is, or is about to be, engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

When making the foregoing objective determination, both federal and state courts have repeatedly held that purely innocent behavior may, under the totality of the circumstances, lead to an inference that trouble is afoot. While any number of these cases could be cited for this proposition, of particular note is the Court's decision in *United States v. Arvizu*, 534 U.S. 266 (2002), because it happens to come the closest—albeit not in the precise words or circumstances—to formulating the question at issue in a manner akin to the way Mr. Zoellick does.

More specifically, the *Arvizu* Court was reviewing whether the Ninth Circuit correctly applied the totality of the circumstances test when it parsed out the conclusions to be drawn from the innocent behaviors it examined from those which were incriminating. In its analysis, the *Arvizu* Court stated:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a

> "particularized and objective basis" for suspecting legal wrongdoing.
>
> * * *
>
> We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. **The court appeared to believe that each observation by [the border patrol agent] that was by itself readily susceptible to an innocent explanation was entitled to "no weight." *Terry*, however, precludes this sort of divide-and-conquer analysis.**

Arvizu, 534 U.S. at 273-74 (citations omitted; emphasis added). While the *Arvizu* Court was admittedly examining the "innocent behavior" of the defendant in the context of how it might *support* a determination of reasonable suspicion, the Court's overall point is clear: "innocent" factors cannot be *excluded* from consideration in the "totality of the circumstances" test.

If this statement is true—that facts which are "innocent" in nature *are* entitled to some "weight"—then there must be some point at which the "inferential

pendulum" swings from *supporting* an inference of wrongdoing to *undermining* it. Where this line lies and how to properly determine it is the question Mr. Zoellick presents for the Court's consideration. At present, this assessment has been left to lower courts without direction, and this has ultimately led to the disfigurement of the test to a degree which is so distorted it is no longer recognizable. Courts do not examine the true "totality" of the circumstances, but rather, look solely at the inferences which support a reasonable suspicion or probable cause determination *no matter how much stronger* the opposite inference may be based upon the innocent facts.

If the test is employed as intended, when determining whether the individual is objectively manifesting behavior that justifies an investigatory detention, courts should consider everything objectively discernable from the citizen-law enforcement encounter, *i.e.*, the whole picture. In fact, that is precisely how this Court characterized it: "[T]he totality of the circumstances—**the whole picture**—must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981)(emphasis added). "Based upon that **whole picture** the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id*. at 417-18 (emphasis added).

Despite recognizing that the totality of the circumstances test involves an examination of the "whole picture" known to law enforcement officers, over

time this notion has not simply fallen by the wayside, but has actually metamorphosed into a standard by which any "purely innocent" evidence that counter-indicates the existence of an objective suspicion is either disregarded or, worse still, becomes so contrived that the conclusions drawn from the innocent behavior strain credulity. In essence, many trial courts have become nothing more than apologists for law enforcement officers at the expense of the Fourth Amendment rights of the accused.

Perhaps this has become the prevailing approach because of how the *Cortez* court clarified what it meant by "the whole picture" when it observed that this analysis contains two elements, the first of which "proceeds with various objective observations, *information from police reports*, if such are available, and *consideration of the modes or patterns of operation of certain kinds of lawbreakers*." *Id.* at 418 (emphasis added). In the real-world, day-to-day administration of the criminal justice system, this limited exemplar has been interpreted to mean that countervailing proof of exculpation is ignored or discounted and only incriminating observations are considered. What is remarkable about the abuse of the standard is that the *Cortez* Court enunciated in the immediately proceeding sentence that "the assessment must be based upon **all** of the circumstances." *Id.* at 418 (emphasis added). Yet, in practice, this cautionary note is utterly ignored.

While the genesis of this problem is not clear, it seems the limiting examples chosen by the *Cortez* Court

to describe what constitutes the "whole picture" may be akin to Justice Black's expressed dissatisfaction[7] about the Court choosing the words "with all deliberate speed" in *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 301 (1955), because it allowed for southern lawyers to delay the implementation of school desegregation. *See Alexander v. Holmes County Board of Education, et al.*, 396 U.S. 19 (1969). To be clear, Mr. Zoellick does *not* contend that the issue he raises is cut from the same historically critical moral fabric as that addressed in *Brown*, however, to the extent that it is an example of how the language of this Court's decisions may be misinterpreted, abused, or even ignored, it is valid.

On the point of the totality of the circumstances test devolving into something it was not intended to be, there have been other circumstances involving the same test in which these concerns have arisen as well. In other words, Mr. Zoellick does not stand alone in raising the concerns he does regarding the application of the totality of the circumstances test.

For example, in the context of applying the totality of the circumstances test to tipped information under *Illinois v. Gates*, 462 U.S. 213 (1983), it has been said that:

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[7]A. Wortham, *The Reclaiming of Hugo Black*, Tuscaloosanews.com (May 16, 2004)(Justice Black "never forgave himself for bending to the will of the other Justices") https://www.tuscaloosanews.com/story/news/2004/05/16/the-reclaiming-of-hugo-black/27864731007/.

> …*Gates* itself unfairly balances fourth amendment interests by sacrificing the principles of individual liberty inherent in the fourth amendment in the name of effective law enforcement. Further, the *Gates* totality of the circumstances test **offers no specific criteria as to when the requisite probable cause exists. Without specific criteria, probable cause is too easily found and consequently fourth amendment rights go unprotected**.
>
> A survey of state courts that have ruled on the issue of whether an informant's tip establishes probable cause since the *Gates* decision demonstrates that the *Gates* totality of the circumstances test fails to protect values inherent in the fourth amendment, and that it weakens the protection of the probable cause requirement. . . . . [T]he states that have adopted the *Gates* totality of the circumstances test demonstrate the extent to which the probable cause requirement is weakened by *Gates*. **Virtually every state that has applied that test has found probable cause to exist, *despite marked factual differences from case to case***.

Note, *The Impact of* Illinois v. Gates: *The States Consider the Totality of the Circumstances Test*, 52 Brooklyn L. Rev. 1127, 1129-30 (1987)(footnotes omitted; emphasis added)[hereinafter "Note, *The Impact*

of Illinois v. Gates"]. The same concerns identified with *Gates* extend to the application of the totality of the circumstances test in circumstances such as Mr. Zoellick's because the "totality" is not really a review of the "totality" of the circumstances, but rather, just another mechanism by which to manufacture reasonable suspicion after the fact. *Id.* at 1143 ("the lack of guidance inherent in the totality of the circumstances test constitutes a drastic weakening of the probable cause requirement").

Another commentator has also recognized the pervasive problem with the unqualified adoption of a "totality of the circumstances" test in the context of whether the Fourth Amendment should have a bright-line rule requiring law enforcement officers to inform individuals that they are "free to go" during an investigatory detention, remarking:

> The Supreme Court's decision in *Ohio v. Robinette* upsets the balance of constitutional interests protected by the Fourth Amendment. The Court's holding impermissibly expands the power of law enforcement officials and grants great discretion to police officers in their interactions with motorists. **In strictly adhering to the totality of the circumstances test in police officer-citizen encounters, the Court ignored the distinct Fourth Amendment issues raised in the police officer-motorist context**.

A. Mendelsohn, *The Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction With the Totality of the Circumstances Test*, 88 J. Crim. L. & Criminology 930 (1998)(emphasis added). While the foregoing article concluded that "the police officer-motorist encounter must be controlled by something more than the totality of the circumstances test," this is not what Mr. Zoellick seeks. Instead, he contends that the "something more" that is needed is not a different test, a reformulation, or even a modification of the test, but rather, is a *clarification* of what "totality" really means and what weight should be given to innocent facts which *counter*-indicate a particularized and objective basis to believe that an individual is engaged in wrongdoing. *Id.*

Although tangentially related from a factual perspective, the foregoing identifies a glaring imperfection in the totality of the circumstances test, *i.e.*, it is being employed to favor law enforcement powers over constitutional rights in clear contravention to this Court's admonishment that courts "owe a duty of vigilance" to ensure that the Fourth Amendment be "liberally construed" in "favor of the individual." *See* Sec. I.B.1, at pp. 22-24, *supra*.

The notion that a *totality* should include an accounting of facts which are exculpating and therefore mitigate against a finding of reasonable suspicion—in order to avoid the problem of a law-enforcement biased test—is no stranger to other types of actions in which affirmative defenses "can eliminate probable cause."

Jocks v. Tavernier, 316 F.3d 128, 135 (2d Cir. 2003). For example, in *Jocks*, a semi driver attempted to use a pay phone to make an emergency call to authorities to advise them that his truck had broken down and was partially blocking the roadway and, worse yet, was not immediately visible to motorists because of a hill. *Id*. at 132. Unfortunately, the pay phone Jocks wished to use outside of a nearby convenience store was already being used by an off-duty New York City police officer. *Id*.

When Jocks attempted to inform the officer of the emergent situation and the potential danger created by the positioning of his truck on the highway, the officer told him to wait. *Id*. Eventually Jocks, concerned about the peril his truck created for other motorists, disconnected the officer's call by pressing down the hook on the phone, after which the officer threw the receiver at Jocks. *Id*. Jocks took the receiver and attempted to dial 911, however, the officer shoved him out of the way and threatened to "blow [his] head off," and thereafter, drew his service revolver. *Id*. Jocks then threw the receiver at the officer, striking him in the mouth and then running away. *Id*. The officer ran Jocks down, threw him to the ground, and pressed his gun into the back of Jock's head. *Id*. Ultimately, an off-duty Nassau police officer arrived and settled the two men down. *Id*. 132-33. After each man described his version of the facts to the Nassau officer, Jocks was arrested for assault. *Id*. at 133.

Jocks filed a 42 USC § 1983 action against the off-duty officer, Tavernier, alleging claims of false arrest

and malicious prosecution. *Id*. at 134. After a verdict against him, Tavernier moved, *inter alia*, for a judgment as a matter of law based upon the fact that Jocks had properly been taken into custody for the assault of throwing the phone receiver at him. Tavernier's motion was denied by the district court. *Id*. Tavernier appealed. *Id*.

On appeal, Tavernier argued that for Jocks to succeed on a claim of false arrest, he needed to prove that the "confinement was not otherwise privileged." *Id.* at 134-35 (internal quotations and citation omitted). Tavernier maintained that he was privileged to make an arrest of Jocks for the assault. *Id*. at 135. The *Jocks* court disagreed, concluding that any probable cause which may have existed to arrest Jocks needed to account for Tavernier's "awareness of the facts supporting [a] defense" of either a necessary emergency measure or self-defense because such defenses "can eliminate probable cause." *Id*.

Tavernier proffered that there was no jurisprudence which imposed a duty on him that "require[d] him to verify whether the defense is true." *Id*. The *Jocks* court agreed to the extent that there was no "duty to investigate," and on that basis, partially reversed the decision of the district court. *Id*. at 135-36. The *Jocks* court noted, however, that "probable cause to arrest should be determined **on what the officer knew at the time of the arrest**," and that law enforcement officers should **not** "deliberately disregard facts known to [them] which [are a factor in the arrest calculus]." *Id*.

(emphasis added). In other words, the *Jocks* court acknowledged that probable cause can otherwise exist when applied superficially to the inculpating facts of a case, but when the "whole picture" is considered (*Cortez*), innocent facts—such as an affirmative defense—can undermine the probable cause determination. This is precisely Mr. Zoellick's contention, to wit: innocent facts can undermine a reasonable suspicion or probable cause determination to the point where they "can [be] eliminate[d]." *Jocks*, 316 F.3d at 135.

Admittedly, the *Jock* decision is cut from a slightly different fabric than the question Mr. Zoellick presents, but that is simply due to the fact that there are no decisions from this Court which are directly on point. Nevertheless, the idea underlying the *Jocks* holding is no less instructive. More particularly, the "totality" of the circumstances surrounding any decision to conduct an investigatory detention should include the facts "the officer knew at the time of" the detention and not be "deliberately disregarded." Despite this seemingly fundamental and common-sense notion, the totality of the circumstances test "is too easily [satisfied] and consequently fourth amendment rights go unprotected." Note, *The Impact of* Illinois v. Gates, at 1129.

Several of this Court's decisions provide examples of how innocent observations, when taken together, lead to *inculpating* conclusions. For example, in *United States v. Sokolow*, 4901 U.S. 1 (1989), the Court commented that few people travel twenty hours from Honolulu to Miami only to spend forty-eight hours at

their destination. *Id*. at 9. The *Sokolow* Court recognized the inherent innocence in this behavior, but in light of other inculpating facts, such as paying for a plane ticket with a large roll of $ 20 bills, appearing nervous, and checking none of his luggage, concluded that the innocent behavior was really no longer so innocent. Mr. Zoellick does not assert that the *Sokolow* Court erred in reaching this conclusion. He acknowledges that, under the right circumstances, such an inference is permissibly drawn from innocent behavior. His acknowledgment of the same, however, standing alone, misses the mark of what this petition is all about as demonstrated in the hypothetical below.

Assume, *arguendo*, that the same facts are established—that a person flew from Honolulu to Miami for the weekend, paid for a ticket in cash, appeared nervous, and did not check his luggage—but further assume that, known to the officer conducting an investigatory detention, the detained individual informed him that he was attending a wedding, was wearing a suit, had a wrapped gift in his hands, and had a digital camera with him. At this juncture the inculpating inference drawn by the officer regarding the suspicion otherwise inherent in so brief a trip would either dissipate or carry significantly less weight since people frequently take cash with them to weddings which have cash bars, may appear nervous if they are the best man responsible for holding onto the wedding bands until the service, and might not check luggage because it is only a weekend trip. The innocence of the facts examined in *Sokolow* would now carry far less

inculpating gravitas because the *totality* of the circumstances dictates as much.

Imagining that "innocent behavior" *contradicts* any inculpating inference because it is wholly *exculpatory* and one arrives at precisely what happened in Mr. Zoellick's case. Very much *unlike* the litany of cases in which this Court has condoned the drawing of inculpating inferences from purely innocent conduct,[8] it has yet to give direction to state and federal courts that, when evaluating the totality of the circumstances, facts which *contravene* inferences that a crime is afoot must be weighed on the scales of justice as undercutting the inference of wrongdoing. As the commentators above have noted, the "the lack of guidance inherent in the totality of the circumstances test constitutes a drastic weakening of the probable cause requirement," and as more fully set forth below, this is precisely what happened in Mr. Zoellick's case.

II. THE EROSION OF THE TOTAILTY OF THE CIRCUMSTANCES TEST LED TO THE COURTS IN THIS MATTER ABUSING THE FOURTH AMENDMENT'S REASONABLE SUSPICION STANDARD.

A. Statement of the Facts Relevant to the Question Presented.

On October 12, 2020, at approximately 8:16 a.m., Andrew Zoellick, was stopped and detained in the City

[8] *See*, *e.g.*, *Arvizu*, 534 U.S. 266; *Sokolow*, 490 U.S.1; *Reid v. Georgia*, 460 U.S. 491 (1983); *Cortez*, 499 U.S. 411; *Terry*, 392 U.S. 1.

of Neenah by Officer Nathan Franzke of the Neenah Police Department for briefly straddling two traffic lanes and failing to stop at a traffic light according to an anonymous tip. R37 at 3:4 to 4:24.

Due to the COVID-19 pandemic restrictions in place at the time, after approaching Mr. Zoellick, Officer Franzke observed that he placed a towel over his face in lieu of a facemask. R37 at 14:12 to 15:2. Officer Franzke admitted that Mr. Zoellick immediately apologized and told him that he was placing the towel over his face because he could not locate a facemask anywhere within his vehicle. R37 at 14:16-24. Notably, Officer Franzke was himself wearing a protective facemask. *Id*.

At the time of his initial contact with Mr. Zoellick, Officer Franzke conceded that he did not observe any odor of intoxicants emanating from his person[9] nor did his cover officer, Officer Barnard—who was speaking directly with Mr. Zoellick—notice any odor of intoxicants. R37 at 16:18-24. Similarly, Officer Franzke did not observe that Mr. Zoellick had any bloodshot or glassy eyes despite the officer "deliberately look[ing] in his eyes." R37 at 9:10-11; 20:1-5. Officer Barnard also did not observe that Mr. Zoellick had glassy eyes. R37 at 19:8-12; 20:6-11. Likewise, Officer Franzke admitted that Mr. Zoellick did not have any slurred speech. R37 at 18:18-19. When repeatedly questioned about whether

[9]R37 at 8:14-16; 9:11-12; 15:13-17.

he had been drinking, Mr. Zoellick denied consuming any intoxicating beverages. R37 at 6:20-21; 8:17-19.

Notably, Officer Franzke indicated that "[t]here were **literally no signs of impairment** present with Mr. Zoellick," and "there was **no sign of even consumption of alcohol**." R37 at 20:12-17 (emphasis added). Despite the utter absence of any odor, signs of impairment, or of consumption of alcohol, Officer Franzke—based solely upon direction he received from Lt. Ann Wagner with whom he spoke telephonically—directed Mr. Zoellick to exit his motor vehicle and perform field sobriety tests **"just to see if he'd been drinking."** R37 at 20:18-24. The only reason Officer Franzke proffered for having Mr. Zoellick exit his vehicle and perform the field tests was "based off Lieutenant Wagner['s]" direction which itself was solely premised upon the fact that Mr. Zoellick was subject to a .02 alcohol restriction due to his prior convictions for operating while intoxicated. R37 at 20:21-24.

Notably, Lt. Wagner was never present on the scene of Mr. Zoellick's detention, had never made contact with Mr. Zoellick, nor had she made any observations of his person. R37 at 20:25 to 21:9. In fact, both Officers Zoellick and Barnard believed that they did not "even have enough to bring [Mr. Zoellick] out of the vehicle." R37 at 21:23-25; 22:2-4. Officer Barnard expressed this concern to Lt. Wagner when he told her, "we have nothing else . . ." on Mr. Zoellick. R37 at 23:4-9.

Of further relevance to the "totality" of the circumstances known to the detaining officers at the time of their initial contact with Mr. Zoellick are the following facts adduced at the evidentiary hearing:

(1) Mr. Zoellick timely responded to the officer's signal to stop his motor vehicle (R37 at 13:13-15);

(2) Mr. Zoellick had no difficulty executing the turn into the parking lot in which he stopped (R37 at 13:19-21);

(3) He parked appropriately in a parking stall in the lot into which he drove (R37 at 13:22-24);

(4) Mr. Zoellick had no difficulty "parking in a straight manner . . ." (R37 at 13:25 to 14:6);

(5) When asked to do so, Mr. Zoellick provided Officer Barnard with all of the water bottles in his vehicle so the officer could check to see whether any of them contained alcohol, which *none* of them did (R37 at 17:12 to 18:6); and

(6) The officers were acting solely under the erroneous belief that because Mr. Zoellick was subject to a .02 alcohol restriction, they had the authority to remove him from his vehicle for field sobriety testing (R37 at 21:12-15).

Ultimately, Mr. Zoellick was ordered from his vehicle to perform field sobriety tests which he allegedly failed and was thereafter placed under arrest for operating while intoxicated.

B. The Abuse of the Totality of the Circumstances Test in This Case.

In its decision, the court of appeals drew several troubling conclusions from the facts before it which Mr. Zoellick proffers are unreasonable to the point of abusing the *Cortez* "whole picture" standard.

The issue the Wisconsin Court of Appeals examined was whether any "additional suspicious factors" existed which would have alerted officers to the possibility that Mr. Zoellick may have done more than driven recklessly. The answer to this question, if one examines the "whole picture," should have been derived in the context of these facts adduced from the evidentiary record:

> Did Mr. Zoellick slur his words? **NO.** (R37 at 18:18-19).
>
> Did Mr. Zoellick have bloodshot or glassy eyes? **NO.** (R37 at 19:8-12; 20:6-11).
>
> Was there an odor of intoxicants about Mr. Zoellick's person? **NO.** (R37 at 8:14-16; 9:11-12; 15:13-17; 16:18-24).
>
> Was Mr. Zoellick stopped at a time "typical" for

drunk driving offenses? **NO.** (R37 at 3:25)

Did Mr. Zoellick delay in responding to the officer's signal to stop? **NO.** (R37 at 13:13-15).

Did Mr. Zoellick improperly turn into the parking lot when stopped? **NO.** (R37 at 13:19-21).

Did Mr. Zoellick park his vehicle improperly? **NO.** (R37 at 13:19-21).

Was Mr. Zoellick uncooperative with officers? **NO.** (R37 at 17:23-24; 18:7-9).

Did Mr. Zoellick have any alcoholic beverages in his vehicle? **NO.** (R37 at 17:12 to 18:6).

Did Mr. Zoellick have any difficulty answering the officers' questions? **NO.** (R37 *passim*).

Did Mr. Zoellick admit to consuming intoxicants? **NO.** (R37 at 6:20-21; 8:17-19).

Did Mr. Zoellick display any problems with his coordination? **NO.** (R37 at 15:10-12).

Did Mr. Zoellick ever exhibit any indicia of impairment or of consuming intoxicants? **NO.** (R37 at 20:12-17).

Despite the fact that no additional suspicious

factors existed in this case for law enforcement officers to believe that anything more than a failure-to-stop violation occurred, if one wanted to discount the foregoing argument as nothing more than zealous advocacy by legal counsel, then the view of the State's own witnesses—namely, the arresting officers—should be considered as well since they are most certainly *not* advocates for Mr. Zoellick. Both Officers Franzke and Barnard concurred and conceded that they did not "even have enough to bring [Mr. Zoellick] out of the vehicle." R37 at 21:23-25; 22:2-4.

There are few—if any—cases in which law enforcement officers freely admit that they literally *had no reason to remove an individual from a vehicle*. Clearly, the officers' admission is as condemning as it possibly could be with regard to enlarging the scope of a detention. If the officers honestly admit that they had no "additional suspicious factors" which justified Mr. Zoellick's removal from his vehicle, there was no reason for either the circuit court or the court of appeals to strain credulity by manufacturing them. In fact, the court of appeals went so far as to wholly discount the officers' opinions. P-App. at 115-16. According to the court of appeals, "[e]ven if Franzke and Barnard subjectively believed they needed more explicit signs of intoxication (than what they had observed) before they could do field sobriety tests, that is not determinative." P-App. at 116. There are several problems with ignoring the officers' opinions and the other facts which comprised the "totality" of the circumstances known to

the officers.

First, it ignores the fact that the officers' "subjective" opinion was based upon the *objective* facts they were then and there observing about Mr. Zoellick. The conclusions Officers Franzke and Barnard drew are relevant because they were the only individuals present to draw these conclusions based upon the facts they were *objectively* observing at the time. Put another way, the officers' opinions are part of the "totality" of the circumstances the circuit court and court of appeals should have considered since they are *objectively* premised. In their collective opinion, Mr. Zoellick did not exhibit any indicia of impairment or of having consumed alcohol. The undisputed factual conclusions of highly trained law enforcement officers observing Mr. Zoellick in real time should have been considered as part of the "totality" of the circumstances at the time of the expansion of the scope of Mr. Zoellick's stop and mitigated against its enlargement.

Second, the law enforcement opinion which was wholly disregarded by the court of appeals was not based upon the reading of tea leaves, tarot cards, or upon the fact that both officers were "best friends" with Mr. Zoellick. These officers receive extensive *training* on what constitutes a "reasonable suspicion to investigate" possible impaired drivers. They are not simply matriculated from their training without having studied this standard. Their opinions are, therefore, entitled to more than just being ignored because they represent a

part of the "whole picture" to which the *Cortez* Court referred.

Finally, disregarding the officers' collective opinion falls directly into the bin of Mr. Zoellick's argument in this matter. More particularly, rather than considering this relevant factor as mitigating against a finding of a reasonable suspicion to extend the scope of Mr. Zoellick's detention, the court of appeals elected simply to subtract it from its analysis. In other words, it "parsed it out" contrary to what the *Arvizu* Court warned against. The officers' opinions are very much a part of the "totality" analysis in this matter which leads to the conclusion that a reasonable suspicion did not exist to enlarge the scope of Mr. Zoellick's detention.

Apart from the foregoing, the circuit court put significant stock in the fact that Mr. Zoellick produced two expired insurance cards and incorrect documentation of his vehicle's registration. R37 at 35:9-22; P-App. 124. The court of appeals noted this behavior as well in its decision. P-App. at 118. What neither court considered in this case but which can confidently be proffered is that this "mis-documentation" is proof of nothing as it relates to impairment by alcohol. There are literally *hundreds of thousands* of drivers on the roadways of this country right now who do not have "proper proof" of insurance. If this was not a legitimate concern, there would not be statutory requirements throughout the country which require drivers to carry proof of insurance.

The court of appeals also expended a significant amount of its analysis on the fact that Mr. Zoellick was subject to a .02 alcohol restriction. P-App. at 113-114. As noted above, both officers in this matter did not observe any odor of intoxicants emanating from Mr. Zoellick's breath, however, in another apologetic effort to discount this "innocent behavior," both the circuit court and the court of appeals noted that Mr. Zoellick put a towel up to his face when speaking with the officers. Perhaps of all the crutches both courts created to prop up the reasonable suspicion conclusion, this is both the most ridiculous and most offensive.

While the lower court believed that the towel Mr. Zoellick used to cover his face could have obscured an odor, Mr. Zoellick reasonably explained to the officers that he could not find his facemask, and as result, he had to use a towel for their protection against the COVID-19 virus. Apparently, however, neither the circuit court nor the court of appeals elected to give any credence to Mr. Zoellick's assertion because, instead of recognizing the reasonableness inherent in such conduct, each court implied that if he had not chosen to cover his face, there *would have been an odor*.

Making an assumption, whether implied or expressed, such as this fails to give credit to the "innocence" of Mr. Zoellick's behavior and instead treats it as criminal. At the time of Mr. Zoellick's contact with law enforcement, the pandemic created an environment

in which the media and medical authorities were inundating the public with the triumvirate of "wash your hands, cover your face, and stand six feet apart." Why should anyone be impugned for doing precisely what they were *repeatedly* instructed to do *by government and medical authorities*? It seems that if Mr. Zoellick had his mask with him and put it on, he would have been condemned for that behavior because, "obviously," he was only doing it to hide the odor of an intoxicant. This conclusion puts Mr. Zoellick in a no-win situation because it impales him on the horns of the "do this and the police will think I'm hiding something" or "don't do this and I expose myself and the officers to the COVID virus" dilemma. That neither the trial court nor the court of appeals considered the pandemic as a serious part of its analysis of the totality of the circumstances is offensive to the *Cortez* rule that the "whole picture" must be considered as part of the totality of the circumstances test. After all, the officers need only have asked Mr. Zoellick to lower the towel to make their assessment, yet they did not. This is a fact which should impugn their investigation and not Mr. Zoellick's character.

The current pandemic has made the times in which we live "unusual" and "extraordinary" to say the least. On the date of Mr. Zoellick's detention, October 12, 2020, this country was experiencing the height of the COVID-19 pandemic and people were *expected* to cover their faces with masks in an effort to stem the spread of the COVID infection. Notably, both officers who

interacted with Mr. Zoellick were *wearing their own masks* during the entirety of the encounter. It is not at all unreasonable or suspicious for Mr. Zoellick to use whatever he had at hand to cover his face when he could not find his N95 mask, especially when both officers themselves were "masked up." If Officer Franzke was truly concerned about a .02 restriction violation, he easily could have asked Mr. Zoellick to lower the towel covering his face to determine whether he actually had an odor of alcohol about his person. Officer Franzke admitted, however, that he *never* "asked [Mr. Zoellick] to lower the towel" covering his face. R37 at 15:3-9.

Despite the foregoing, this case is *not* about the bones of contention Mr. Zoellick has with the lower courts' inferences from facts which (only remotely) inculpated him. Mr. Zoellick digressed into the foregoing discussion solely to point out how truly strained Fourth Amendment analysis has become. Instead, the focus of Mr. Zoellick's claim centers about the problem that the courts below failed to consider the *actual* totality of everything known to law enforcement officers at the time they encountered Mr. Zoellick—the vast majority of which undercut any inference that he was impaired. The mitigating facts were simply ignored. In common vernacular, it is this "we're only going to look at the inculpating facts" attitude which not only worked an injustice in Mr. Zoellick's case, but which, unfortunately, is pervasive throughout the country due to a lack of direction from this Court or the misguided reading of the Courts' decisions regarding the

examination of "innocent facts."

More particularly, it is part of the common stock of knowledge that the consumption of alcohol causes an odor on a person's breath, slurred speech, bloodshot and/or glassy eyes, impairment of fine motor control, impairment of a person's ability to think clearly, slow movements, confusion, *et al*. In this case, **none** of these factors were present and, more importantly, the law enforcement officers involved *conceded as much*. Yet, despite the exculpatory absence of any of these factors, neither the circuit court nor the court of appeals found them worthy of consideration as part of the "totality" of the circumstances. It is as though each court felt obligated to examine only those very few and very strained facts which supported a finding of reasonable suspicion to enlarge the scope of Mr. Zoellick's detention. Rhetorically, one might inquire at this juncture: How, precisely, does such an approach satisfy this Court's requirement that the Fourth Amendment be "liberally construed" in "favor of the individual?" How does it ensure that the "duty of vigilance" courts owe to the Fourth Amendment is satisfied? *See* Section I.B.1., *supra*.

More than the fact that the *absence* of the foregoing observations is exculpating and a part of the "totality" of things known to the officers, there are also those facts which were *present* which were both exculpating and, regrettably, ignored. For example, Mr. Zoellick was observed to properly and immediately

respond to the officer's signal to stop. He turned into a parking lot safely and parked appropriately. He denied consuming any intoxicants. *Etc.* Nevertheless, just as the absence of any of the traditional indicia of impairment meant nothing for either the circuit court or court of appeals in this case, so too were the observed facts treated as judicial flotsam.

Based upon the foregoing, the question now becomes what conclusion should be drawn from the decisions of the courts below in this (and countless other) cases? It is simply this: the totality of the circumstances test is incomplete. It has not been adequately defined with respect to the term "totality," and more disturbingly, has been corrupted to the point where any innocent behavior is either outright ignored or perverted into a tool to justify law enforcement actions.

Because a "*totality* of the circumstances" approach is required in cases involving the Fourth Amendment's reasonable suspicion and probable cause standards, *both* sides of the scale on which the "totality" is examined must be weighed. This means that an examination of the plethora of facts present in this case which were counter-indicative of a violation should have been considered. Unfortunately, this is not an isolated incident. Rather, not only did the court of appeals selectively pick the facts it examined—something which the *Arzivu* Court cautioned against—but it gave no consideration to a vast multitude of other facts which mitigated *against* the notion that Mr. Zoellick was

engaged in a violation of the law.

Mr. Zoellick proffered the foregoing detailed analysis of the facts of his specific case *not* because he expects this Court to act as an error-correcting court with regard to the lower courts' findings. He acknowledges that this is not the Court's purpose in being the ultimate arbiter of the law. Rather, he is suggesting that the *approach* to the legal standard of the "totality of the circumstances" test has become, in large measure, corrupted. Repeatedly, circuit courts and the courts of appeal either ignore "innocent behavior" altogether or distort it in such a way that it lends support to the inference the government wishes to draw whenever it so requests, and this forms the basis for why it is time for this Court to intervene.

CONCLUSION

This Court has yet to qualify that the admonishment offered in *Arvizu*—that innocent conduct is a permissible consideration as part of the totality of the circumstances test—compels courts and law enforcement officers to consider that those innocent facts may conspire to mitigate *against* a finding of reasonable suspicion or probable cause. This Court now has the opportunity to do so by granting Mr. Zoellick's petition.

Dated this 30th day of August, 2023.

Respectfully submitted:

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In the
Supreme Court of the United States

ANDREW H. ZOELLICK,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

APPENDIX

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April 18, 2023
Amended April 18, 2023

To:

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You are hereby notified that the Court has entered the following AMENDED order (amended to insert correct date):

No. 2021AP2204-CR State v. Zoellick L.C.#2020CF637

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-

petitioner, Andrew H. Zoellick, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

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DISTRICT II

To: November 23, 2022

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Circuit Court Judge
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Dennis M. Melowski
Electronic Notice

Tara Berry
Clerk of Circuit Court
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Electronic Notice

Michael C. Sanders
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP2204-CR State of Wisconsin v. Andrew H. Zoellick (L.C. #2020CF637)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition order may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Andrew H. Zoellick appeals from a judgment entered after he pled no contest to fifth-offense operating a motor vehicle while under the influence (OWI) with an alcohol fine enhancer, contrary to WIS. STAT. §§ 346.63(1) and 346.65(2)(g)3 (2019-20).[1] Zoellick contends the police officers lacked reasonable suspicion to extend the traffic stop to conduct field sobriety tests, and therefore he argues the circuit court erred in denying his suppression motion. Based upon our review of the brief and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In October 2020, shortly after 8:00 a.m., a citizen witness called in a complaint about a vehicle that was "all over the road" and provided the vehicle's license plate number. Two officers responded. Officer Nathan Franzke, who was parked in the area for speed enforcement, observed what he believed to be the described vehicle pass by him. Franzke pulled up behind the vehicle to observe it and confirmed that the license plate number matched what the citizen witness had provided. Franzke then observed the vehicle veer over the lane marker without using a signal and drive while

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

straddling between the two lanes before driving through a red light. Thereafter, the officer conducted a traffic stop.

When Franzke approached the vehicle, the driver --later identified as Zoellick--was digging in the back seat, which triggered a concern for officer safety. Franzke instructed Zoellick to stop digging around, and Zoellick complied while pulling a white towel out and covering his face, indicating he did not have a mask for COVID-19.[2] At the time of the stop, the officer was wearing a mask for COVID-19, and it was a very windy day. The officer thought Zoellick's towel use was unusual and noticed Zoellick would not make eye contact with him. When asked for his driver's license, Zoellick could not produce it and just gave his name to the officer. When asked for his insurance information, Zoellick first produced two expired cards, and when asked for a current insurance card, Zoellick handed the officer his Wisconsin registration form. Zoellick told Franzke that he ran the red light because he was "going to work and was nervous[,]" although he did not clarify why he was nervous. When Franzke asked Zoellick how much he had

[2] The World Health Organization declared a global pandemic of coronavirus disease (COVID-19) on March 11, 2020 due to widespread human infection worldwide.

Zoellick said he had "none" and volunteered that he attends "double A"[3] meetings. Franzke asked Zoellick a second time if he had been drinking, and Zoellick again denied it.

When a second officer, B. Barnard, arrived on the scene, Franzke discussed the situation with him. While Franzke ran a check on Zoellick's license, Barnard went to talk to Zoellick and asked to smell the multiple water bottles he saw in Zoellick's car. Barnard did not smell alcohol in any of the water bottles. Neither officer smelled alcohol on Zoellick or observed other classic signs of intoxication, except that the second time Franzke approached Zoellick's vehicle, he noticed Zoellick's eyes were glassy.

Franzke discovered from the license check that Zoellick had multiple prior OWI's[4] and was subject to a .02 blood alcohol concentration (BAC) restriction. Because Franzke and Barnard were unsure whether they had enough information to ask Zoellick to perform

[3] We presume "double A" refers to Alcoholic Anonymous.

[4] Although Officer Franzke's suppression hearing testimony establishes that he learned Zoellick had five prior OWIs at some point during the traffic stop, it is not entirely clear at what point he actually learned the exact number.

field sobriety tests, Barnard contacted Police Lieutenant Amy Wagner to confirm. Wagner advised that the officers could conduct field sobriety tests.

While Zoellick was performing one of the field sobriety tests, Franzke noticed a moderate odor of alcohol. Zoellick failed all the field sobriety tests, refused to do a preliminary breath test (PBT), and was subsequently arrested for OWI. A blood test conducted after obtaining a search warrant showed Zoellick's BAC was .319. Zoellick was charged with sixth-offense OWI, and he filed a motion to suppress arguing that the officers lacked reasonable suspicion to extend the traffic stop to conduct field sobriety tests.

After hearing Franzke's testimony, the circuit court denied the suppression motion, explaining:

> What we have here was a significant complaint with regard to a reckless driver and then someone who went through a red light. That's what starts this. So that's a concern with regard to potential impaired driving. So that's a different category because of the nature of the driving itself that starts this whole process that would give to the objective

officer a basis for which to begin to have suspicion here as to what's impairing the driver to the point that they're driving recklessly, that they're going through a red light. Then there's the stop. Then there's the fumbling with regard to getting the insurance card. Then there's the issue with the towel. And the fact that it was windy at the time and the officer mentioning that here, that it was potentially evasive behavior, number one; number two, the fact there was a towel and the wind and the potential of not being able to smell. There was some evidence of glassy eyes, but we've got—

This isn't a case in which the officers—because of the 02, which they found early on, this isn't a case in which they're going to expect to necessarily—it's not that they have to find significant impairment with a high alcohol content.

The fact that we've got someone who's been impaired and they're driving it would appear, the fact that there's some

potential fumbling, some potential with regard to–and again, there's other explanations, sure, with regard to the towel and the fact there's Covid, but at the same token, it can also go to the other category of it could be evasive behavior.

When you take all that into consideration and then knowing that there's an 02 limit, there doesn't necessarily have to be, again, significant impairment or a strong odor….

The court has to look at this from, that objective officer standard and not from what we have here is two officers trying to get advice from the supervisor. But the thing is, [if] the law is on this issue not to give them those tests, others are in peril.

You got, again, significant driving issues. They know there's an 02 here and they couldn't smell it. It's a windy night—or windy morning, I'm sorry.

> And they would like to at least do some fields. And that's reasonable articulable suspicion and the motion to suppress is denied.

When asked to clarify what it meant by "fumbling," the court explained:

> He gave two insurance cards. I shouldn't say he was not physically fumbling, that's correct. But he was not able to produce the insurance cards and had produced documentation that wasn't the correct documentation, that being the registration.
>
> Now, again, is that something in and of itself is enough? No. But as to the totality of the circumstances, that's just another factor.

The circuit court did grant Zoellick's motion collaterally attacking a prior OWI, which made the current arrest a fifth-offense OWI, rather than a sixth-offense OWI. Zoellick entered a no contest plea to fifth-offense OWI, with an alcohol fine enhancer. Zoellick now appeals.

This case involved review of whether evidence was obtained in violation of the Fourth Amendment[5] and, as a result, should have been suppressed. We review the circuit court's decision on a suppression motion under a two-part standard of review. ***State v. Anderson,*** 2019 WI 97, ¶19, 389 Wis. 2d 106, 935 N.W.2d 285. The circuit court's findings of fact will be upheld "unless they are clearly erroneous." ***Id.,*** ¶ 20. We apply "constitutional principles to those facts independently of the decisions rendered by the circuit court[.]" ***Id.*** The Fourth Amendment prohibits unreasonable searches and seizures, "and our analysis focuses on what is *reasonable* in light of the particular circumstances." ***State v. Smith***, 2018 WI 2, ¶1, 379 Wis. 2d 86, 905 N.W.2d 353.

Here, Zoellick asserts the extension of the stop to conduct field sobriety tests was unreasonable because the police officers lacked reasonable suspicion. We disagree. Reasonable suspicion is "a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996)

[5] U.S. CONST. amend IV.

(alteration in original; quotation marks and citation omitted). "Reasonable suspicion is 'a low bar[.]'" ***State v. Nimmer***, 2022 WI 47, ¶25, 402 Wis. 2d 416, 975 N.W.2d 598 (alteration in original; citation omitted). We look to "'what would a reasonable police officer reasonably suspect in light of his or her training and experience.'" ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted).

The circumstances here involved a citizen-witness report that Zoellick was driving recklessly. Officer Franzke confirmed the erratic driving after he pulled behind Zoellick's car to observe. Franzke suspected that the driving behavior may be related to intoxication, so he asked Zoellick twice whether he had been drinking. Although Zoellick denied having any alcohol, Zoellick engaged in evasive conduct, including avoiding eye contact with the officers and holding a towel over his mouth—an action made more suspicious in light of Zoellick's .02 restriction because even the slightest hint of alcohol could have been indicative of driving with a prohibitive alcohol concentration. Zoellick volunteered that he attends Alcoholics Anonymous meetings, and upon a second look, Officer Franzke noticed Zoellick's eyes were glassy.

Significantly, Franzke learned that Zoellick had five prior OWI convictions and was subject to the .02 BAC restriction. Although it is true that the officers did not observe typical signs of intoxication such as slurred speech, *bloodshot* eyes[6], or the odor of alcohol—before conducting the field sobriety tests—such factors may not be present when investigating whether an individual subject to a .02 restriction was driving with a prohibited alcohol concentration. *See* ***State v. Blatterman***, 2015 WI 46, ¶68, 362 Wis. 2d 138, 864 N.W.2d 26 (Ziegler, J., concurring) (recognizing that when a driver is subject to the .02 BAC, a driver may "not exhibit any indicia of intoxication or impairment" for the "obvious reason" that only a small amount of alcohol can create a .02 BAC).[7] "[T]he legality of the extension of the traffic stop…turns on the presence of factors which, in the aggregate, amount to reasonable suspicion that [the defendant] committed a crime the investigation of which would be furthered by the defendant's performance on

[6] Officer Franzke did notice glassy eyes when he approached Zoellick's vehicle a second time.

[7] Besides the fact that a BAC of .02 would not require a large quantity of alcohol, there are numerous methods with which a driver could mask the odor of alcohol, including chewing gum, sucking on a mint or cough drop, smoking a cigarette, or even using a COVID-19 mask/towel to cover his mouth.

field sobriety tests." ***State v. Hogan***, 2015 WI 76, ¶37, 364 Wis. 2d 167, 868 N.W.2d 124.

This traffic stop did not involve a missing taillight or even speeding, which are common among all drivers. It involved reckless driving of such a substantial degree that it triggered a citizen witness to take the time to get the license plate numbers and call the police to report the driver. This case involved erratic driving of such a duration that, after the citizen's report, the erratic driving continued long enough for a responding officer to locate and follow Zoellick and personally observe the reckless driving, which included swerving, straddling between lanes, and running a red light. This information, together with the knowledge that Zoellick had multiple prior OWIs and was subject to the .02 BAC, Zoellick's admission that he attended Alcoholics Anonymous meetings, and Zoellick's having engaged in behaviors that a reasonable officer could view as attempts to hide intoxication, provided specific articulable facts (or reasonable inferences therefrom) to constitute reasonable suspicion warranting further investigation into whether Zoellick was violating WIS. STAT. § 346.63(1)(b) (operating with a prohibited alcohol concentration (PAC)).

"Field sobriety tests are 'observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication,' comprising 'visual cues' of a [driver's] 'coordination, balance, concentration, speech, ability to follow instructions, mood and general physical condition.'" *See* ***State v. Adell***, 2021 WI App 72, ¶33, 399 Wis. 2d 399, 966 N.W.2d 115 (quoting ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶¶1, 20, 278 Wis. 2d 643, 693 N.W.2d 324). The field sobriety tests could confirm or dispel the officer's suspicion that Zoellick's reckless driving and evasive behaviors arose from him in violation of his .02 BAC restriction. See ***Adell***, 399 Wis. 2d 399, ¶34. Further, officers are not obligated to rule out innocent explanations when they observe indicia of an intoxicated driver because "'innocent' behavior frequently will provide the basis for a showing of probable cause." ***State v. Tullberg***, 2014 WI 134, ¶35, 359 Wis. 2d 421, 857 N.W.2d 120 (citations, quotation marks, and bracket omitted). The field sobriety tests could just as easily have dispelled the suspicion that Zoellick was violating the PAC statute.

Zoellick makes much of the fact that Officers

Franzke's and Barnard's body camera videos[8] show the officers saying that they did not think they had enough information to get Zoellick out of his car to do field sobriety tests and that Lieutenant Wagner purportedly believed that a .02 restriction *alone* provides a sufficient basis to do field sobriety tests. Neither point is persuasive. First, our review is based on a review of the totality of the circumstances under an objective test—whether a reasonable officer with the known information and reasonable inferences from that information would reasonably suspect that Zoellick was driving with a prohibited alcohol concentration of .02. Even if Franzke and Barnard subjectively believed they needed more explicit signs of intoxication (than what they had observed) before they could do field sobriety tests, that is not determinative. Applying an objective, reasonable officer test, we conclude that reasonable suspicion existed to conduct field sobriety tests.

Second, whether Lieutenant Wagner thought that a police officer can conduct field sobriety tests *any* time

[8] The body camera videos are not in the Record.

a traffic stop occurs with a .02-restricted driver is irrelevant to our analysis. This case did not solely involve a .02-restricted driver without any other facts to suggest the driver was breaking the law. Rather, this case involved a .02-restricted driver who drove so recklessly that a citizen witness took the time to get the license plate number and phone the police. This case involved a responding officer who also observed Zoellick's continued reckless driving. This case also involved Zoellick engaging in behavior during the traffic stop that constituted suspicious, evasive behavior and a driver with glassy eyes. Thus, the field sobriety tests were conducted based on the totality of the circumstances in the aggregate—not solely based on the .02 factor.

These officers certainly could have taken additional steps before proceeding with the field sobriety tests. They could have asked Zoellick to step out of the car, for example, particularly since he was digging around in the back seat when the officer approached. *See* ***Smith***, 379 Wis. 2d 86, ¶31 ("'[e]stablishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements' which could threaten the officer's safety: (alteration in original) (quoting ***Pennsylvania v. Mimms***, 434 U.S. 106, 110 (1977)).

They could have engaged in further conversation with Zoellick and insisted he produce a current insurance card. They could have told Zoellick that he did not need to worry about COVID-19 and asked him to remove the towel. But, our focus is not about what more *could* have been done, but rather on what was actually done and whether those facts satisfy the legal standard. It is not our job to second-guess how an officer could have better conducted a particular investigation.[9] Rather, our function is to review the facts and apply the law under the proper standard of review to ensure that police operate within the confines of our constitutions. ***State v. Reed***, 2018 WI 109, ¶53, 384 Wis. 2d 469, 920 N.W.2d 56 ("'It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" (citation omitted)).

We conclude that the circuit court properly denied Zoellick's motion seeking suppression because the totality of the facts demonstrate that the officers had reasonable suspicion to extend the stop to conduct field

[9] Our supreme court has cautioned courts to recognize that police officers are tasked with making "split-second," on-the-street decisions, often "'in circumstances that are tense, uncertain, and rapidly evolving[.]'" ***State v. Smith*** WI 2, ¶32 n.18, 379 Wis. 2d 86, 905 N.W.2d 353 (citation omitted).

sobriety tests to investigate whether Zoellick was operating with a prohibited alcohol concentration.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

STATE OF WISCONSIN
WINNEBAGO COUNTY
CIRCUIT COURT

STATE OF WISCONSIN,

Plaintiff,

-vs- Case No. 2020-CF-637

ANDREW H. ZOELLICK,

Defendant.

PARTIAL TRANSCRIPT OF
MARCH 22, 2021 EVIDENTIARY HEARING

ORAL DECISION OF THE CIRCUIT COURT

[R37 at pp. 32:1 to 35:23]

THE COURT: Thank you. I think the argument of fishing expedition would make more sense if the basis for the stop was something like an unregistered vehicle. What we have here was a significant complaint with regard to a reckless driver and then someone wo went through a red light. That's what started this. So that's a concern with regard to potential impaired driving. So that's a different category because of the nature of the driving itself that starts this whole process that would give to the objective officer a basis for which to begin to have suspicion here as to what's impairing a driver to the point that they're driving through a red light. Then there's the stop. Then there's the fumbling with regard to getting the insurance card. Then there's the stop. Then there's the issue with the towel. And the fact that it was windy at the time and the officer mentioning that here, that it was potentially evasive behavior, number one; number two, the fact there was a towel and the wind and the potential of not being able to smell. There was some evidence of glassy eyes, but we've got—

This isn't a case in which the .

officers—because of the 02, which they found early on, this isn't a case in which they're going to expect to necessarily—it's not that they have to find significant impairment with a high alcohol content.

The fact that we've got someone who's been impaired and they're driving it would appear, the fact that there's some potential fumbling, some potential with regard to—and, again, there's other explanations, sure, with regard to the towel and the fact that there's Covid, but at the same token, it can also go to the other category of it could be evasive behavior.

When you take all that into consideration and then knowing that there's an 02 limit, there doesn't necessarily have to be, again, significant impairment or a strong odor. Is that enough for which the—the intrusion here is one in which there's a stop, there's the—then the taking out of the vehicle itself to do the tests. I think that's State v. Brown that was issued July third. I don't have the exact cite here. But there was a case remanded that does allow for them being taken out of the vehicle, although in those

in those situations it could be for officer protection.

But, nonetheless, you get out of the car. They do what is less invasive than the next step with regard to arrest or-- You know, this is simply on the spectrum with regard to reasonable suspicion, probable cause from the Terry stop, to the spectrum of later the arrest. So this is a lower standard, reasonable suspicion, articulable facts. But is it articulable enough for which to run some type of field sobriety tests to see what they're dealing with? I think they—that's for their own—whatever—

The Court has to look at this from, again, that objective officer standard and not from what we have here is two officers trying to get advice from the supervisor. But the thing is the law is on this issue to not give them those tests, others are in peril.

You got, again, significant driving issues. They know there's an 02 here and they couldn't smell it. Iti's a windy night—or windy morning, I'm sorry. And they would like to at least do some fields. And that's reasonable articulable

suspicion and the motion to suppress is denied.

ATTORNEY MELOWSKI: Judge, could I seek clarification on one point?

THE COURT: Yes.

ATTORNEY MELOWSKI: More than one occasion in your ruling you indicated there was evidence of Mr. Zoellick fumbling with things.

THE COURT: I shouldn't say fumbling, it was that he couldn't get his insurance card right away.

ATTORNEY MELOWSKI: He couldn't find it.

THE COURT: Couldn't find it—

ATTORNEY MELOWSKI: Yes.

THE COURT: --that's right. He gave two insurance cards. I shouldn't say, he was not physically fumbling, that's correct. But he was not able to produce the insurance cards and then produced documentation that wasn't the correct documentation, that being the registration.

Now again, is that something in and of itself enough? No, But as to the totality of the circumstances, that's just another factor.