STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP142-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES W. RICHEY,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE MARATHON COUNTY CIRCUIT COURT, THE HONORABLE GREGORY J. STRASSER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Late at night in a small town, a sheriff's deputy told his fellow police officers to look out for a Harley-Davidson motorcycle, which he had seen speeding and driving erratically but could not apprehend. Five minutes later, a police officer stopped Charles W. Richey, who was driving a Harley-Davidson motorcycle in the area. Richey immediately showed signs of intoxication. He was arrested and pleaded no contest to OWI / 8th. He now argues that the initial stop was not supported by reasonable suspicion.

1. At the time of the stop, did the officer have reasonable suspicion to believe that Richey's vehicle was the same one that violated traffic laws five minutes earlier?

The circuit court answered: "Yes."

The court of appeals answered: "Yes."

This Court should affirm.

2. Did the Court of Appeals err by not sua sponte discussing the facts of other cases that were arguably similar to this one?

This Court should answer: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case that warrants this Court's review, oral argument and publication are appropriate.

INTRODUCTION

A sheriff's deputy observed a Harley-Davidson motorcycle speeding and driving erratically late at night in a small town. Unable to detain the driver, he told the town's police officers to watch for the motorcycle. Five minutes later, Officer Alexis Meier stopped Richey's vehicle, a Harley-

Davidson, and arrested him for operating while intoxicated. Richey filed a suppression motion asserting that the initial stop was not supported by reasonable suspicion. The arresting officer explained that traffic was very light at the time and that, in her experience, there were few motorcycles out at that time of year. The circuit court concluded that the officer had reasonable suspicion to stop Richey's vehicle. Following the denial of his motion, Richey pleaded no contest to OWI / 8th.

Richey appealed the denial of his suppression motion. The court of appeals examined the facts presented at the motion hearing and affirmed the circuit court's decision, concluding that the officer had reasonable suspicion to stop Richey. Richey now appeals. In addition to arguing that the stop was not supported by reasonable suspicion, he argues that the court of appeals erred by failing to distinguish factually similar cases.

Richey is not entitled to any relief. The facts within the officer's knowledge at the time of the stop—including the description of Richey's vehicle, the closeness in time and distance to the observed violation, and the relative scarcity of other motorcycles at that time of year and of night—supported the officer's reasonable belief that Richey's vehicle was the one seen driving erratically and at a high rate of speed. Additionally, the court of appeals had no duty to distinguish factually similar cases, as Richey never argued in his court of appeals brief that any published cases were factually similar to this one.

STATEMENT OF THE CASE

At approximately 11:00 p.m. on April 28, 2018, a Marathon County sheriff's deputy told Everest Metro police officers to check the area for a Harley-Davidson motorcycle, which had been driving erratically and at high speeds in the village of Weston. (R. 2:2.) Five minutes later, Everest Metro

police officer Alexis Meier located and stopped Richey, who was driving a Harley-Davidson within half a mile of where the speeding Harley-Davidson was last seen. (R. 2:2; 76:7.) Richey's speech was slurred, and Officer Meier detected an odor of intoxicants. (R. 2:3.) Richey was arrested and charged with Operating while Intoxicated / 8th Offense. (R. 2:1–2.)

Richey filed a suppression motion asserting that the initial stop of his motorcycle was not supported by a reasonable suspicion. (R. 16.) The circuit court held a hearing on Richey's motion on January 6, 2020. (R. 76:1, 3.) Everest Metro police officer Alexis Meier testified that at 11:00 p.m. on April 28, 2018, Deputy D'Aquisto of the Marathon County Sheriff's Office had broadcast over his radio that he was stopping for a disabled motorcycle in the Village of Weston. (R. 76:5.) He cleared the stop 15 seconds later with no explanation. (R. 76:19.) Shortly thereafter, he asked Everest Metro officers to check the area for a motorcycle he had observed driving erratically and at a high rate of speed in the same area. (R. 76:5.) The speeding motorcycle was a Harley-Davidson. (R. 76:6.)

Five minutes after Deputy D'Aquisto's broadcast, Officer Meier observed a motorcycle within half a mile of where Deputy D'Aquisto saw the motorcycle driving erratically. (R. 76:7.) She checked its registration and learned it was a Harley-Davidson. (R. 76:7.) She then stopped the motorcycle. (R. 76:7.) Richey was the driver.[1] (R. 76:13.)

Officer Meier explained that traffic at the time was "very light." (R. 76.6.) She had not observed any other motorcycles around that time. (R. 76:6.) She further explained that as it was still April, which is early in the motorcycle

[1] Richey does not argue that anything occurring after the initial stop was improper. He challenges only the initial stop. (Richey's Br. 5; R. 76:32–33.)

season, she had not seen many motorcycles out at that time of year. (R. 76:13.)

The circuit court denied Richey's motion to suppress. (R. 76:48.) The circuit court explained that reasonable suspicion turns on the totality of the circumstances and must be based on facts rather than a mere hunch. (R. 76:43.) The circuit court concluded that the facts within Officer Meier's knowledge at the time of the stop would warrant a reasonable police officer to suspect that Richey had been driving his motorcycle erratically. (R. 76:43, 48.) Some of the most important facts were Deputy D'Aquisto's broadcast; the fact that it was the very beginning of motorcycle season, late at night with very light traffic, at a time when "it's rare to see" motorcycles out; and the fact that this was not just any motorcycle, but a Harley-Davidson. (R. 76:44–45.)

Following the denial of his suppression motion, Richey pleaded no contest to Operating While Intoxicated / 8th Offense. (R. 50:1; 57:1.) He was sentenced to four years of initial confinement and five years of extended supervision. (R. 57:1.)

Richey then appealed the denial of his suppression motion. He argued that the initial stop of his motorcycle was not supported by reasonable suspicion. *State v. Richey*, No. 2021AP142-CR, 2022 WL 454074 (Wis. Ct. App. Feb. 15, 2022) (unpublished) (R-App. 101–03.) The court of appeals concluded that the facts within the officer's knowledge at the time of the stop—including the report of the speeding Harley-Davidson, the fact that Richey's Harley-Davidson was seen just five minutes later and less than a mile away, and the fact that it was late at night with light traffic at a time of year when few motorcycles are seen—gave rise to a reasonable suspicion. *Richey*, 2022 WL 454074, ¶¶ 7–10.

Richey filed a petition for review, which this Court granted.

STANDARD OF REVIEW

Whether a traffic stop is supported by reasonable suspicion is a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. This is a mixed question of fact and law; this Court accepts the circuit court's findings of historical fact unless clearly erroneous, but independently determines whether those facts give rise to a reasonable suspicion. *Id.*; *Ornelas v. United States*, 517 U.S. 690, 696–97 (1996).

ARGUMENT

I. The stop of Richey's vehicle was supported by reasonable suspicion.

A. An officer may stop a vehicle so long as he or she can reasonably infer, based on the totality of the circumstances, that a person has committed a traffic violation.

The Fourth Amendment to the United States Constitution and article I, section 11, of the Wisconsin Constitution protect against unreasonable searches and seizures.[2] U.S. Const. amend. IV; Wis. Const. art. I, § 11. "The touchstone of the Fourth Amendment is reasonableness." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). For this reason, the Fourth Amendment does not proscribe all state-initiated seizures; "it merely proscribes those which are unreasonable." *Id.* (quoting *Jimeno*, 500 U.S. at 250).

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[2] Article I, section 11 of the Wisconsin Constitution is "substantively identical" to the federal Fourth Amendment and is interpreted "in accord with the Supreme Court's interpretation of the Fourth Amendment." *State v. Dumstrey*, 2016 WI 3, ¶ 14, 366 Wis. 2d 64, 873 N.W.2d 502.

Consistent with these protections, police may conduct a brief investigatory stop, also known as a *Terry*[3] stop, if they have a "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *State v. Genous*, 2021 WI 50, ¶ 7, 397 Wis. 2d 293, 961 N.W.2d 41 (quoting *State v. Young*, 2006 WI 98, ¶ 20, 294 Wis. 2d 1, 717 N.W.2d 729). This is equally true in the traffic stop context, where "the 'temporary and brief' detention of a traffic stop" requires only a reasonable suspicion that a traffic law has been violated. *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143 (citation omitted).

Reasonable suspicion means a police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young*, 294 Wis. 2d 1, ¶ 21. What constitutes reasonable suspicion is a common-sense, totality-of-the-circumstances test that asks, under all the facts and circumstances present, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience[?]" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citing *State v. Anderson*, 155 Wis. 2d 77, 83–84, 454 N.W.2d 763 (1990)). Courts focus "not on isolated, independent facts, but on 'the whole picture' viewed together." *Genous*, 397 Wis. 2d 293, ¶ 9 (citation omitted). Courts "consider everything observed by and known to the officer, and then determine whether a reasonable officer in that situation would reasonably suspect" a traffic violation had occurred. *Id.* ¶ 10.

"[P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Anderson*, 155 Wis. 2d at 84. "Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity."

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[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

Waldner, 206 Wis. 2d at 60. For this reason, "when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." *Id.*

It does not take much to give rise to a reasonable suspicion. Reasonable suspicion is "a low bar." *Genous*, 397 Wis. 2d 293, ¶ 8. "The reasonable suspicion inquiry 'falls considerably short' of 51% accuracy." *Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020) (citation omitted).

Courts use six non-exhaustive factors to determine whether reasonable suspicion exists to support a stop. These factors are:

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

State v. Guzy, 139 Wis. 2d 663, 677, 407 N.W.2d 548 (quoting 3 Wayne R. LaFave, *Search and Seizure*, sec. 9.3(d), at 461 (2d ed. 1987)). These factors are helpful but non-exhaustive and not all of them must be present to justify a stop—"the focus is on the facts and circumstances present in each case." *State v. Rissley*, 2012 WI App 112, ¶ 15, 344 Wis. 2d 422, 824 N.W.2d 853. Courts examine these factors while keeping in mind that the bar for reasonable suspicion is "low." *Genous*, 397 Wis. 2d 293, ¶ 8.

B. The arresting officer had reasonable suspicion to believe Richey's vehicle was the one that committed the traffic violation five minutes earlier.

Here, at the time Officer Meier stopped Richey, she had a reasonable suspicion to believe he had committed a traffic violation. First, Deputy D'Aquisto observed traffic violations by the driver of a Harley-Davidson motorcycle. (R. 76:5–6.) *See, e.g.*, Wis. Stat. § 346.57(2) (requiring that "[n]o person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions"). There is no dispute that Deputy D'Aquisto could have performed an investigatory stop based on his reasonable suspicion of a noncriminal traffic violation. *Houghton*, 364 Wis. 2d 234, ¶ 30. Additionally, while Officer Meier did not actually observe the traffic violation herself, she was able to rely on Deputy D'Aquisto's observations. *State v. Pickens*, 2010 WI App 5, ¶¶ 11–13, 323 Wis. 2d 226, 779 N.W.2d 1 (discussing the collective knowledge rule). If Officer Meier reasonably suspected that Richey was the person Deputy D'Aquisto had observed violating traffic laws, then she was justified in stopping him. Richey does not argue otherwise.

The only question in this case is: did Officer Meier reasonably suspect that Richey's vehicle was the vehicle Deputy D'Aquisto observed driving erratically and at a high rate of speed five minutes earlier? An analysis of the *Guzy* factors shows that the answer is "yes."

The first and most important factor, which weighs heavily in the State's favor here, is the "particularity of the description of the offender or the vehicle in which he fled." *Guzy*, 139 Wis. 2d at 677. Deputy D'Aquisto's broadcast narrowed down the vehicle's description not only to a motorcycle, but to a specific make of motorcycle. (R. 76:6.)

Officer Meier stopped Richey's vehicle because it fit a highly specific and particular description. *Guzy*, 139 Wis. 2d at 677.

"[T]he most important consideration concerning a physical description 'is whether the description is sufficiently unique to permit a reasonable degree of selectivity from the group of all potential suspects.'" *Guzy*, 139 Wis. 2d at 680 (citation omitted). Here, out of all the vehicles on the road that could have been driven by potential suspects, Deputy D'Aquisto narrowed down the description to a Harley-Davidson motorcycle. (R. 76:6.) This was more than enough to permit a reasonable degree of selectivity from the group of all potential suspects. And as Officer Meier explained, the stop occurred early in the motorcycle season at a time of year when there were few motorcycles on the roads. (R. 76:13.) This fact makes Deputy D'Aquisto's description even more particular and limiting.

The second factor, "the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred," *Guzy*, 139 Wis. 2d at 677, also favors the State. Officer Meier explained that just five minutes had passed between Deputy D'Aquisto's report and the time she stopped Richey. (R. 76:12.) And she stopped Richey just half a mile from where the crime occurred. (R. 76:7.)

The third factor, "the number of persons about in that area," *Guzy*, 139 Wis. 2d at 677, weighs heavily in the State's favor. Officer Meier explained that traffic in general was "very light" at the time of the stop, so there were very few persons about in that area. (R. 76:6.) And again, the stop occurred at a time of year when Officer Meier had seen few motorcycles on the roads. (R. 76:13.) In fact, she had not personally seen *any* motorcycles around that time until she saw Richey's Harley-Davidson. (R. 76:6.) The number of persons about in the area was therefore extremely low.

The fourth factor, "the known or probable direction of the offender's flight," *Guzy*, 139 Wis. 2d at 677, favors the State as well. Deputy D'Aquisto reported that the speeding, erratic vehicle was driving "northbound on Alderson Street from Jelinek Avenue." (R. 76:5.) Shortly thereafter, Officer Meier encountered Richey driving his motorcycle eastbound toward Alderson Street about half a mile away. (R. 42; 76:8, 20–21.) She marked the locations of Deputy D'Aquisto's report and her sighting of Richey's vehicle on a map. (R. 42.) The marked locations were consistent with Richey having driven north on Alderson Street as Deputy D'Aquisto described. (R. 42.)

The fifth and sixth factors are not relevant here because Officer Meier did not personally observe Richey violating any traffic laws and did not know who Richey was before stopping him. *Rissley*, 344 Wis. 2d 422, ¶ 18 (explaining that factors five and six were irrelevant in that case for the same reasons). However, the strength of the other factors—particularly factors one and three—make it reasonable for Officer Meier to believe the vehicle Richey was driving was the same vehicle that Deputy D'Aquisto had seen violating traffic laws just five minutes earlier. *Guzy*, 139 Wis. 2d at 677; *Genous*, 397 Wis. 2d 293, ¶ 9.

Rissley, 344 Wis. 2d 422, a Wisconsin case that is highly similar to this one, helps to illustrate that reasonable suspicion existed in this case. In *Rissley*, a homeowner reported that a stranger trespassed onto his property at 3:00 a.m., threatened him, and sped away in a beige Chevrolet minivan. *Id.* ¶¶ 2–3. He also told police which direction the minivan was headed. *Id.* ¶ 3. The dispatcher sent a patrol officer to find the minivan. *Id.* ¶ 4. The patrol officer then stopped a beige Chevy minivan five minutes after the homeowner's call to the police. *Id.* ¶ 5.

Rissley argued, among other things, that the police did not have reasonable suspicion to believe his vehicle was the vehicle connected to the crime. *Rissley*, 344 Wis. 2d 422, ¶ 15. The court of appeals disagreed. *Id.* ¶ 15. The court of appeals explained that based on the first four *Guzy* factors,[4] the police had reasonable suspicion to believe that Rissley's van was the same one reported by the homeowner. *Id.* ¶¶ 16–18. The court of appeals based its decision on the specific description of Rissley's vehicle, the general direction of the vehicle's reported travel, the relative lack of other vehicles traveling at that time of night, and the fact that only five minutes passed between the reported flight and the time the police located Rissley. *Id.* ¶¶ 16–17.

This case is just like *Rissley*. Here, as in *Rissley*, there was a fleeing suspect reported; a specific description of the suspect's vehicle was given, along with the direction of its travel; traffic was light at the time; and a vehicle matching the description of the suspect's vehicle was located five minutes after the report.

In addition to all these similarities to *Rissley*, Officer Meier had another important fact going for her that the officer in *Rissley* did not. In this case, Deputy D'Aquisto actually observed a traffic violation (R. 76:5), whereas *Rissley* involved only a citizen's report of suspicious conduct that may or may not have been criminal. *Rissley*, 344 Wis. 2d 422, ¶¶ 13–14. If reasonable suspicion existed in *Rissley*, then reasonable suspicion existed here.

Of course, Officer Meier could not be certain that the vehicle she was stopping was the same one involved in the

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[4] The fifth and sixth factors were deemed irrelevant because police knew nothing about the driver and had not independently witnessed any unlawful activity before stopping him. *State v. Rissley*, 2012 WI App 112, ¶ 18, 344 Wis. 2d 422, 824 N.W.2d 853.

violation five minutes earlier, just as the officer in *Rissley* could not be certain he was stopping the same van. But the Fourth Amendment does not require certainty, or anything close to it. On the contrary, "[t]he reasonable suspicion inquiry 'falls considerably short' of 51% accuracy." *Glover*, 140 S. Ct. at 1188. *Terry* and its progeny authorized Officer Meier "to temporarily freeze the situation" to investigate further. *Anderson*, 155 Wis. 2d at 88. The stop was based not on a mere hunch or a funny feeling, but on several specific and articulable facts that led Officer Meier to believe Richey's vehicle was the same one that prompted Deputy D'Aquisto's report.

Richey attempts to analogize this case to *United States v. Bohman*, 683 F.3d 861 (7th Cir. 2012), and *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999), but these cases are readily distinguishable. In *Bohman*, an informant told police that "known meth cook Jack Barttelt" was making meth in a cabin on a large rural property. *Bohman*, 683 F.3d at 862–63. The informant said Barttelt drove a green Mercury Grand Marquis. *Id.* at 863. Police waited outside the property until Bohman drove out and stopped his car. *Id.* Bohman, however, was not driving a green Mercury—he was driving a red Chevrolet. *Id.* The Seventh Circuit held that no reasonable suspicion existed because "[a] mere suspicion of illegal activity at a particular place is not enough to transfer that suspicion to anyone who leaves that property." *Id.* at 864.

The most obvious distinction between *Bohman* and this case is that in *Bohman*, police stopped a completely different type of vehicle than the one they were looking for. Here, in contrast, Officer Meier was looking for a Harley-Davidson motorcycle and she found a Harley-Davidson motorcycle. (R. 76:7.) Additionally, in *Bohman*, the police did not even have "probable cause that the cabin housed a meth cook" at the time they stopped Bohman's car. *Bohman*, 683 F.3d at

864–65. *Bohman* is therefore a far cry from this case. In *Bohman*, police stopped a completely different type of vehicle than the one they were looking for, merely because it came from an area where they thought a crime *might* have been occurring; here, in stark contrast, police stopped a vehicle that fit exactly the description of the vehicle they were looking for after an officer actually *watched* a violation occur.

Johnson is even less similar to this case. In *Johnson*, police received a citizen report that drug activity was "probably" taking place in one of four apartments in an apartment building. *Johnson*, 170 F.3d at 711. Police went into the apartment building on New Year's Eve and stood outside one of the suspect apartments. *Id.* at 711. As they prepared to knock on the door, Johnson opened the door, and police seized him. *Id.* at 711–12. The Seventh Circuit held that reasonable suspicion did not exist, as police had simply decided to seize "literally anyone who might emerge from" the busy apartment. *Id.* at 710.

Here, in stark contrast to *Johnson*, Officer Meier did not decide to seize "literally anyone" who was in the area. She would not likely have stopped the driver of a Honda Civic, for example, or seized someone who was in the area but on foot. Rather, she stopped Richey because he was not only in the area, but was riding the specific brand of motorcycle that was used to commit the traffic violation—a "rare" sight at that time of night and time of year. (R. 76:45.) And again, this case involved an observed traffic violation, while *Johnson* involved only a citizen report of unspecified "drug activity" that was "probably" taking place. *Johnson*, 170 F.3d at 711.

Finally, Richey cites *Illinois v. Wardlow*, 528 U.S. 119 (2000), for the proposition that "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." (Richey's Br. 12, 15

(emphasis added).) This argument fails for two reasons: it is not what *Wardlow* says, and it is also not what happened in this case.

The first problem with Richey's argument is *Wardlow* does not mean what he says it does; he misquotes the opinion in a way that changes its meaning. What *Wardlow* actually says is: "An 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. In other words, *Wardlow* says a person cannot be stopped merely for being in a known "high crime area." *Id.* But by changing the word "expected" to "suspected," Richey creates the impression that an individual's presence in an area where a *specific* crime has just occurred can never support a reasonable suspicion. That is not what *Wardlow* says.

The second problem with Richey's argument is that, as explained above, he was not stopped merely because he was present in the area where the crime occurred. He was stopped because he was driving a vehicle that fit the specific description of the vehicle involved in the crime. He was also stopped due to several other specific and articulable facts, such as the light traffic at the time, the relative scarcity of motorcycles at that time of year, and the closeness in time and distance to the crime, that helped to support Officer Meier's reasonable suspicion. It was far more than Richey's mere presence in the area that led the officer to believe he had just committed a traffic violation.

II. The court of appeals had no duty to discuss the facts of similar cases, and in any event, Richey did not analyze the facts of any published cases in his court of appeals brief.

Richey argues that the United States Supreme Court's opinion in *Ornelas* implicitly required that appellate courts

"look to cases with similar fact patterns to guide their reasonable suspicion determinations." (Richey's Br. 16.) Based on this assertion, he faults the court of appeals in this case for not discussing the facts of cases he believes are similar and analogizing or distinguishing those cases. (Richey's Br. 15–18.)

Richey is incorrect for two reasons. First, Richey misunderstands *Ornelas*, which does not implicitly require courts to distinguish cases with arguably similar fact patterns in every reasonable suspicion case. Second, Richey did not even argue in his court of appeals brief that any published cases were factually similar to his own, so the court of appeals appropriately declined to make his argument for him.

The first problem with Richey's argument is that *Ornelas* does not implicitly require courts to consider factually similar cases in all reasonable suspicion cases, especially where the appellant does not actually argue any. The issue in *Ornelas* was which standard of review—either the "clearly erroneous" standard or de novo review—should apply to the trial court's determination of probable cause. *Ornelas*, 517 U.S. at 694–95. The Supreme Court determined that de novo review should apply to the ultimate question of whether reasonable suspicion exists. *Id.* at 697. This is because "the legal rules for probable cause and reasonable suspicion acquire content only through application," and because de novo review will come closer to providing a defined set of rules to guide police officers. *Id.* at 697–98. The *Ornelas* court cautioned, however, that "because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, 'one determination will seldom be a useful "precedent" for another.'" *Id.* at 698 (citation omitted).

Of course, just like in any other area of law, analogizing and/or distinguishing factually similar cases might sometimes be helpful in determining whether reasonable

suspicion exists. But due to the highly fact-specific nature of the reasonable suspicion inquiry, few reasonable suspicion cases will ever truly control the result of another case, as one factual dissimilarity can alter the entire totality-of-the-circumstances analysis. *Ornelas*, 517 U.S. at 698.

Thus, *Ornelas*, which was about the proper standard of review to apply in reasonable suspicion cases, cannot reasonably be read as imposing an implicit mandate that courts must always consider factually similar cases, even where the appellant does not argue that such cases are factually similar. If the Supreme Court had meant to make such a sweeping bright-line rule, it surely would have said so explicitly. And more importantly, the Supreme Court directly stated that one reasonable suspicion case "will seldom be a useful 'precedent' for another" due to the highly fact-specific nature of the inquiry. *Ornelas*, 517 U.S. at 698.

The second problem with Richey's argument is that he faults the court of appeals for failing to address an argument he never made. Richey complains that the court of appeals did not "compare[ ] the facts of his case to any other case." (Richey's Br. 17.) But in his court of appeals brief, Richey did not argue that his case was factually similar to any published cases. *See* Richey's COA Br. (R-App. 104–16).

The only case whose facts Richey analyzed in his court of appeals brief was *State v. Adams*, No. 2018AP174-CR, 2019 WL 194763 (Wis. Ct. App. Jan. 15, 2019) (unpublished) (R-App. 117–20), which he now argues that the court of appeals erred by failing to distinguish. (Richey's Br. 17.) But *Adams* is an unpublished opinion, so the court of appeals had no obligation to even mention it. Wis. Stat. § (Rule) 809.23(3)(b) ("A court need not distinguish or otherwise discuss an unpublished opinion.").

Aside from *Adams*, which the court of appeals had no obligation to discuss, Richey did not argue in his court of

appeals brief that any other cases were factually similar to his own. (R-App. 110–15.) Wisconsin's appellate courts do not "abandon [their] neutrality in an attempt to develop arguments for parties." *State v. King*, 2020 WI App 66, ¶ 51, 394 Wis. 2d 431, 950 N.W.2d 891; *accord. State v. Pal*, 2017 WI 44, ¶ 26, 374 Wis. 2d 759, 893 N.W.2d 848. It is true that Richey now argues *Bohman* and *Johnson* are factually similar to this case. But he did not make this argument in his court of appeals brief. (R-App. 110–15.) He cannot fault the court of appeals for not sua sponte raising and addressing an argument he did not make. *King*, 394 Wis. 2d 431, ¶ 51.

In any event, *Bohman* and *Johnson* are easily distinguished as discussed above, and the facts of *Adams* are not remotely similar to the facts of this case. In *Adams*, officers stopped a car containing several people, and one of them fled on foot and ran into the woods. *Adams*, 2019 WL 194763, ¶ 2. Thirty minutes later an officer began to follow Adams's car, which was a mile from where the mystery person fled. *Id.* ¶ 3. The officer watched Adams turn around on a dead-end road and drive toward the area of the original stop. *Id.* ¶ 3. The officer stopped Adams's vehicle because he had a hunch that Adams may have received a call from the person who had fled on foot thirty minutes ago to come and pick him up. *Id.* ¶¶ 4, 10–11. The court of appeals held that the officer did not have reasonable suspicion to stop Adams's vehicle because "there [were] no facts to support [the officer's] 'inchoate and unparticularized suspicion or hunch' that the fleeing suspect may have tried to use a cell phone to request that Adams pick him up." *Id.* ¶ 12. The officer made a logical leap that was supported not by specific and articulable facts, but by a mere hunch. *Id.*

Adams is not pertinent to this case. The problem in *Adams* was that the officer "transferred the reasonable suspicion of criminal activity attributed to the fleeing suspect

onto Adams simply because he was driving within the search area, with [the officer] having no knowledge of a connection between the fleeing suspect and Adams." *Adams*, 2019 WL 194763, ¶ 15. Here, in contrast, there was no "transfer" of reasonable suspicion at all. Officer Meier did not believe Richey was helping the person who was seen driving erratically—she believed he was the person who was seen driving erratically. And this belief was based on the specific and articulable fact that Richey was driving a Harley-Davidson motorcycle, along with the light traffic that night and the rarity of motorcycles at that time of year. (R. 76:44–45.) The officer in *Adams* had no information about the fleeing suspect at all, *Adams*, 2019 WL 194763, ¶ 2, while the parameters of Officer Meier's search were significantly limited by the fact that she knew the suspect was driving a Harley-Davidson. Finally, Officer Meier's observations were much closer in time and space than the officer's observations in *Adams*; five minutes and half a mile versus thirty minutes and a mile. *Id.* ¶ 3; (R. 76:7, 12.) For all these reasons, *Adams* is inapposite.

CONCLUSION

This Court should affirm Richey's judgment of conviction and the order denying postconviction relief.

Dated this 10th day of June 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 5,260 words.

Dated this 10th day of June 2022.

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I hereby certify that:

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