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SUPREME COURT**

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP142-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES W. RICHEY,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin opposes Charles W. Richey's petition for review of the Wisconsin Court of Appeals' *per curiam* opinion affirming his judgment for operating while intoxicated as an eighth offense. *State v. Charles W. Richey*, No. 2021AP142-CR, slip op. (February 15, 2022) (unpublished). The court of appeals affirmed the circuit court's decision denying Richey's motion to suppress evidence. *Id.*, slip op. at 2.

An officer stopped Richey after she observed Richey operating a Harley-Davidson motorcycle approximately five minutes later and a half mile from where another officer reported seeing a person operating a Harley-Davidson motorcycle erratically and at a high speed. *Richey*, No. 2021AP142-CR, slip op. at 2. The officer who stopped Richey observed signs of intoxication. *Id.*, slip op. at 3. The State charged Richey with eighth offense of operating a motor vehicle while intoxicated following his arrest after a traffic stop. *Id.*, slip op. at 2.

Asserting that the officer lacked reasonable suspicion for the stop, Richey moved to suppress evidence, including evidence of his intoxication, obtained during the traffic stop. *Richey*, No. 2021AP142-CR, slip op. at 3. The circuit court denied Richey's motion. *Id.*

The court of appeals affirmed, determining that circumstances provided reasonable suspicion that supported the officer's stop of Richey. *Richey*, No. 2021AP142-CR, slip op. at 4–5. These circumstances included the first officer's report of "a motorcycle moving erratically and at a high rate of speed," the description of the motorcycle as a Harley-Davidson," the second officer's observation five minutes later and within a half mile from "the last reported location of the speeding motorcycle," and the second officer's "observation

that there were few motorcycles out that early in the spring and that late at night.” *Id.*, slip op. at 4.

CRITERIA FOR GRANTING REVIEW

Richey’s petition does not reference the criteria specified in Wis. Stat. § 809.62(1r) that this Court considers in deciding to grant review. Instead, Richey asks this court to grant review “to re-emphasize the proper standard of review in reasonable suspicion cases.” (Pet. 4.) Citing *Ornelas v. United States*, 517 U.S. 690 (1996), Richey asserts that appellate courts should review a “lower court’s findings of historical fact for clear error” and review whether an officer had reasonable suspicion under a de novo review standard. (Pet. 6.) Richey contends that the court of appeals failed to apply this standard when it decided his case. (Pet. 8–9.)

Richey is wrong. Wisconsin courts have long applied the two-step standard of review contemplated under *Ornelas*. See *State v. Martwick*, 2000 WI 5, ¶¶ 18–24, 231 Wis. 2d 801, 604 N.W.2d 552 (curtilage context); and *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106 (reasonable suspicion). Under this two-step standard of review, an appellate court upholds the circuit court’s findings of historical fact unless they are clearly erroneous. *Id.* The appellate court then reviews the circuit court’s determination of the constitutional question, e.g., whether reasonable suspicion exists, de novo. *Id.*

Here, the court of appeals identified the applicable standard of review by reference to *State v. Hindsley*, 2000 WI App 130, ¶ 22, 237 Wis. 2d 358, 614 N.W.2d 48. *Richey*, No. 2021AP142-CR, slip op. 4. In *Hindsley*, the court identified the two-step standard of review as follows: “[W]e review the trial courts findings of historical fact under a deferential standard, reversing them only if they are clearly erroneous; and we review de novo the ultimate question whether the facts as found by the trial court meet the constitutional

standard.” *Hindsley*, 237 Wis. 2d 358, ¶ 22. In Richey’s case, the court of appeals said that it would “uphold the circuit court’s findings of fact unless they are clearly erroneous.” *Richey*, No. 2021AP142-CR, slip op. 4. It then said that it would “independently determine, however, whether the facts as found by the circuit court satisfy applicable constitutional provisions.” *Id.* (citation omitted).

After identifying the applicable legal standards, the court of appeals identified four circumstances that supported the stop. *Richey*, No. 2021AP142-CR, slip op. 4. These are historical facts entitled to the court of appeals’ deference. Richey does not suggest that the court of appeals should not have considered them because they were clearly erroneous. While the court of appeals did not expressly state it “independently” determined the constitutional fact, i.e., reasonable suspicion, its decision reflects that it reviewed the “reasonable suspicion” determination *de novo*. By reference to the four circumstances, the court of appeals addressed the legal question, i.e., why these historical facts established reasonable suspicion. *Id.*, slip op. 4–5.

Richey faults the court of appeals because it did not consider its prior decision in *State v. Adams*, No. 2018AP174-CR, 2019 WL 194763 (Wis. Ct. App. January 15, 2019) (unpublished) (P-App. 60–63). (Pet. 8–9.) Contrary to Richey’s suggestion, the court of appeals had no reason to discuss *Adams* because it was readily distinguishable from his case, as the State demonstrated in its response brief. (Plaintiff-Respondent’s Br. 13–15.)

The court of appeals applied settled legal principles when it reviewed the circuit court’s decision to deny Richey’s suppression motion. Richey may disagree with the court of appeals’ determination that reasonable suspicion supported the officer’s stop and seizure of him. But even if the court of appeals erred in determining this constitutional fact, this Court does not ordinarily grant petitions to correct errors in

individual cases. *See, e.g., State v. Gajewski*, 2009 WI 22, ¶ 11, 316 Wis. 2d 1, 762 N.W.2d 104 (*per curiam*).

CONCLUSION

This Court should not grant Richey's petition for review.

Dated this 10th day of March 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 921 words.

Dated this 10th day of March 2022.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

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 10th day of March 2022.

Respectfully submitted,



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