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SUPREME COURT

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
REPLY BRIEF

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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

The 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, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

At the time Officer Meier stopped Charles Richey, she had very little information about the motorcycle that Deputy D'Aquisto had told her to look for. She knew it was a Harley-Davidson motorcycle. (R76:6). She knew it was traveling north on Alderson Street from Jelinek Avenue. (R76:5). She knew it was driving erratically. (R76:5). She knew it was driving at a high rate of speed. (R76:5). All totaled, she knew four basic facts about the vehicle she was supposed to look for.

Agreeably, she stopped Richey and he was driving a Harley-Davidson motorcycle. But Richey was not traveling northbound on Alderson Street. When she first saw him, he was located west of Alderson Street, several minutes north of Jelinek Avenue. (R76:7, 23-25; R42). For Richey to be the mystery motorcycle, he would have had to travel north to Schofield Avenue, take a left on Schofield, turn around at some point and then head east on Schofield to Willow Street, because when Meier spotted him at Willow, he was traveling southeast on Schofield back toward the area where the deputy

had first spotted the mystery motorcycle. (R76:7, 23-25, 34; R42).

Moreover, Richey was not traveling at a high rate of speed. (R76:24). Nor was he driving erratically. (R76:24). Thus, of the four criteria Officer Meier was to look for, Richey matched only one – he was riding a Harley Davidson.

Now the trial court, and the court of appeals, noted that Richey's motorcycle was the only one that Meier had seen on a night when there were not many motorcycles out and about. (R76:45-46); *State v. Richey*, No. 2021AP142, unpublished slip op., ¶9, (WI App Feb. 15, 2022). Presumptively, this would add to Meier's suspicion that Richey was the mystery motorcycle. But Meier never testified to these facts. Only after being prompted by the prosecutor, did she state *also due to, as you stated*, time of year and time of night were among the things she had considered. (R76:12-13). Prior to being prompted, however, she never mentioned time of year or time of night. In other words, these were not facts that Meier originally said she relied on at the time she stopped Richey.

Furthermore, at the time of the stop Meier was under the impression that the motorcycle she was looking for had fled from the deputy. (R76:27-30). But this was not a fact, as Meier only assumed the mystery motorcycle had tried to elude the deputy. (R76:27-30). The deputy never stated this to Meier. However, even if Meier did believe the mystery motorcycle was fleeing the police, the fact that Richey did not attempt to elude Meier should have given her doubt that Richey was the mystery motorcycle.

In its response, the State argued the *Guzy* factors, contending that, on balance, most of them fall in the State's favor. (Resp. Br. at 12-14). The *Guzy* court said these factors

are helpful and should be used in making a reasonable suspicion determination. *State v. Guzy*, 139 Wis.2d 663, 667, 407 N.W.2d 548 (1987).

As to the first factor – the particularity of the description of the vehicle in which an offender has fled – the State says this factor falls in its favor. “Motorcycle” plus “Harley-Davidson” is sufficiently unique, it reasons, to permit a reasonable degree of selectivity from the group of all potential suspects. (Resp. Br. at 13). Richey will not belabor the point. Suffice it to say, however, that in Wisconsin saying the suspect is driving a Harley-Davidson is as unique as saying the suspect is driving a Ford.

As to the second factor – the size of the area in which the offender might be found – the State also says it prevails. (Resp. Br. at 13). Richey respectfully disagrees. As discussed above, Richey was not even traveling in the proper search area. He was supposed to be traveling north on Alderson Street at a high rate of speed, possibly fleeing the deputy. Instead, he was traveling southeast on Schofield Avenue, doing the speed limit, headed back near where the deputy first spotted the mystery motorcycle. Moreover, Richey would have had to take a most improbable path to be traveling east on Schofield from a point west of Alderson when Meier first spotted him.

The third factor – the number of persons about in that area – the State says weighs heavily in its favor. (Resp. Br. at 13). Again, Richey disagrees. Meier testified that the night of Richey’s arrest, traffic was light. (R76:6). Despite very light traffic, police spotted at least two, if not three, motorcycles in a 5-minute span. 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 Meier only assumed they might be the same. (R76:29-30). But three motorcycles in the general area of Alderson and Schofield hardly qualifies as an extremely low number in a 5-minute time frame.

Finally, the fourth factor – the known or probable direction of the offender’s flight – the State believes falls in its favor as well. (Resp. Br. at 14). It reasons that Meier’s marked locations on the map exhibit from the suppression hearing were consistent with Richey having driven north on Alderson Street. (Resp. Br. at 14). Again, Richey disagrees for the reasons already stated. To be the mystery motorcycle, he would have had to drive north on Alderson from Jelinek up to Schofield, then turn left on Schofield and drive west at least to Willow Street. At some point after Willow, he would have had to make a 180 degree turn and head east on Schofield because when Meier first spotted him, at Willow, he was traveling southeast on Schofield. (R76:23-24). This path would make little sense to a motorcyclist fleeing police.

Richey submits that, at best, only one of the *Guzy* factors falls in the State’s favor. That would be that the motorcycle Meier stopped was a Harley-Davidson. The remaining factors fall in Richey’s favor suggesting that Meier only stopped Richey because he was the first motorcycle she had seen in the vicinity of Alderson Street. As we know, an individual’s presence in an area of expected criminal activity is not enough to support a reasonable, particularized suspicion that the person is committing a crime. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

The State also analogizes Richey’s facts to those found in the *Rissley* case, where the court of appeal found a law

enforcement officer had reasonable suspicion to stop Rissley. (Resp. Br. at 15-16). But *Rissley* is distinguishable. In *Rissley*, a homeowner who Rissley apparently had threatened at three o'clock in the morning, called the Caledonia Police Department asking it to send a squad to his residence. *State v. Rissley*, 2012 WI App 112, ¶2, 344 Wis.2d 422, 824 N.W.2d 853. The dispatcher notified an officer and while the officer was responding, the homeowner continued to communicate with dispatch, giving continuous updates about Rissley. *Id.* ¶4. He was driving a beige Chevy minivan, he was traveling on Six Mile Road toward Middle Road, then he turned south on Middle. *Id.* ¶3. The driver was Caucasian, wearing a hooded sweatshirt, was clean-shaven, and wore a crew-cut hairstyle. *Id.* ¶3. The officer first spotted Rissley just as he turned south from Six Mile Road onto Middle Road. *Id.* ¶4.

Aside from the many additional facts known by the officer in *Rissley*, what really distinguishes *Rissley* from *Richey* is the fact that the homeowner was giving the officer a minute-by-minute update of Rissley's travels. Thus, the officer did not just stop the first vehicle he encountered in the vicinity of the homeowner's residence. The homeowner never lost eyesight of Rissley, telling the officer that he had just turned left onto Middle Road, a turn the officer witnessed. *Id.* ¶4. The court of appeals found this fact to be significant in its analysis. *Id.* ¶16. Of course, in *Richey*'s case, the deputy said the fleeing suspect was traveling north on Alderson Street, while Officer Meier spotted *Richey* traveling south on Schofield. So, he was really nowhere near where Deputy D'Aquisto reported him to be.

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

The State says that Richey misunderstands the *Ornelas* decision; that it does not implicitly require courts to distinguish cases with similar fact patterns when making reasonable suspicion determinations. (Resp. Br. at 19). It reasons that if the United States Supreme Court had meant to make such a sweeping bright-line rule, it surely would have said so. (Resp. Br. at 20).

In reply, Richey can only say there is no other way to read *Ornelas* than the way he reads it. *Ornelas* initially recognized that because the mosaic which is analyzed for a reasonable-suspicion inquiry is multi-faceted, one determination will seldom be a useful precedent for another. *Ornelas v. U.S.*, 517 U.S. 690, 698, 116 S.Ct. 1657, 134 L.Ed2d 911 (1006). But it said there are exceptions. *Id.* It then went on to discuss, by way of example, four pairs of reasonable-suspicion cases that were factually similar. *Id.* It then concluded that 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.*

Richey submits that the whole point of the *Ornelas* discussion was to try and unify precedent. *Id.* at 690. Appellate courts cannot unify precedent if they ignore it.

As for the *Adams* case – the one Richey complains the court of appeals ignored – Richey admits it is not a published case and he likewise admits that it was not factually identical to his case. But it was similar insofar as it was a reasonable suspicion case involving an individual that had fled from police following a traffic stop. *State v. Adams*, No. 2018AP174, unpublished slip op., ¶2 (WI App Jan. 15, 2019). The deputy making the traffic stop then alerted Deputy Hujet to be on the lookout for the fleeing individual. *Id.* Hujet began a search. *Id.* Soon thereafter, Adams drove into the search area and

Deputy Hujet initiated a traffic stop on Adams. *Id.* ¶3. Based on his prior experiences Hujet reasoned that the fleeing individual had called Adams from his cell phone to come and pick him up. *Id.* ¶4. During the stop, Hujet detected alcohol on Adams' breath and arrested him for an OWI. *Id.* ¶5.

Ultimately, the court of appeals ruled that Hujet did not have reasonable suspicion to stop Adams under the circumstances. *Id.* ¶11.

Presence in a suspect area cannot generally be used to impute suspicion onto another individual. [citation omitted]. Without some articulable fact that connected Adams to the fleeing suspect, we conclude that, under the totality of the circumstances, the traffic stop was impermissible.

Id. ¶12.

In Richey's mind, the facts of *Adams* were similar to the facts of his case. Officer Meier imputed suspicion onto Richey predominantly because he was the first motorcycle Meier had spotted in the search area. That is, Meier reasoned that Richey was probably the driver of the mysterious fleeing motorcycle simply because he was in the suspect area. Meier had no articulable fact that connected Richey to the mystery motorcycle, other than he was riding a Harley-Davidson.

Richey cited *Adams* for its persuasive value. If the court of appeals did not find its reasoning persuasive, it could have said so and thereby usefully added to the body of law on reasonable suspicion.

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 his conviction be vacated.

Dated this 19th day of June 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 2,053 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 19th day of June 2022.

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