STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2021AP142-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES W. RICHEY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT ENTERED IN MARATHON COUNTY CIRCUIT COURT, THE HONORABLE GREGORY J. STRASSER, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Charles W. Richey pleaded no contest to operating while intoxicated as a seventh, eighth, or ninth offense after the circuit court denied his motion to suppress evidence. On appeal, Richey contends that the officer lacked reasonable suspicion to stop him after a police officer received a request from a deputy sheriff minutes earlier to locate a Harley-Davidson motorcycle driving erratically at a high rate of speed.

Did the officer have reasonable suspicion to stop Richey?

The circuit court answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

The charges. The State charged Richey with operating while intoxicated as a seventh, eighth, or ninth offense, contrary to Wis. Stat. §§ 346.63(1)(a) and 939.50(3)(f). (R. 2:1.) According to the complaint, Marathon County Sheriff's Deputy D'Acquisto requested assistance locating a Harley-Davidson motorcycle that was driving erratically and at a high rate of speed. (R. 2:2.) Minutes later, Everest Metro Police Department Officer Alexis Meier stopped Charles Richey, who was driving a Harley-Davidson motorcycle. (R. 2:2.) D'Acquisto arrived and told Meier that Richey was not the male driver that he previously saw on a motorcycle. (R. 2:3.) But based on her observations of Richey during her interaction with him, Meier arrested Richey for operating under the influence. (R. 2:3–4.)

Richey's motion to suppress evidence. Richey filed a motion to suppress evidence, alleging that the officer lacked probable cause to stop him. (R. 16:1.) Richey later clarified that he challenged the absence of reasonable suspicion for the initial stop. (R. 76:15.)

The suppression hearing. Officer Meier testified that on April 28, 2018, at approximately 10:59 p.m., Deputy D'Acquisto broadcast that he was with a disabled motorcycle at "Business 51 and Schofield Avenue in the Village of Weston." (R. 76:5, 19.)[1] D'Acquisto reported seconds later that he had cleared the disabled motorcycle. (R. 76:19.) At 11:04 p.m., D'Acquisto asked Everest Metro officers to check the area for a Harley-Davidson that D'Acquisto had observed driving erratically at a high rate of speed northbound on Alderson Street from Jelinek Avenue in the Village of Weston. (R. 76:5–6, 20.)

Approximately five minutes after D'Acquisto's request, Meier saw a Harley-Davidson traveling eastbound on Schofield Avenue just west of Alderson Street, approximately half a mile from where D'Acquisto reported last seeing the Harley-Davidson. (R. 76:7, 12.) Meier said that the only information D'Acquisto provided was that the motorcycle was a Harley-Davidson. (R. 76:22.) D'Acquisto did not provide information about the model, color, or how many people were on the motorcycle. (R. 76:23.) Meier testified that the traffic was light, that she had not observed any motorcycles at that

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[1] Before the circuit court took Meier's testimony, it noted that it had reviewed a DVD that included video from Officer Meier, video from another officer, and a phone call related to a blood draw. (R. 76:3–4.) The DVD is not listed on the exhibit list for the motion hearing. (R. 41.) It is neither listed in the index to the record nor is it identified in the clerk's certificate as an item that must be sent by traditional methods. (R. 80:1.) A clerk for the Marathon County Clerk of Court's office informed undersigned counsel that the DVD is not in the record.

time, and that this was the first Harley-Davidson she saw within that five-minute period. (R. 76:6, 12.)

After Meier confirmed through a registration check that the motorcycle she was following was a Harley-Davidson, she testified that she decided to stop the motorcycle. (R. 76:7.) Meier explained that she decided to stop the Harley-Davidson based on D'Acquisto's broadcast minutes earlier that he saw a Harley-Davidson motorcycle driving erratically at a high rate of speed. (R. 76:12–13, 31–32.) Meier travelled two and a half blocks behind the Harley-Davidson before she turned on her lights and, Richey, whom she identified as the driver, pulled over. (R. 76:13, 26.) Meier acknowledged that Richey was neither speeding nor operating the Harley-Davidson in an erratic manner before she stopped him. (R. 76:24.) Meier identified herself to Richey, advised him of the reason for the stop, and asked for identification. (R. 76:13.)[2] D'Acquisto arrived and told Meier that this was not the Harley-Davidson that he had previously seen. (R. 76:14.)

The circuit court's decision denying Richey's motion to suppress. Based on the totality of the circumstances, the circuit court determined that Meier had reasonable suspicion to stop Richey. (R. 76:47–48.) These circumstances included the time and location of Meier's observations of the Harley-Davidson in relation to D'Acquisto's recent report of a Harley-Davidson driving erratically at a high speed in the area and the absence of other motorcycles. (R. 76:45–46, 48.)

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[2] The prosecutor asked Meier if she observed anything during her contact with Richey that made her believe that another crime had occurred. (R. 76:14.) Richey objected, contending that he was challenging the lack of reasonable suspicion for the initial stop in the first place. (R. 76:14–15, 17.) The circuit court explained that it was focusing on "what was in this officer's mind when she stopped and pulled Mr. Richey over." (R. 76:15.)

Richey's plea and sentencing. After the circuit court denied Richey's suppression motion, Richey entered a no contest plea to a charge of operating while intoxicated as a seventh, eighth, or ninth offense. (R. 79:4, 19.) As part of a plea agreement, the State dismissed the accompanying charge of operating with a prohibited alcohol concentration. (R. 79:4–5.)[3] The circuit court sentenced Richey to a nine-year term of imprisonment consisting of a four-year term of initial confinement and a five-year term of extended supervision. (R. 57:1.)

Richey appeals.

ARGUMENT

The circuit court correctly denied Richey's suppression motion because the officer seized him based on reasonable suspicion of unlawful activity.

A. The State bears the burden of demonstrating the reasonableness of a warrantless stop.

Standard of review. "Whether evidence should be suppressed is a question of constitutional fact." *State v. Wright*, 2019 WI 45, ¶ 22, 386 Wis. 2d 495, 926 N.W.2d 157. An appellate court applies a two-step inquiry when it reviews a question of constitutional fact. First, it applies the clearly erroneous standard to the circuit court's findings of historical facts. *Id*. Second, the appellate court independently applies the relevant constitutional principles to those facts. *Id*.

The touchstone of a Fourth Amendment claim is reasonableness. The Fourth Amendment to the United States

[3] Richey's plea in this case was part of a plea agreement that resolved several other pending cases. (R. 79:3–4.) The resolution of those cases is not relevant to the suppression issue that Richey raises on appeal. The State does not address these cases further.

Constitution, and Article I, § 11 of the Wisconsin Constitution, protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV; Wis. Const. art. I, § 11. "The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted). While a warrantless search is presumptively unreasonable, a court will uphold the search if it falls within an exception to the warrant requirement. *Id.* ¶ 30.

In applying the reasonableness test, courts have "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *State v. Scott*, 2017 WI App 74, ¶ 14, 378 Wis. 2d 578, 904 N.W.2d 125 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)). Courts assess reasonableness, weighing the governmental interest that justifies the search against the invasion that the search entails. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). As part of this calculus, courts consider "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (citation omitted).

Investigatory stops. An officer may conduct an investigatory stop if the officer reasonably suspects that criminal activity may be afoot. *Terry*, 392 U.S. at 30. A court assesses the lawfulness of a *Terry* stop based on the totality of the circumstances. *State v. Williams*, 2001 WI 21, ¶¶ 22–23, 241 Wis. 2d 631, 623 N.W.2d 106. To justify a particular intrusion, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that

intrusion." *Terry*, 392 U.S. at 21. "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." *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634.

"[T]he required showing of reasonable suspicion is low." *State v. Eason*, 2001 WI 98, ¶ 19, 245 Wis. 2d 206, 629 N.W.2d 625. "[S]uspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity." *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). That is, it is the essence of good police work for an officer to freeze the situation until the officer can sort out the ambiguity. *State v. Begicevic*, 2004 WI App 57, ¶ 7, 270 Wis. 2d 675, 678 N.W.2d 293. "In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people." *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

While the behavior that an officer confronts may have a possible innocent explanation, "a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion." *State v. Hogan*, 2015 WI 76, ¶ 36, 364 Wis. 2d 167, 868 N.W.2d 124. Thus, an officer need not rule out the possibility of innocent behavior before initiating an investigatory stop. *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729.

Terry *stops and automobiles*. An officer's authority to conduct a *Terry* investigatory stop extends to "the stopping of a vehicle and detention of its occupants." *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). "[R]easonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops. *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143. When an officer "reasonably suspect[s] an individual is breaking the law," the officer may conduct a traffic stop for the purpose of obtaining

information to confirm or dispel the officer's suspicions. *Id.* ¶ 22.

B. Based on the totality of the circumstances, Officer Meier had reasonable suspicion to stop Richey.

The totality of the circumstances supported Meier's decision to stop Richey. These circumstances included the information that D'Acquisto provided and Meier's subsequent observations.

D'Acquisto reported to other officers that he saw a Harley-Davidson being driven erratically and at a high speed at an intersection in the Village of Weston. (R. 76:5–6.) D'Acquisto's observations provided reasonable suspicion to believe that the Harley-Davidson's driver had committed a non-criminal traffic violation. For example, a person who operates a motorcycle has a responsibility to operate it at a speed that is "reasonable and prudent under the conditions," regardless of the fixed speed limit. Wis. Stat. § 346.57(2). D'Acquisto could have performed an investigatory stop of the Harley-Davidson based on a reasonable suspicion of a non-criminal traffic violation. *State v. Colstad*, 2003 WI App 25, ¶ 11, 260 Wis. 2d 406, 659 N.W.2d 394. For reasons unclear from the record, D'Acquisto was unable to locate the Harley-Davidson and asked Everest Metro officers to look for it. (R. 76:5.)

Meier heard D'Acquisto's request to look for a Harley-Davidson because the driver was operating erratically at a high rate of speed. (R. 76:5–6.) When Meier spotted and then briefly followed Richey's Harley-Davidson, she did not see him drive it erratically or at a high speed. (R. 76:24.) But Meier could act on D'Acquisto's information. Under the collective knowledge doctrine, Meier could rely and act based on D'Acquisto's knowledge without herself knowing the underlying facts, so long as D'Acquisto himself had knowledge

of the facts amounting to reasonable suspicion. *State v. Pickens*, 2010 WI App 5, ¶¶ 11–13, 323 Wis. 2d 226, 779 N.W.2d 1 (discussing the collective knowledge rule).

Although Meier eventually learned that her suspicion was wrong, she had reasonable suspicion to stop Richey based on D'Acquisto's information. Five minutes after D'Acquisto's request, Meier saw Richey's Harley-Davidson motorcycle, the same make that D'Acquisto reported. (R. 76:12.) This was the only motorcycle that Meier saw during this time. (R. 76:12, 19.) Meier further noted that the Harley-Davidson was within a half mile from where D'Acquisto reported seeing the Harley-Davidson. (R. 76:7.) Could Meier be certain that Richey's Harley-Davidson was the same one that D'Acquisto saw? No. But reasonable suspicion did not require Meier to have "absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985) (quoting *Hill v. California*, 401 U.S. 797, 804 (1971)). Based on her observation of Richey's Harley-Davidson near in place and time to D'Acquisto's report, a sufficient probability justified Meier's belief that Richey's Harley-Davidson was the same Harley-Davidson that D'Acquisto reported.

Based on her reasonable suspicion, *Terry* and its progeny authorized Meier "to temporarily freeze the situation" to investigate whether Richey's Harley-Davidson was the same one that prompted D'Acquisto's report. *See State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). True, those concerns were dispelled almost immediately after Meier's initial contact with Richey when D'Acquisto arrived and told Meier that Richey's Harley-Davidson was not the Harley-Davidson that he saw earlier. (R. 76:13–14.) But the Fourth Amendment did not require Meier "to simply shrug [her] shoulders" and allow a potential traffic violator to escape because she herself did not see Richey violate a traffic law or

have additional details about D'Acquisto's earlier observations. *Adams v. Williams*, 407 U.S. 143, 145 (1972).

Based on the facts known to Meier at the time, it was reasonable for Meier to briefly stop Richey "in order to determine his identity or to maintain the status quo momentarily while obtaining more information." *Adams,* 407 U.S. at 146. While Meier's reasonable suspicion was dispelled upon D'Acquisto's arrival, Meier acted in an objectively and constitutionally reasonable manner.

C. Richey's attempts to challenge reasonable suspicion are unpersuasive.

Richey's various challenges to reasonable suspicion are unpersuasive.

First, relying on *Wardlow*, 528 U.S. 119, Richey argues that his presence "in the suspect area [was] not enough to impute suspicion onto him." (Richey's Br. 6, 9.) Under *Wardlow*, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at 124. Meier did not stop Richey simply because he happened to be in an area where D'Acquisto observed a traffic violation minutes earlier. Meier had an objective justification for the stop. *See id*. at 123. She stopped Richey because he was the only person that she saw driving a motorcycle at that time. (R. 76:6.) More importantly, Richey was not just driving any motorcycle, but a Harley-Davidson, the same make of motorcycle that D'Acquisto spotted driving erratically at a high speed just five minutes earlier within a half mile. (R. 76:5–7.)

Second, relying on *State v. Adams*, No. 2018AP174-CR, 2019 WL 194763 (Wis. Ct. App. January 15, 2019) (unpublished) (R-App. 101–104), Richey contends that Meier needed "something extra" to justify reasonable suspicion. (Richey's Br. 6–7.) In that case, officers stopped a car

containing several people, one of whom fled on foot, weaving in and out of the woods. *Adams*, 2019 WL 194763, ¶ 2. Thirty minutes after a responding deputy began his search for the fleeing person, the deputy began to follow Adams's car, which was approximately a mile from where the individual fled on foot. *Id*. ¶ 3. The deputy stopped the car after he watched it drive down a dead-end road, turn around, and proceed in a direction opposite of the deputy toward the scene of the original traffic stop. *Id*. ¶ 3. Based on the deputy's testimony, the State asserted, without any evidence, that the person who fled the original traffic stop location had summoned Adams to the area to pick up the fleeing person. *Id*. ¶¶ 10–11. Based on the record, this Court determined that there was an insufficient basis from which the deputy could reasonably suspect that Adams was attempting to aid a person who fled the police. *Id*. ¶¶ 11–12.

Adams is not on point. What this Court found problematic in Adams was that the deputy "transferred the reasonable suspicion of criminal activity attributed to the fleeing suspect onto Adams simply because he was driving within the search area." *Id*. ¶ 15. There was no transfer of reasonable suspicion from one person to another here: Meier did not stop Richey because she believed he was helping the person D'Acquisto saw on a Harley-Davidson flee the area. Rather, Meier's reasonable suspicion stemmed from her observation of Richey driving a Harley-Davidson within a half mile and minutes after D'Acquisto requested assistance to locate a Harley-Davidson being operated erratically at a high speed. (R. 76:5–7.)

And Meier had objective facts going for her not present in *Adams*. First, the record is devoid of any information about the person who fled the traffic scene in *Adams*. *Adams*, 2019 WL 194763, ¶ 2. By contrast, D'Acquisto provided information that significantly limited the parameters of Meier's search: a Harley-Davidson motorcycle. Second, Meier's decision to stop

Richey was also objectively reasonable because her observations were significantly closer in space and time than those of the deputy in *Adams*: five minutes versus a half hour and a half mile versus a mile. *Id*. ¶ 3; (R. 76:7, 12.)

Third, Richey counts the total number of motorcycles—three—that both D'Acquisto and Meier observed in the area and suggests that motorcycles were more common than the single Harley-Davidson that Meier saw. (Richey's Br. 8.) A large number of motorcycles in the area would have undermined reasonable suspicion. But as the circuit court noted, unlike a summer night when people are cruising around, the stop occurred in April, at the beginning of the riding season, when there probably are not a lot of motorcycles. (R. 76:44–45.) And the circuit court's observation was consistent with Meier's testimony that she had not seen many motorcycles that early in the year or at that time of night when traffic was light. (R. 76:13.) More importantly, Richey's after-the-fact calculus is inconsistent with this Court's obligation to assess reasonable suspicion based on the information available to the officer when the officer made the stop. *See State v. Guzy*, 139 Wis. 2d 663, 679, 407 N.W.2d 548 (1987). And Richey's Harley-Davidson was the only motorcycle that Meier saw around the time of D'Acquisto's broadcast.

Fourth, Richey suggests that if he had been eluding D'Acquisto, he would not have been travelling back in D'Acquisto's direction and would have attempted to flee Meier as well. (Richey's Br. 8–9.) D'Acquisto did not report to the other officers that the Harley-Davidson was eluding him. According to Meier, D'Acquisto reported that the Harley-Davidson was travelling erratically at a high speed. (R. 76:6,

31–32.)[4] Because the record does not support the inference that the Harley-Davidson fled D'Acquisto, Richey's operation of the Harley-Davidson in the direction where D'Acquisto observed it did not undermine reasonable suspicion.

* * * * *

Meier did not act unreasonably based on an unparticularized suspicion or hunch when she stopped Richey. Rather, Meier did what the Fourth Amendment expects from officers: She acted reasonably, based on reasonable suspicion, and grounded in objective facts when she stopped Richey to determine whether Richey was the person that D'Acquisto saw operating a Harley-Davidson erratically at a high speed nearby and minutes earlier. Meier lawfully seized Richey, and her actions did not violate his Fourth Amendment rights.

[4] The prosecutor and Richey's attorney asked Meier questions that suggested or assumed that the Harley-Davidson was fleeing D'Acquisto. (R. 76:30, 32.) But Meier's actual testimony about D'Acquisto's broadcast only indicated that the Harley-Davidson was being operated erratically at a high speed and that this was the basis for the stop. (R. 76:6, 12.)

CONCLUSION

This Court should affirm Richey's judgment of conviction.

Dated this 6th day of May 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,341 words.

Dated this 6th day of May 2021.

Electronically signed by:

/s/ Donald V. Latorraca
DONALD V. LATORRACA
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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/s/ Donald V. Latorraca
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Supplemental Appendix
State of Wisconsin v. Charles W. Richey
Case No. 2021AP142-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Electronically signed by:

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A copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

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