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WISCONSIN COURT OF APPEALS
District III

STATE OF WISCONSIN

Plaintiff-Respondent

v.

Appeal No. 2021AP000142
Circuit Court Case No. 2018CF510

CHARLES W. RICHEY

Defendant-Appellant

On appeal from a Judgment Entered
in the Circuit Court for Marathon County,
the Honorable Gregory J. Strasser, Circuit Judge, presiding.

DEFENDANT-APPELLANT'S
BRIEF and APPENDIX

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ISSUE PRESENTED

1. Whether, at the time of the stop, Officer Meier only had a generalized hunch that Richey's motorcycle may have been the one that committed a traffic violation.

Answered by the trial court: No.

STATEMENT ON ORAL ARGUMENT

Because the briefs should fully cover the issues in this appeal, oral argument is not recommended.

STATEMENT ON PUBLICATION

Publication is not recommended. The case presents no issues that have not been clarified by existing law.

STATEMENT OF THE CASE

BACKGROUND FACTS

On April 28, 2018, Police Officer Alexis Meier was on routine patrol in the Village of Weston. (R76:5-6). Around 11:00 p.m., a deputy from the Marathon County Sheriff's Office broadcast over the radio that he had stopped to assist a disabled motorcycle near Business 51 and Schofield Avenue in the village. (R76:5). Shortly thereafter the deputy announced he had cleared that scene, but then announced that any other officers in the area should be on the lookout for a Harley-Davidson motorcycle driving erratically and at a high rate of speed, traveling northbound on Alderson Street. (R76:5).

Officer Meier was in the general vicinity of Alderson Street. (R76:6). About five minutes after hearing the deputy's

call, Meier spotted a Harley-Davidson motorcycle traveling eastbound on Schofield, just west of Alderson Street. (R76:7, 12). Although it was not driving fast or erratically, she followed it for two-and-a-half blocks before activating her lights to make a traffic stop. (R76:26). At no time had she observed the motorcycle commit any traffic violations. (R76:23-24). According to Meier, she stopped the motorcycle based solely on the deputy's broadcast that she should be on the lookout for a Harley-Davidson in that general area. (R76:12-13).

As luck would have it, the motorcycle Officer Meier had pulled over was not the motorcycle the deputy had witnessed driving erratically. (R76:14). However, unfortunately for the driver of the motorcycle, the defendant, Charles Richey, this mistake was not very consoling. Because Richey had shown signs of intoxication Officer Meier placed him under arrest for OWI. (R2).

PROCEDURE IN THE TRIAL COURT

Mr. Richey filed a motion to suppress all OWI evidence law enforcement had gathered after the initial traffic stop on grounds that Meier did not have reasonable suspicion to pull him over. (R16). The circuit court denied the motion reasoning that Meier had sufficient grounds. (R76:46-47). Thereafter, Richey pled no contest to the OWI, the court accepted his plea, and found him guilty of an OWI 8th. (R79). The court sentenced him to nine years of imprisonment, bifurcated four and five. (R79). Richey timely filed his Notice of Intent and this appeal follows.¹

¹ Wis. Stats. § 971.31(10) modifies the guilty-plea-waiver rule as follows: An order denying a motion to suppress evidence ... may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty

SUMMARY OF THE ARGUMENT

The sole issue Mr. Richey presents on appeal is that, at the time of the stop, Officer Meier did not have reasonable suspicion to suspect that he had been driving his motorcycle erratically or at excessive speeds. To the contrary, at best Meier had nothing more than a generalized hunch he could be the mysterious motorcycle described by the deputy. Meier's hunch was based on little more than the fact that Richey happened to be driving a Harley-Davidson in the general area of Alderson Street shortly after the deputy sent out his alert. Under the circumstances, he reasons, this was not enough to form reasonable suspicion.

LEGAL STANDARD

A traffic stop does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures when an officer has reasonable suspicion to believe a crime or traffic violation has been or will be committed by the vehicle's occupants. *State v. Houghton*, 2015 WI 79, ¶21, 364 Wis.2d 234, 868 N.W.2d 143. This standard requires that the stop be based on more than an officer's inchoate and unparticularized suspicion or hunch. *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634. Rather, an officer's reasonable suspicion must be supported by articulable facts that wrongful activity may be afoot. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. *Post*, 2007 WI 60, ¶13.

Whether an officer's suspicion is reasonable is a common sense test that turns on the totality of the facts and circumstances. *Id.* In assessing the totality of the circumstances for a traffic stop, a driver's actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion. *Id.* ¶24. But police cannot simply pull over all vehicles on a certain road in hopes of finding violators. *United States v. Bohman*, 683 F.3d 861, 866 (7th Cir. 2012). Rather, an officer must have particular suspicion about the vehicle actually stopped. *Id.* at 865.

When this Court reviews a circuit court's ruling on a motion to suppress evidence on Fourth Amendment grounds, it applies a two-step standard. *State v. Martin*, 2012 WI 96, ¶28, 343 Wis.2d 278, 816 N.W.2d 270. It will uphold the court's factual findings unless they are clearly erroneous. *State v. Eskridge*, 2002 WI App 158, ¶9, 256 Wis.2d 314, 647 N.W.2d 434. However, it independently decides whether the facts establish that a particular search or seizure occurred, and if so, whether it violated constitutional standards. *State v. Richardson*, 156 Wis.2d 128, 137-38, 456 N.W.2d 830 (1990). Where an unlawful stop occurs, the remedy is to suppress the evidence it produced. *State v. Washington*, 2005 WI App 123, ¶10, 284 Wis.2d 456, 700 N.W.2d 305.

ARGUMENT

- I. **At the time of the stop, Officer Meier only had a generalized hunch that Richey's motorcycle may have been the one that committed a traffic violation.**

Officer Meier testified at the suppression hearing. When asked directly why she had stopped Richey she explained that, based on what the deputy had broadcast, she knew she should be on the lookout for a Harley-Davidson

motorcycle heading north on Alderson Street. (R76:9-10, 12-13). She stated that she had not seen any other Harley-Davidsons that night until she had spotted Richey's Harley traveling east on Schofield Avenue. (R76:7). Richey's location was within a half mile of where the deputy said he had first spotted the mystery motorcycle heading north. (R76:7).

But this was all Meier knew. She did not know the model of the Harley-Davidson, its color or its license plate number, if it was old or new. She did not know whether it carried one passenger or two, whether the driver was male or female, or whether he or she was wearing a helmet. For all intents and purposes it could be said that all she really knew was that she was looking for a Harley-Davidson motorcycle in the general area of Alderson Street.

At the hearing, Richey argued that these facts were insufficient to form reasonable suspicion. (R76:38). For starters, he said, Meier assumed the mystery motorcycle had fled the deputy at a high rate of speed. (R76:29). Yet, she admitted that she had followed Richey for two-and-a-half blocks in a marked squad without Richey even so much as going over the speed limit. (R76:30). In other words, Richey made no attempt to flee Meier. Moreover, while the deputy had broadcast that the mystery motorcycle was traveling north on Alderson, Richey was traveling southeast on Schofield back in the direction where the deputy had first spotted the Harley. (R76:7). These facts, he said, militated against any reasonable belief that Richey and the mystery motorcycle were one and the same. (R76:37).

The trial court disagreed. In the court's mind, Richey was traveling in the general area where Meier was supposed be looking. (R76:46) He appeared within minutes after the deputy broadcast the alert. (R76:46). He was not just riding a

motorcycle, but specifically a Harley-Davidson, which was the brand of motorcycle the deputy had told the other officers to look for. (R76:46). In the words of the court, these were all building blocks that formed reasonable suspicion. (R76:46). Furthermore, said the court, Richey's motorcycle was a rare sight late at night when not many motorcycles were out and about. (R76:46).

Richey submits, however, that the totality of these circumstances does not give rise to reasonable suspicion that Richey was the driver of the mysterious motorcycle. Officer Meier had no particular or articulable reason to believe Richey's Harley and the mysterious Harley were one and the same. As a matter of law, the fact that Richey was present in the suspect area is not enough to impute suspicion onto him. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (*An individual's presence in an area of suspected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.*). To the contrary, Meier needed something extra to move her justification for the stop from a hunch to at least minimal suspicion. *United States v. Bohman*, 683 F.3d 861, 865 (2012). And in this instance she had nothing more than she should be on the lookout for a Harley-Davidson in the vicinity of Alderson Street.

Last year, this Court had the opportunity to review a similar set of facts in the *Adams* case. In *Adams*, a police officer made a traffic stop and during the course of the stop one of the passengers took off on foot. *State v. Adams*, No. 2018AP174, unpublished slip op., ¶2 (WI App Jan. 15, 2019). The deputy making the stop broadcast to Deputy William Hujet to be on the lookout for the fleeing individual. *Id.* Hujet immediately began searching the area and about thirty minutes later Hujet encountered defendant Adams driving within one mile or so where the suspect had fled. *Id.* ¶3. In

his mind, Hujet surmised that the fleeing individual had called Adams on his cell phone to come pick him up. *Id.* ¶4.

Hujet continued to watch Adams who somewhat suspiciously drove down a dead-end road, backed up, and returned back to where he had started. *Id.* ¶3. When Adams turned onto another road which led back to the area of the original stop, Hujet effectuated his traffic stop of Adams. *Id.* ¶3. Upon making contact, Hujet detected intoxicants and subsequently arrested Adams for OWI. *Id.* ¶5.

In the trial court, Adams unsuccessfully moved to suppress on grounds that Hujet did not have reasonable suspicion to stop him, as he had committed no crimes or traffic violations in Hujet's presence. *Id.* ¶11. Adams renewed his claim on appeal and in this instance this Court agreed with Adams. *Id.* ¶15.

Based on the circumstances presented this Court reasoned that Hujet had stopped Adams simply because he was driving within the search area. *Id.* ¶15. Otherwise, Hujet had no knowledge of any connection between the fleeing suspect and Adams. *Id.* Without some articulable fact that connected Adams to the fleeing suspect, the traffic stop was impermissible. *Id.* ¶12.

This is the situation that Richey presents in this appeal. Officer Meier did not have that "something extra" that would have moved her justification for the stop from a hunch to at least minimal suspicion. At best, Meier stopped Richey solely because he was riding a Harley-Davidson in the search area.

Now, the circuit court also found some significance in the fact that, at this time of year – April 28th – it was a little early for motorcycle season. (R76:45). In the court's mind, it

was unlikely that a significant number of motorcycles would be buzzing about the Village of Weston, especially at 11:00 p.m. so early in the season. (R76:45-46). This fact, said the court, would add an additional building block to Meier's suspicion, because it would be unusual for an unrelated motorcycle to be in the vicinity. (R76:45-46).

But Meier testified that on the night in question traffic was very light in Weston. (R76:6). Despite very light traffic, law enforcement spotted at least two, if not three, motorcycles in the suspect area within a time span of five minutes. There was the disabled motorcycle the deputy stopped to assist. There was the fleeing motorcycle that the deputy alerted Meier about. And there was Richey's motorcycle. Whether the disabled motorcycle and the fleeing motorcycle were one in the same is unclear as Officer Meier only assumed they might be the same. (R76:29-30). Whether they were was never established.

Nevertheless, Richey's point is that Officer Meier seeing Richey in the search area may not have been a significant fact at all, given that quite possibly police had spotted three motorcycles within a half mile of each other in a span of five minutes. If motorcycles were common in Weston in April 2018, rather than rare, then this fact would add nothing to Meier's reasonable suspicion about Richey. In other words, it would make it even less likely that Richey's motorcycle and the fleeing motorcycle were the same vehicles.

If one adds to the circumstances the fact that Richey was not traveling north attempting to elude the deputy, but rather was traveling southeast back toward him it makes it even less likely that Richey was the suspect. If one also adds to the circumstances that Richey made no attempt to elude Meier after Meier followed him in a marked squad for two-and-a-

half blocks, it makes it even less likely that Richey was the fleeing suspect.

In summary, based on the evidence offered by Officer Meier, she stopped Richey because he was riding a Harley-Davidson motorcycle in the vicinity of Alderson Street and for no other reason. However, the law says an individual's presence in an area of criminal activity is not enough to support reasonable particularized suspicion. *Wardlow*, 528 U.S. at 124. More is needed and in this instance, Officer Meier did not have more. The circuit court should have granted Richey's motion to suppress.

CONCLUSION

Charles Richey respectfully asks this Court to reverse the circuit court's denial of his motion to suppress and remand with directions that his motion be granted and that his conviction be vacated.

Dated this 4th day of March 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,207 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding appendix, if any, which complies with the requirements of s. 809(19)(12). I further certify that:

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

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

Dated this 4th day of March 2021.

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