STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN

Plaintiff-Respondent

v. Appeal No. 2021AP000142 CR
Circuit Court Case No. 2018CF000510

CHARLES W. RICHEY,

Defendant-Appellant-Petitioner.

On petition for review
of a court of appeals decision affirming a Judgment
entered in the Circuit Court for Marathon County,
the Honorable Gregory J. Strasser, Circuit Judge, presiding.

DEFENDANT-APPELLANT-PETITIONER'S BRIEF

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ISSUES PRESENTED

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

Answered by the trial court: Yes.

Answered by the court of appeals: Yes.

2. Whether the court of appeals failed to consider factually similar cases when it decided Richey's case.

Not answered.

STATEMENT ON ORAL ARGUMENT

Because oral argument would give the Court the opportunity to pose any questions not answered by the parties' briefs, oral argument is recommended.

STATEMENT ON PUBLICATION

Because this case asks the Court to clarify the standard the courts should use when making reasonable suspicion determinations, publication is recommended.

STATEMENT OF THE CASE

Statement of Facts

On April 28, 2018, Everest Metro Police Department 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 being driven 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, Charles Richey, this mistake was not very consoling. Because Richey had shown signs of intoxication Officer Meier placed him under arrest for Operating While Intoxicated. (R2).

Procedure in the Trial Court

The State charged Richey with Operating While Intoxicated as an eighth offense contrary to Wis. Stat. §§ 346.63(1) and 939.50(3)(f). (R2). He 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 to Pursue Postconviction Relief and shortly thereafter filed his Notice of Appeal. (R55; R66).

Procedure in the Court of Appeals

The sole issue Mr. Richey presented on appeal was 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, Richey reasoned, this was not enough to form reasonable suspicion.

The court of appeals affirmed the trial court's decision denying Richey's motion to suppress. According to the court of appeals, Meier's observation of a Harley-Davidson within five minutes of the deputy's alert, and within a half-mile from where the deputy first saw it, together with Meier's observations that there were few motorcycles out that early in the spring and that late at night, was enough to create reasonable suspicion. *State v. Richey*, No. 2021AP142, unpublished slip op., ¶7 (WI App Feb. 15, 2022).

Still believing that the totality of the circumstances known to Officer Meier did not give her reasonable suspicion, and further believing that the court of appeals performed an

incomplete "reasonable suspicion" analysis, Richey petitioned this Court to review his case.

ARGUMENT

I. At the time of the stop, Officer Meier did not have reasonable suspicion that Richey's motorcycle was the one the deputy reported; at best Meier had an inchoate hunch.

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 commonsense 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.

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, its license plate number, or 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. (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. At best she had a hunch. Meier needed something extra to move her justification for the stop from a hunch to at least minimal suspicion. *Bohman*, 683 F.3d at 864. 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.

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 trial court's mind, it was unlikely that a significant number of motorcycles would be buzzing about the tiny Village of Weston so early in the season, especially at 11:00 at night. (R76:45-46). This fact,

said the court would add an additional building block to Meier's suspicion, such that when she spotted Richey riding his motorcycle it might be unusual for an innocent and unrelated motorcycle to be in the vicinity. (R76:45-46). The court of appeals likewise found this to be a significant fact, going so far as to say that at this time of day and time of year, motorcycle sightings were rare in Weston. *State v. Richey*, No. 2021AP142, unpublished slip op., ¶9 (WI App Feb. 15, 2022).

But Meier never said the time of night and time of year were factors she relied on. After the prosecutor prompted her on these two factors, she did say *also due to, as you had stated*, time of year and time of night were among the things she considered. (R76:12-13). But before being prompted she never mentioned time of year and time of night.

Meier testified that on the night in question traffic was very light in Weston. (R76:6). Despite very light traffic, police spotted at least two, if not three, motorcycles in the suspect area within a time span of about 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 in the quantum of evidence 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 adds nothing to Meier's reasonable suspicion about Richey. In other words, if motorcycles were common, it

would make it even less likely that Richey's motorcycle and the fleeing motorcycle were the same.

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, 120 S.Ct. 673, 145 L.Ed.2d 570 (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*.). A mere suspicion of illegal activity at a particular place is not enough to transfer that suspicion to anyone who leaves that place. *Bohman*, 683 F.3d at 865. And a police officer's bare hope of finding a suspect at a particular location does not constitute a particularized and objective basis for seizing a vehicle. *United States v. Hudson*, 405 F.3d 425, 438 (6th Cir. 2005).

In the *Bohman* case, Sgt. Brian Kingsley, acting on a tip, suspected that methamphetamines were being produced in a cabin located in Marathon County. *Bohman*, 683 F.3d at 862-63. According to the tip, the driveway would be protected by a cable, there would be an anhydrous ammonia tank there, and the "cook" would be driving a green Mercury Grand Marquis. *Id.* at 863. At 11:00 p.m., Kingsley drove to the cabin site to look around. *Id.* He saw the cabin and the cable just as the tipster had promised. *Id.* So, Kingsley parked his vehicle, but while preparing his surveillance gear he inadvertently honked his horn. *Id.* This caused a vehicle to drive down the cabin driveway, stop at the gate, then go back up to the cabin. *Id.* Five minutes later another vehicle drove down the driveway, but this time the driver unlocked the gate and drove out into the road. *Id.*

Kingsley immediately activated his lights and the vehicle, a Chevrolet, pulled over. *Id.* When Kingsley approached it, he recognized the driver as Bohman. *Id.* The

passenger turned out to be the "cook" that the tipster had squealed on. *Id.*

Like Richey, Bohman moved to suppress the methamphetamine evidence collected in a subsequent search of the cabin, on grounds that Kingsley did not have reasonable suspicion to pull him over. *Id.* at 862. While the district court found it to be a close call, it nonetheless denied Bohman's suppression motion. *Id.* at 864. It found that the tipster's corroborated information along with the suspicious behavior in response to the horn honk moved Kingsley's suspicion from a hunch to at least minimal suspicion. *Id.*

The Seventh Circuit, however, disagreed. Kingsley had no particularized suspicion about Bowman's Chevrolet. *Id.* at 865. Basically, he stopped the Chevrolet because it emerged from a suspected methamphetamine cook site. *Id*. at 865. It found Bohman's case to be indistinguishable from *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999), where police officers stopped the first person who emerged from an apartment building suspected of hosting criminal activity. *Id.* Like in *Johnson*, Kingsley simply stopped a car he knew nothing about other than its emergence from a suspected meth cook site. *Id.* at 866 n.1.

Richey's case is factually similar to *Bohman* and *Johnson.* That is, Meier had no particularized suspicion about Richey's Harley. It just happened to be the first motorcycle Meier saw in the search area.

In 2019, our court of appeals had the opportunity to review similar facts in the *Adams* case. In *Adams*, a Forest County deputy made a traffic stop and during the stop one individual took off on foot. *State v. Adams*, No. 1018AP174, 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 where the individual had fled, 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 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 also 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 the court of appeals agreed with Adams. *Id.* ¶15.

Based on the circumstances presented the court of appeals 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 for review. 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, she stopped Richey because he was the first Harley-Davidson she spotted in the search area.

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 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.

II. The court of appeals inappropriately failed to consider factually similar cases when it reviewed Richey's case.

Many years ago, in *Ornelas v. U.S.*, the United States Supreme Court set forth the methodology that appellate courts should use when determining whether a law enforcement officer had "reasonable suspicion" to stop and detain a citizen. *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). That is, they should review the lower court's findings of historical fact for clear error, but they were to review *de novo* whether the officer had reasonable suspicion. *Id.* at 700. The "*de novo*" standard was grounded in three principals.

First, the Supreme Court felt independent appellate review of the ultimate question would prevent varied results based on interpretations of similar facts by different trial judges. *Id.* at 697. Varied results would be inconsistent with the idea of a unitary system of law, which as a matter-of-course, would be unacceptable. *Id.*

Second, independent review would be necessary if appellate courts were to maintain control of, and to clarify, the pertinent legal principles. *Id.* at 698.

Finally, *de novo* review would tend to unify precedent and would come closer to providing law enforcement officers with a defined set of rules which, in most instances, would allow them to reach a correct determination beforehand. *Id.* Such review would likewise provide unitary guidance to litigants, lawyers, and trial courts. *State v. Hajicek*, 2001 WI 3, ¶18, 240 Wis.2d 349, 620 N.W.2d 781.

The Supreme Court acknowledged that because the mosaic which is analyzed for a reasonable-suspicion inquiry is multi-faceted, one determination seldom would be a useful precedent for another. *Ornelas*, 517 U.S. at 698. But even where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject. *Id.*

Implicit in the *Ornelas* Court's directions was that appellate courts should look to cases with similar fact patterns to guide their reasonable suspicion determinations. In fact, the *Ornelas* Court presented several examples where the facts in prior cases were remarkably like those in *Ornelas*. *Id.* *De novo* review would allow for a measure of consistency in the treatment of similar factual settings, rather than permitting different trial judges to reach inconsistent conclusions about same or similar facts. *Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998).

Wisconsin uses the *Ornelas* standard of review when reviewing reasonable suspicion cases. *See e.g., State v. Powers*, 2004 WI App 143, ¶6, 275 Wis.2d 456, 685 N.W.2d 869. The court of appeals claimed to have used the *Ornelas* standard

when it reviewed Richey's case, but it never compared the facts of his case to any other case. It did not distinguish the *Adams* case Richey had analogized in his brief. In fact, it never even mentioned the *Adams* case.

Our "reasonable suspicion" cases contain some good examples of what the *Ornelas* court expected from appellate courts. For example, take *State v. Williams*, 2001 WI 21, 241 Wis.2d 631, 623 N.W.2d 106, which was an anonymous tip case. In deciding *Williams*, the supreme court compared the *Williams* facts to numerous other anonymous tip cases to explain why reasonable suspicion was present in *Williams* when it was not present in the other cases. *Id.* ¶¶24-47.

Take the *Popke* case, which was a drunk driving case. *State v. Popke*, 2009 WI 37, ¶1, 317 Wis.2d 118, 765 N.W.2d 569. A police officer following Popke saw Popke swerve back and forth in the traffic lane. *Id.* ¶16. In deciding the case, the supreme court compared the *Popke* facts to the facts in *State v. Post*, 2007 WI 60, 304 Wis.2d 1, 733 N.W.2d 634, another swerving case. *Popke*, 2009 WI 37, ¶¶23-27. After comparing the facts, the court concluded that the *Popke* case contained more facts in support of reasonable suspicion than did the *Post* case.

Take *State v. Powers*, 2004 WI App 143, 275 Wis.2d 456, 685 N.W.2d 869, a citizen informant case. There, the court of appeals compared the facts in *Powers* with factually similar cases from Vermont, Kansas, Colorado, and Minnesota, to reason that traffic stops based on tips from a citizen informant can give rise to reasonable suspicion.

The point is, comparing the facts in a given case to factually similar cases allows for consistency among decisions. Looking for factual similarities gets us closer to that unitary

body of "reasonable suspicion" law that the *Ornelas* Court envisioned. And it reduces the chance of getting varied results based on interpretations of similar facts by different trial judges, as seems to be the result in Richey's case.

CONCLUSION

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

Dated this 10th day of May 2022.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of the brief is 3,583 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 10th day of May 2022.

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