STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2016AP002404-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
XAVIER GRULLON,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from Brown County Circuit Court,
the Honorable Marc A. Hammer, presiding
Trial Court Case No. 15CT1412

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ISSUES FOR REVIEW

1. Was Grullon seized under the meaning of the Fourth Amendment where an officer pulled his squad car into a driveway where Grullon had stopped his bike and got off, and turned on his emergency lights when Grullon was walking towards a house?

   The Trial Court Answered: No.

2. If Grullon was seized, did the totality of the circumstances support a reasonable suspicion to support a seizure?

   The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

On July 22, 2015, at approximately 1:45 a.m., the Green Bay Police Department received a phone call stating that there was a man on Western Avenue who had "dumped," or fallen off, his motorcycle,

tried to get the motorcycle back up, succeeded with some difficulty, and then left heading eastbound toward Oak Street, where Western Avenue ends. (38:7-9, 36, 46) *See also* (15:1). The caller also stated that the male driving the motorcycle appeared to be intoxicated. (38:46). After receiving that information from dispatch, Lieutenant Mahoney, starting from the corner of W. Mason Street and Nicolet Avenue, proceeded eastbound on Mason and then northbound on 13th Avenue toward that general area, making sure to cut off any motorcycle that might be coming from that direction. (38:8). While on 13th Avenue Mahoney noticed a Harley-type of motorcycle traveling eastbound on School Place, one of the two nearest streets that would allow someone to continue traveling eastbound after reaching Oak Street. (38:9-10, 38).

This motorcycle then stopped at a stop sign at the corner of School Place and 13th, waited for Mahoney to pass in his police vehicle, which although it was unmarked would have been easily

identified as a police vehicle,[1] then waited five to ten seconds after Mahoney cleared the intersection before turning right, or southbound, onto 13th Avenue. (38:9-10, 13). Mahoney noted that, based on his training and experience, this behavior was consistent with someone who might be nervous around police. (38:11). As Mahoney turned his vehicle around to follow the motorcycle, he kept watching the motorcyclist and then observed him pull into a driveway at 310 13th Avenue, which was 25 to 40 yards down from the intersection Mahoney and the driver were just at. (38:13). At the time, Mahoney was not aware that 310 13th Avenue was the motorcyclist's residence. (38:15). During the time Mahoney could see the motorcyclist on the road, Mahoney observed no traffic violations. (38:29). While Lieutenant Mahoney was not one-hundred percent sure he had located the right motorcycle, he knew was that it was nearly 2:00 in the morning with "no traffic" coming from the driver's direction, this motorcyclist was potentially involved in an accident, had waited at an

[1] Lt. Mahoney's unmarked squad car was a gray or dark gray Dodge Charger, with a floodlight on the driver's side A-pillar, four to five antennas on the top, and full-width light bars on the inside of both the windshield and the rear window. (38:11-12).

intersection longer than a typical motorcyclist usually waits at an intersection, and had pulled into what seemed to him to be a random driveway in an attempt to avoid the police after Mahoney had just turned his car around. (38:18, 41-42).

Mahoney then observed the driver get off the motorcycle and walk toward a residence near the driveway. (38:13). At this point, Lieutenant Mahoney activated his emergency lights and partially pulled into the driveway in an attempt to get the driver of the motorcycle to stop walking away. (38:13). The driver did stop outside the front of the residence and was eventually identified as Xavier Grullon. (38:14-15). Mahoney asked Grullon, "What's going on?," what he was up to, and if he had dumped his motorcycle. Grullon did not respond to those questions, but he was otherwise willing to talk to Lieutenant Mahoney while outside what later was discovered to be his residence. (38:14-15; 39:8).

Mahoney did not see any damage on Grullon's motorcycle. (38:16). However, Mahoney did observe Grullon to have a strong odor of "an intoxicating beverage," slurred speech, and balance that

was "off a bit." (38:16). There is no dispute that *after* this point Mahoney had reasonable suspicion for an investigatory stop of Grullon.

At no time prior to Mahoney noticing signs of intoxication did he say that Grullon was under arrest or that he was not free to leave (39:19-20). Grullon himself repeatedly acknowledged that Lieutenant Mahoney never told him that he was under arrest or was not free to leave. (39:19-20). In fact, Grullon went to retrieve his keys from his motorcycle in the middle of his contact with Lieutenant Mahoney and Mahoney made no objection whatsoever. (38:15).

On October 26, 2015, Grullon filed a motion to suppress evidence obtained as a result of the stop Lieutenant Mahoney made. At an evidentiary hearing held on January 13, 2016 and February 10, 2016, the circuit court expressed reservations that Grullon had been seized when Mahoney had turned on his flashing emergency lights. (39:26-27). The court further indicated that it did not believe Mahoney had reasonable suspicion to stop Grullon. (39:36-37). The circuit court asked that both counsel brief whether Grullon had

actually been seized, and allowed counsel to also brief whether Lieutenant Mahoney had reasonable suspicion to stop Grullon. (39:35, 38).

On May 24, 2016, the circuit court issued a written decision denying Grullon's motion to suppress. The court found that Mahoney's use of his emergency lights were used to draw Grullon's attention to his presence and indicate Mahoney's desire to speak with Grullon. (15:6). The court was not persuaded that the emergency lights would "lead a reasonable person to conclude they were not free to walk away." (15:6). The court noted that Mahoney did nothing to indicate that Grullon's compliance was compelled; there were no weapons used, no force, no use of language or tone mandating compliance, nor were there multiple officers. (15:6). The court found that on the night in question, Lieutenant Mahoney's use of his emergency lights did not amount to a display of a authority sufficient to constitute a seizure of Grullon. (15:7).

Furthermore, the court reevaluated its position on whether Lieutenant Mahoney had reasonable suspicion to perform an

investigatory stop of Grullon. The court first noted that the CAD call received by Lieutenant Mahoney included both the address and phone number of the informant, thus improving the veracity of the tip because a "false tipster would think twice before using such a system" to report an incident. (15:8). The court also found that the informer's reliability was improved because a motorcycle was located in the area "a very short time after the tip was called in." (15:8-9). "Access to the tipster's phone number and address, reporting the event moments after it occurred, along with corroborating events lead the Court to conclude that this tip amounted to reasonable suspicion." (15:9). Furthermore, the Court bolstered its belief that Mahoney had reasonable suspicion because "while the 'longer than normal' stop [Grullon made] may not, of itself, constitute reasonable suspicion," the "combination of the anonymous tip and the prolonged stop in conjunction with Lieutenant Mahoney's sixteen years of experience [led] to reasonable suspicion" under the totality of the circumstances. (15:10).

On August 1, 2016, Xavier Grullon plead no contest to his fourth offense of operating a motor vehicle while intoxicated-fourth offense, in violation of Wis. Stat. § 346.63(1)(a) and was, among other things, fined and sentenced to 175 days in the local jail with good time and Huber privileges. (35). He now appeals the decision of the trial court.

STANDARD OF REVIEW

In reviewing an order suppressing or refusing to suppress evidence, the Wisconsin Court of Appeals will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Russ*, 2009 WI App 68, ¶ 9, 317 Wis.2d 764, 767 N.W.2d 629. Whether a search or seizure has occurred is a question of law that the Court reviews de novo. *Id*.

Similarly, whether a police officer had reasonable suspicion to stop driver is a question of constitutional fact, and, thus, this Court applies a similar two-step analysis: first, it will uphold the trial court's findings of fact unless they are clearly erroneous, and next, it will apply those facts to constitutional standards like "reasonable

suspicion" de novo. *State v. Batt*, 2010 WI App 155, ¶ 16, 330 Wis.2d 159, 793 N.W.2d 104.

ARGUMENT

I. GRULLON HAD THE RIGHT TO, AND ANY REASONABLE PERSON WOULD HAVE FELT FREE TO, WALK AWAY FROM LIEUTENANT MAHONEY AFTER HE ACTIVATED HIS LIGHTS, EVEN IF THAT IS CONTRARY TO SOCIAL NORMS.

The proper function of the Fourth Amendment and the Wisconsin Constitution's similar provision in Wis. Const. art. I, § 11, is to constrain, not against all government and police seizures, but against seizures which are not justified in the circumstances, or which are made in an improper manner.[2] *Maryland v. King*, --- U.S. ---, 133 S.Ct. 1958, 1969, 186 L.Ed.2d 1 (2013); s*ee also* U.S. Const. amend. IV. A person is seized by police under a Fourth Amendment framework when an officer terminates or restrains that person's freedom by means of physical force or a show of authority. *Florida v.*

[2] The Wisconsin Supreme Court generally interprets Article I, Section 11 consistently with the United States Supreme Court's interpretation of the Fourth Amendment, and "therefore relies on U.S. Supreme Court precedent in applying and interpreting Article I, Section 11 as well as the Fourth Amendment." *State v. Miller*, 2012 WI 61, ¶ 28, 341 Wis.2d 307, 815 N.W.2d 349.

Bostick, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). There has been a test derived for telling when a seizure occurs when an officer's show of authority does not show an unambiguous intent to restrain or when a citizen's submission to a show of authority indicates passive compliance. *Brendlin v. California*, 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). The test is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). If, under the circumstances, a reasonable person would not be so intimidated by police and would consequently feel free to terminate an encounter, then he or she has not been seized." *U.S. v. Drayton*, 536 U.S. 194, 201, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002); *County of Grant v. Vogt*, 2014 WI 76, ¶ 24, 356 Wis.2d 343, 850 N.W.2d 253.

There is no support for the proposition that police use of red and blue emergency lights, on its own, constitutes a seizure. In *Mendenhall*, Justice Stewart listed some shows of authority that might suggest to a reasonable person they are not free to leave: "the

threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice." 446 U.S. 544 at 554. Where there is no inoffensive contact between a citizen and an officer, there is no seizure. *Id*. No amount of mental gymnastics could bring a court to conclude that the use of police emergency lights amounts to a show of authority on par with the display of weapon, physical touching, or an offensive tone. This is particularly true in a scenario where a suspect is no longer on the road in his vehicle, but is instead on his own property.[3]

Grullon relies heavily on the decisions in *State v. Kramer* and *State v. Truax* in support of his argument that police use of emergency lights alone constitutes a display of authority sufficient to constitute a seizure. *See, Kramer*, 2008 WI App 62, ¶ 22, 311 Wis.2d 468, 750 N.W.2d 941 (affirmed by *State v. Kramer*, 2009 WI 14, 315 Wis.2d 414, 759 N.W.2d 941); *also see, Truax*, 2009 WI App 60, ¶¶ 5, 11, 318 Wis.2d 113, 767 N.W.2d 369. The court in *Kramer* never

[3] Grullon mentioned in his own testimony that he was almost to the first step of his residence when he saw Mahoney's lights. (39:8).

decided whether a seizure had occurred, much less whether police activation of emergency lights constitutes a seizure. 2008 WI App 62, footnote 1. Similarly, the court in *Truax* never decided whether there had been a seizure. 2009 WI App 60, ¶ 11. In addition, those cases are factually distinct from Grullon's case insofar as they dealt with vehicles that were either driving or parked on a roadway. *Kramer*, 2008 WI App 62, ¶ 3; *Truax*, 2009 WI App 60, ¶ 3. Grullon's initial contact with the police occurred on his own property, outside of any vehicle. (38:13).

Grullon also cites *State v. Gottschalk*, 2013 WI App 55, ¶ 9, 347 Wis.2d 551, 830 N.W.2d 723, an unpublished opinion from the Wisconsin Court of Appeals, as well as opinions from other jurisdictions to justify his claim that police emergency lights *ipso facto* constitutes a seizure. Grullon cites *State v. Anderson*, 362 P.3d 1232, 1236 (UT 2015); *State v. Morris*, 72 P.3d 570, 573-74 and 577-79 (Kan. 2003); *People v. Brown*, 353 P.3d 305, 308, 310 (Cal. 2015); *State v. Gonzales*, 52 S.W.3d 90, 97 (Tenn. Crim. App. 2000). Again, those cases all involve situations where the defendant was in the

vehicle on a roadway. Wisconsin, for prudent constitutional reasons, in most cases has not made it a crime to walk away from an officer on foot. In contrast, Wisconsin's legislature *has* made it a crime to drive off and flee a marked police vehicle after one has received a visual signal from a traffic officer. *See*, Wis. Stat. § 346.04(3). Thus, the legislature has aptly noted that there is a significant difference between walking away from a police vehicle on foot, and driving away from a marked vehicle after a display of authority.[4] A citizen should feel free to terminate a police encounter in the former situation, and should definitely not feel free to do so in the latter. A vehicle that drives off after being shown a display of authority creates a risk to the public that carries with it criminal liability. *See*, *State v. Sterzinger*, 2002 WI App 171, ¶ 17, 256 Wis.2d 925, 649 N.W.2d 677. No such risk is present in a situation where a defendant is no longer in their

[4] It is a class I felony in Wisconsin for an operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, to knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrian, or for the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee. Wis. Stat. §§ 346.04(3), 346.17(3).

vehicle (or on their motorcycle) and on their own property, and consequently the circumstances present in Grullon's case are markedly different.

In fact, Wisconsin case law points to the opposite proposition Grullon tries to make: emergency lights are not enough to create a seizure. In *State v. Hogan*, Hogan was stopped by a police officer, asked to perform some sobriety tests, and then was told he was free to go. 2015 WI 76, ¶ 11-19, 364 Wis. 2d 167, 868 N.W.2d 124. Moments later, the officers asked if they could search the vehicle. *Id.* at ¶ 20. Throughout the stop, the officer's lights on his patrol car remained on. *Id.* at ¶ 70. The court found that the continued use of emergency lights was not enough to create a new seizure of Hogan. *Id*. Much like how Grullon should have felt free to walk up the steps and into his home in his case, that court found that Hogan should have felt free to drive across the street to his home. *Id* at ¶ 69.

The Wisconsin Supreme Court has even strongly suggested that an officer's activation of emergency lights probably would not be enough to say a seizure has occurred. The Supreme Court of

Wisconsin, after noting that the Court of Appeals in *Kramer* never addressed the issue, explicitly stated while reviewing that decision, that it was "entirely possible upon analysis that" the use of police cruiser emergency lights by itself "may *not* constitute a seizure." *State v. Kramer*, 2009 WI 14 at ¶ 22 (emphasis in original) (citing *State v. Young*, 2006 WI 98, ¶¶ 65–67, 294 Wis.2d 1, 717 N.W.2d 729). Ultimately, they too did not decide the issue in Kramer's case. *Id*. at ¶ 22. Worthy of note, however, is the fact that Kramer was still in his car and on a roadway. *Id.* at ¶¶ 4-5. Grullon was not in or on a vehicle, and was not on a roadway when Lieutenant Mahoney turned on his lights. (38:13). If the Supreme Court of Wisconsin suggested that it would be entirely possible for someone to assume they are free to leave when they are parked in their car on a roadway and an officer activates their lights, then it is even more likely that our State's highest court would find that a citizen would feel free to leave when they are not on a roadway and not on their vehicle when an officer activates their lights. *See also, U.S. v. Mendenhall*, 446 U.S. 544, at 554.

The material facts are not disputed, but Grullon conveniently leaves out or downplays some key facts. Grullon pulled into his driveway, parked his motorcycle, left his keys in the motorcycle's ignition, *got off the motorcycle*, started walking towards *his house* and had *almost made it to the first step* before Lieutenant Mahoney activated his emergency lights. It is true that Lieutenant Mahoney activated the lights to get Grullon's attention and to stop Grullon from walking away from him, but the emergency lights were not used to restrain Grullon. The lights were designed to draw his attention and indicate to him that an officer wished to speak to him. Grullon was free to continue up the steps to his house, walk inside, and refuse any contact with police. No facts suggest that any reasonable person would have been so restrained or intimidated by those lights that they would have felt they would not have been free to continue walking into their own home. While it is true that such an action by Grullon probably would have been disrespectful and against the social norm, that is no fault of an officer who merely wishes to obtain consent to speak to a person. *Vogt*, 2014 WI 76, ¶ 31. "The test is objective and

considers whether an innocent person, rather than the specific defendant, would feel free to leave under the circumstances. *Id*. at ¶ 30. An individual has a right to ignore the police and go about his business when he is approached by an officer who does not have reasonable suspicion or probable cause. *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). Grullon had that right and chose not to invoke it even if he may believe, or have believed, that it is against common practice to do so.

II. THE ANONYMOUS TIP IN CONJUNCTION WITH GRULLON'S BEHAVIOR AT THE STOP SIGN CONSTITUTED REASONABLE SUSPICION FOR A SEIZURE.

1. The "Reasonable Suspicion" Standard.

The Fourth Amendment permits brief investigative stops when a law enforcement officer has a "reasonable suspicion;" that is, "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, --- U.S. ---, 134 S.Ct. 1683, 1687, 188 L.Ed.2d 680 (2014). *See also, Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "The

'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability.'" *Navarette,* 134 S.Ct. at 1687 (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). In determining whether an officer had reasonable suspicion, the court needs to look at the totality of the circumstances, looking at all the facts, and seeing if all the facts add up to reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). A mere hunch does not create reasonable suspicion, but reasonable suspicion is an "obviously less" exacting standard than probable cause. *Id.* One does not need to rule out every possible explanation for innocent behavior in order to determine that an officer had reasonable suspicion for an investigatory stop. *Id*. at 59.

2. The anonymous tip was a substantial factor in establishing Lieutenant Mahoney's reasonable suspicion.

When police have relied, at least in part, on information from an informant, the Wisconsin Supreme Court advises balancing two factors to determine whether officers acted reasonably in reliance on

that information: 1) the quality of the information, dependent on the reliability of the source; and 2) the quantity and content of the information. *State v. Miller*, 2012 WI 61, ¶ 31, 341 Wis.2d 307, 815 N.W.2d 349. The more reliable the informant, the less detail in the tip is necessary. *Id.* at ¶ 32. "There are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'" *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (quoting *White,* 496 U.S. 325, 329). The Supreme Court seems to suggest that where there are ways to determine an informant's basis of knowledge or veracity, an anonymous tip can establish reasonable suspicion. *Id*.

Things to consider when evaluating an anonymous tip are: 1) the caller's basis for knowledge of the alleged criminal activity (such as personal observation versus hearsay); 2) the contemporaneousness of the police call to the alleged incident; 3) the caller's use of the 911 system as opposed to other, more anonymous means; and 4) details of information that are corroborated. *Navarette,* 134 S.Ct. at 1689-1690.

> An informant who provides some self-identifying information is likely more reliable than an anonymous informant because risking one's identification intimates that, more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster.

Miller, 2012 WI 61, ¶ 33 (quotations omitted). This is particularly true in 911 calls where an informant has disclosed their identity to police and could potentially be held responsible for their actions. *Id.*; *see also* Wis. Stat. § 946.41 (obstructing an officer).

a. The tip was reliable as it utilized the 911 system to provide a first-hand account of an ongoing situation and sufficiently identified what was likely the only motorcycle in the area heading east at 2:00 in the morning.

The facts in Grullon's case have more similarities than differences with *Navarette* that cut in favor of the tip being reliable. Someone made a call to dispatch through the 911 system and risked their identification by doing so, including the address and phone number of the caller. *See,* Appellant's Brief, page 17. The caller proceeded to give his first-hand account of a potentially drunk tall male who had just fallen off his motorcycle and was attempting to get it back upright. (38:7-8). The way that information was coming from

dispatch in bits suggests that the incident had just happened and that information was being received contemporaneously with the incident. (38:29). In addition, the informant told police that the motorcyclist was headed eastbound on Western Avenue, a fact that could easily be corroborated if the police found him on that street *or a nearby street headed east*. (38:8-10).

Grullon's suggestion that the caller had some sort of scheming motive for the report is unfounded. The caller was more than likely merely reporting that the accident occurred in front of his neighbor's house. (38:30). Grullon is right that we do not know the history between the person who lives at 1070 Western Avenue and the person who lives at 1074 Western Avenue. Appellant's Brief, at 17. However, there is no reason to believe that the relationship between the two is anything more than incidental and innocuous, and it is rather ridiculous to suggest that this caller would use the 911 system at 1:45 in the morning for nefarious purposes. If anything, the fact that the person at 1070 Western Avenue had some identifying information about the person who lived at 1074 Western (Randall

Doulhauf) suggests that the person making the call was familiar with the neighborhood, and that fact cuts in favor of the tip being more reliable. *See, State v. Limon*, 2008 WI App 77, ¶ 18, 312 Wis. 2d 174, 751 N.W.2d 877 (familiarity with an area bolsters the quality of information).

Grullon also undervalues the quality of the information provided by the informant. He cites *Navarette*, 134 S.Ct. at 1686, and *People v. Smulik*, 964 N.E.2d 183, 187 (App. Ill. 2012), as examples of cases where the information provided by the informant was more specific and particularized. What Grullon does not mention about those cases, however, is telling. He does not mention the traffic conditions, the time of night it was, the area in which Grullon was found and its proximity to where it was reported he had fallen over, the direction he was traveling; all facts which distinguish Grullon's facts from the facts in those cases cited by him.

While the information provided by the informant about the vehicle was not as specific as the information provided in *Navarette* or *Smulik*, there could be little doubt that the motorcycle Mahoney

located was the one his informant described, given the time of day, the direction he was traveling, and where he was located. When Lieutenant Mahoney found the motorcyclist he was likely looking for, it was nearly 2:00 in the morning with "no traffic." (38:18-19). Because the east end of Western Avenue stops at Oak Street, and because one of the two nearest roads that would allow a person to continue east off of Oak Street is School Place, the motorcyclist Lieutenant Mahoney found on School Place at 2:00 in the morning was almost certainly the same one the caller was talking about. Of course, Mahoney could not have been one-hundred percent sure that he had found the right driver as soon as he spotted him, but he did not have to be certain; he never had to rule out every possible innocent explanation. *See, Waldner*, 206 Wis. 2d 51, at 59. And even while the corroborated information by itself might not add up to reasonable suspicion, there is the additional circumstances Mahoney observed afterwards that amounted to reasonable suspicion. (38:11, 41-42).

b. Motorcyclists do not just fall over in the middle of the street without some sort of suspicious circumstances.

The informant certainly relayed enough information to dispatch to suggest that there was illegal conduct afoot, as is required by law. *J.L.*, 529 U.S. 266, at 271. The informant in this case reported that they saw a rider who had fallen off his bike, struggled to right it, and in doing so appeared intoxicated. People do not just fall off their bike in the middle of a roadway for no reason. The fact that a person has just fallen off their motorcycle is enough in itself to arouse suspicion that something like impairment due to alcohol consumption might be involved. This is not just a "minor traffic infraction" as Grullon suggests. An officer arguably does not need any more clues to suspect someone is driving their motorcycle while drunk. If Mahoney had witnessed such behavior himself, he undoubtedly would have had cause for a traffic stop at that point. All Mahoney needed for reasonable suspicion after a tip like the one the informant gave was some sort of evidence that the driver was in fact driving while intoxicated. Grullon gave him that evidence given his evasive

behavior after he noticed Mahoney approach and turn around. (38:11, 41-42).

The circumstances in this case are similar to those in *Navarette*. 134 S.Ct. at 1685. The behavior the informant was reporting in that case was similarly as egregious as the motorcyclist's behavior in this case. In *Navarette*, the behavior was the caller having nearly been run off the road per her eyewitness account. *Id*. In Grullon's case, the behavior was a motorcyclist falling off his bike and struggling to get it upright per an eyewitness account.

What made *Navarette* a close call was not the conduct that was alleged, but rather the reliability of the caller and veracity of the tip, factors that were ultimately decided in favor of the state of California. *Id*. at 1692. In fact, the Supreme Court noted that the tip properly alleged illegal conduct. *Id.* at 1686 ("Running another car off the road suggests the sort of impairment that characterizes drunk driving. While that conduct might be explained by another cause such as driver distraction, reasonable suspicion 'need not rule out the possibility of innocent conduct.'"). Falling off a motorcycle in what

was presumably normal weather conditions, by oneself, with no traffic at 1:45 in the morning suggests just as much impairment as almost running another car off the road does. (38:7-8).

Grullon correctly notes that the facts in this case are not close to those in *White*. The information provided by the completely anonymous tip in *White* were extremely detailed and alleged that criminal activity would be taking place so as to suggest that the informant had "special familiarity" with the defendant's affairs. 496 U.S. at 326. *White* was a close case because there was absolutely *no* information about the informant that would distinguish their call from that of a prank call. *Id*. That is not the case for Grullon. The informant in Grullon's case not only provided information that strongly indicated drunk driving but also used the 911 system, which would reveal some preliminary details as to who the caller was, even if he were to later assert that he wished to remain anonymous. What was potentially lacking in Grullon's case was the content of the information itself, specifically identification of the motorcyclist or the

license plate, not the reliability of the informant or the conduct alleged. *Id*.

Standing alone, the content of the tip itself might have been lacking, but that factor is not to be considered in a vacuum. *Miller*, 2012 WI 61, ¶ 32. It was clear from the outset that Mahoney was looking for a possible drunk motorcyclist in a nearby area, at a time where there would not be many, if any, vehicles headed east from the vicinity of Western and Oak. (38:18-19). That information from a semi-anonymous source, *in conjunction with what Mahoney observed after seeing Grullon on a motorcycle*, amounted to reasonable suspicion that a crime was taking place.

3. Grullon's prolonged stop and apparent attempt to dodge police in conjunction with the tip amounted to reasonable suspicion.

Considering the totality of the circumstances, i.e. the source of the 911 tip, the contents of the tip alleging potential drunk driving, Grullon's extended stop when he saw Mahoney's squad car, and his apparent or perceived attempt to avoid police certainly amounted to reasonable suspicion. In determining whether an officer had

reasonable suspicion, the court needs to look all the facts and evaluate whether all the facts add up to reasonable suspicion. *Waldner*, 206 Wis.2d at 58. In evaluating whether there is reasonable suspicion, one is not to look at facts as they stand alone, but rather add them up to see if they reach a point where reasonable suspicion is established. *Id*.

An officer does not need to observe a driver violate the law in order to have reasonable suspicion for a traffic stop. *In re Refusal of Anagnos*, 2012 WI 64, ¶47, 341 Wis. 2d 576, 815 N.W.2d 675. Where lawful acts by themselves could have innocent reasons behind them, police officers are allowed to draw reasonable inferences from the totality of circumstances to derive suspicion that there may be criminal activity taking place. *Waldner* , 206 Wis.2d at 57.

Lieutenant Mahoney, with his sixteen years of experience in law enforcement received some information from dispatch that there was a motorcycle near 1074 Western Avenue headed east and was potentially drunk. (38:7). Drunk drivers generally want to avoid the police. Mahoney saw some behavior consistent with someone who would want to avoid the police: the driver waited for a an unusually

long time at a stop sign after likely noticing his police vehicle, and then the driver pulled into a nearby driveway (which appeared to be random to Mahoney at the time) as soon as Mahoney turned his squad car around. (38:42). Not only that, but the motorcyclist left the lights on his motorcycle on after he got off his motorcycle, which could appear to be the operator attempting to get away from the motorcycle before the police could finish turning around to approach and speak to him. Indications that an individual wants to evade police is a strong indication of a guilty mind and is sufficient to justify reasonable suspicion. *State v. Anderson*, 155 Wis.2d 77, 79, 454 N.W.2d 763 (1990). With the information from the call pointing towards there being a drunk motorcyclist in the area, and this motorcyclist exhibiting behaviors consistent with a drunk driver who wants to avoid contact with the police, Lieutenant Mahoney had reasonable suspicion, based on the totality of the circumstances. *Waldner*, 206 Wis.2d at 58.

Grullon argues that an officer cannot rely on a five to ten second delay at an intersection as the basis for reasonable suspicion

under *State v. Fields*, 2000 WI App 218, ¶ 14, 239 Wis.2d 38, 619 N.W.2d 279. However, *Fields* is inapplicable here. That case merely stands for the proposition that a delay at an intersection, *without more*, cannot support reasonable suspicion. *Id*. at ¶ 23. In *Fields*, the officer initiated a traffic stop based on what he thought was reasonable suspicion after a car waited at an intersection for five to ten seconds. *Id*. at ¶ 4. The officer in that case had no information from dispatch that there was a potential drunk driver in the area, it was nearly two hours earlier in the night than when Grullon's incident occurred, the driver did not subsequently pull into a driveway the moment the officer turned around, and the officer was much less experienced than Mahoney was in Grullon's case (by nearly 13 years). *Id*. at ¶¶ 2-6. In Grullon's case, Mahoney did not just observe Grullon wait at an intersection for an extended period of time; he also had some other information at his disposal to justify a reasonable suspicion: the call into dispatch describing an impaired motorcyclist, the lack of traffic in the area, the time of day, and the evasive behavior of pulling into a what appeared to be a random driveway. Accordingly, the circuit

court did not err when it found Lieutenant Mahoney had reasonable suspicion. (15:10).

CONCLUSION

Grullon was not seized under the Fourth Amendment and the Wisconsin Constitution's similar provision, as a reasonable person under these circumstances would have felt free to leave. But even if Grullon had been seized, Officer Mahoney had reasonable suspicion to justify a stop. For those reasons, the Court should uphold the circuit court's decision and Grullon's conviction for OWI, and deny his appeal.

Respectfully submitted this _____ day of July, 2017.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5996 words, including footnotes.

There is no appendix attached to this brief as any items that would have been included were included in the Defendant-Appellant's appendix.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copes of this brief filed with the court and served on all opposing parties.

Dated this _____ day of July, 2017.

Signed:

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