STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2021AP000939-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERE J. MEDDAUGH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Wood County Circuit Court,
Judge Gregory Potter, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the police have reasonable suspicion to justify the investigatory stop of Jere J. Meddaugh?

The circuit court answered "Yes." (34:28; App. 33).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Meddaugh does not request oral argument or publication. The single issue in the case involves the application of settled law to the facts of this case and will be fully addressed by the parties' briefs.

STATEMENT OF THE CASE AND THE FACTS

Jere J. Meddaugh was charged with possession of more than 50 grams of methamphetamine with intent to deliver within 1,000 feet of a school, possession of drug paraphernalia, resisting an officer, and misdemeanor bail jumping after he was stopped, arrested, and searched by police early in the morning of April 26, 2020. (1:1-3; 9). Meddaugh was bound over after a preliminary hearing, where the state presented the testimony of Deputy John Matthews of the Wood County Sheriff's Department, the officer who stopped Meddaugh. (33:4-15; App. 39-50).

Meddaugh moved to suppress the evidence seized from him on the ground that Deputy Matthews lacked reasonable suspicion to stop Meddaugh for investigation. (12; 13; App. 3-5). The circuit court held an evidentiary hearing on the motion at which Matthews was the only witness. (34; App. 6-36).[1]

Matthews testified that at 12:39 a.m. on April 26, 2020, he was on patrol in Wisconsin Rapids. Matthews saw "zero" people out at the time. (34:19-20; App. 24-25). He could not recall if he had seen people outside earlier that night, but he acknowledged that, despite a recently issued, pandemic-related "stay at home" order, he had seen people out and about, albeit fewer than he was used to seeing in the past. (34:4, 19-21; App. 9, 24-26).

Matthews was driving on Saratoga Street when he saw a "flashing red light" coming from the grounds of Howe Elementary School. (33:4-5; 34:3-4, 16; App. 8-9, 21, 39-40). The area behind the school is "a large, asphalt playground with wood chips on the exterior [*sic*]." (34:4; App. 9).

[1] The following statement of facts is based on the transcripts of both the suppression hearing and the preliminary hearing, as the latter provides some additional details and clarification regarding the events. When reviewing a suppression order, an appellate court may consider facts brought out at proceedings other than the suppression hearing, including the preliminary hearing. *State v. Gaines*, 197 Wis. 2d 102, 106–07 n.1, 539 N.W.2d 723 (Ct. App. 1995).

The gate to the school grounds was open, so Matthews drove onto the grounds and saw that the flashing red light was coming from a bicycle moving south across the playground. It was being pedaled by a man wearing "old" "dark" or "black" clothing. (33:5, 10-11; 34:4, 8, 16-17; App. 9, 13, 21-22, 40, 45-46).

Matthews followed the bicycle. When he was about 20 feet away, he turned on his squad spotlight and trained it on the moving bicycle. (34:5; App. 10). With the spotlight on the bicycle and its rider, Matthews caught up to it and "drove up alongside of him assuming that he would see my marked squad with the spotlight showing directly on him." (33:5-6; App. 10-11). When Matthews was approximately fifteen feet away from and parallel to the bicycle, the man riding it "looked back and waved with his hand up in the air." (33:6; App. 11). Matthews "yelled for him to stop," but "he did not." (33:5-6; 34:6; App. 11, 40-41).

Instead, the cyclist continued riding southbound across the school grounds. (34:6, 19; App. 11, 24). The bicycle moved at "a normal pace" and the rider did not try to hide as Matthews continued to follow it. (34:7, 19; App. 12, 24). On the south end of the school grounds, where they abut Oak Street, there is a barrier—a cable suspended between two posts. Both Matthews and the bicyclist went around the barrier. (34:6-8; App. 11-13).

The cyclist, crossed Oak Street and rode onto the sidewalk on 7th Street. (34:8; App. 13). Matthews continued following the bicycle, crossing Oak Street and driving onto 7th Street. (34:8; App. 13). As the bicycle continued south on 7th Street, Matthews "drove up, potentially, ahead of him, so with my marked squad, shined – I did have that spotlight on him, and then did the stop." (34:8-9; App. 13-14).

Matthews did not block the bicycle's path, but the man riding it stopped pedaling and dismounted. (33:6; 34:9; App. 14, 41). Matthews got out of his squad car, noted that the man had headphones covering his ears, and announced himself as law enforcement and asked the man why he did not stop. (33:6; 34:9; App. 14, 41). The cyclist, who removed his headphones, responded that he was cutting through the school grounds to go to a convenience store. (33:6; 34:9; App. 14, 41).

Matthews told the cyclist that he had been stopped because it was "suspicious" for him to be "behind a school at that time of the night, wearing dark clothing." (34:10; App. 15). Matthews elaborated a bit on his reasons for the stop at the suppression hearing, testifying that he was "concern[ed]" because, "[a]t that time, we were currently under [a] stay-at-home order, and at that time of the night, I hadn't seen any other individuals out walking, riding by, but at that time of the night, I was unsure as to why anybody would be back there. Very unusual." (34:4; App. 9). He also reiterated that the bicyclist "was wearing all black clothing in the early morning hours" and added that

he assumed the bicyclist saw the squad car following him and illuminating him with the spotlight, yet "he continued to ride and didn't stop on my command to stop." (34:8; App. 13). (*See also* 34:12-13; App. 17-18).

Matthews acknowledged, however, that he did not have any evidence the man was doing anything illegal. (34:17; App. 22). Indeed, he admitted he was "unsure" what the man was doing wrong. (33:11; 34:18; App. 23, 46). He also acknowledged he had not received any dispatches or heard any reports about possible criminal or suspicious activity at the school and did not know of any history of complaints or problems, such as vandalism, at the school. (34:17; App. 22).

Having explained to the cyclist why he had been stopped, Matthews asked the man for his name. The man initially refused to give his name, and was "agitated, uncooperative, profusely sweating." (34:10; App. 15). Matthews also noticed the man had a hand-held scanner tuned to the county sheriff's department, though the man said it was a walkie-talkie; when Matthews disputed the man's statement, the man acknowledged it was a scanner but said it was not illegal to have. (33:8, 34:10-11; App. 15-16, 43).

In response to Matthews's second request for his name, the man gave his first name but not his last, saying he did not have to identify himself and that he did not have to or want to talk to the officer. (33:8; 34:11-12; App. 16-17, 43). After this exchange, and about 30 seconds after he had been stopped, the man

remounted his bicycle and rapidly pedaled away. (33:13; 34:8; App. 18, 43). Matthews immediately yelled "stop," but the man continued pedaling away. Matthews gave chase and, within 15 feet, tackled the man, knocking him off his bicycle. (34:13-14; App. 18-19).

The man—later identified as Jere Meddaugh—resisted and refused to comply with Matthews's orders and was finally restrained when backup officers arrived. (34:13-14; App. 18-19). The officers seized a folding knife from Meddaugh's pants' pocket and a substance later identified as methamphetamine from the backpack Meddaugh was carrying. (1:2-3; 33:8-9; 34:14-15; App. 19-20, 43-44).

Based on Deputy Matthews's testimony, the state argued that the officer had reason to stop Meddaugh, citing the stay-at-home order, Meddaugh being on school grounds at 12:30 a.m., "where he shouldn't be," wearing dark clothing and failing to stop when the officer shined the squad spotlight on him as he was riding. (34:23; App. 28). Thought it cited events that happened *after* Meddaugh stopped on 7th Street, dismounted, and spoke with Matthews, the state argued that "even before Mr. Meddaugh was stopped," the totality of the circumstances provided reasonable suspicion of criminal activity. (34:24-25; App. 29-30). Meddaugh's attorney argued that Meddaugh "was doing absolutely nothing wrong" because it was "totally legal" for him to ride through the school ground, and that what happened after Meddaugh was

stopped provided no basis to justify the stop itself. (34:22, 25-26; App. 27, 30-31).

The circuit court denied the suppression motion. (34:28; App. 33). The court noted that, to determine whether there was reasonable suspicion to stop Meddaugh, it had to consider the totality of the circumstances. (34:26; App. 31). It said that the circumstances in this case are "a little bit unique; mainly, because we have this pandemic that's going on. There was a stay-at-home order in effect at that point in time, that there was very little traffic on the roads, even less than normal,…" (34:26; App. 31).

After noted that context, the court summarized the facts established by Deputy Matthews's testimony:

> …[Y]ou have an individual who is seen approximately at 12:30 a.m. in the morning. He is on a bicycle behind a school, he's wearing dark clothing, and when the deputy approaches a light on him [*sic*], he is not moving at a very high rate of speed, but when the deputy comes parallel with him and stops him and has the ability to ask him questions, at that point in time, the defendant is non-responsive. He is unwilling to provide a name.
>
> The deputy sees that there is some type of device, which he inquires what it is. He's informed that it's a walkie-talkie, the deputy recognizes that it's a scanner. It states Wood County on it.
>
> The deputy then inquires of his name. He provides a first name, and before he's willing to provide any additional information, he gets on his bike and

> starts pedaling faster away from the deputy, which results in the deputy attempting to stop, ultimately taking him off the bike, dragging him to the ground, where he is handcuffed, attempted to be restrained, I should say, until additional officers or deputies arrive.

(34:26-27; App. 31-32).

The court then turned to the legal standard for determining whether the stop of Meddaugh was supported by reasonable suspicion:

> In looking at the totality, again, we have to look at the time, 12:40 in the morning, the fact that there's a stay-at-home order which means less than normal that could be on the street; even less than what's normal at 12:40 in the morning.
>
> The location is a school where no one should be around at that time of the day, the fact that he's wearing dark clothing, the fact that once the deputy first makes contact, he doesn't respond to a verbal command.
>
> When a light is shown on him in [*sic*] a verbal command is communicated, again, he doesn't react.
>
> Ultimately, when the deputy is able to get him to stop, he's non-cooperative, won't provide a name, lies about the equipment that he has, ultimately gives a first name after refusing to give a last name, and while still being questioned, leaves the deputy's presence, even though he's commanded to stop and stay there.

> Based on those circumstances, I think there is a reasonable suspicion for the stop, and obviously, when it gets to the point where he refuses to provide a full name, and the fact that he continues to lie to the officer about the equipment and then, gets on his bike and leaves is the total basis for the stop, and therefore, the Motion to Suppress is denied.

(34:27-28; App. 32-33).

Meddaugh later entered a no contest plea to the charge of possession of between 10 and 50 grams of methamphetamine with intent to deliver, without the school zone enhancer. (17; 18:1; 36:2-3). The remaining charges were dismissed and read in, as were charges in another pending case (13-CT-494) and two uncharged offenses. (14; 36:2, 3, 4). The court sentenced Meddaugh to eight years in prison (four years of initial confinement and four years of extended supervision). (27; 37:15).

Meddaugh appeals the denial of his motion to suppress as permitted under Wis. Stat. § 971.31(10). (30).

ARGUMENT

Deputy Matthews did not have reasonable suspicion to stop Meddaugh, so the seizure and resulting search of Meddaugh violated his right to be free from unreasonable searches and seizures.

A. General legal principles and standard of review.

Both the United States and Wisconsin Constitutions guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11; *State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. "The Fourth Amendment to the United States Constitution is the securing anchor of the right of persons to their privacy against government intrusion." *State v. Gordon*, 2014 WI App 44, ¶11, 353 Wis. 2d 468, 476, 846 N.W.2d 483.

This case involves the reasonableness of Deputy Matthews's seizure of Jere Meddaugh after he rode his bicycle through a school yard early one morning. Resolving the legality of that seizure requires this court to decide when Meddaugh was seized and whether the officer had reasonable suspicion to justify that seizure at the time the seizure occurred. *State v. VanBeek*, 2021 WI 51, ¶25, 397 Wis. 2d 311, 960 N.W.2d 32 (when a seizure is claimed to have occurred, reviewing court first determines "when it began and whether it was

constitutionally permissible at its inception."); *Terry v. Ohio*, 392 U.S. 1, 16, 19-20 (1968).

Not every interaction between a police officer and a citizen implicates the constitutional guarantees against unreasonable seizure. *VanBeek*, 397 Wis. 2d 311, ¶26; *Young*, 294 Wis. 2d 1, ¶18; *Terry*, 392 U.S. at 12-14, 19 n.16. It is not unreasonable for law enforcement officers to approach citizens on the street and put questions to them "as long as the police do not convey a message that compliance with their request is required." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Instead, a seizure implicating the Fourth Amendment occurs "when an officer, 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.[]'" *State v. Williams*, 2002 WI 94, ¶20, 255 Wis. 2d 1, 646 N.W.2d 834, quoting *United States v. Mendenhall*, 446 U.S. 544, 552 (1980), and *Terry*, 392 U.S. at 19 n.16. This test focuses on whether, under the totality of the circumstances, the actions of law enforcement "would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Kaupp v. Texas*, 538 U.S. 626, 629 (2003), quoting *Bostick*, 501 U.S. at 437. *See also Bostick*, 501 U.S. at 439 (a seizure occurs if "police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter."). For a seizure to be effectuated by means of a show of authority only, without the use of physical force, the citizen must actually yield to that show of

authority. *State v. Kelsey C.R.*, 2001 WI 54, ¶33, 243 Wis. 2d 422, 626 N.W.2d 777.

Whether a person has been seized for purposes of the Fourth Amendment is a question of constitutional fact subject to a two-part standard of review. The trial court's findings of evidentiary or historical fact are upheld unless they are clearly erroneous, while the determination of whether the person was "seized" for Fourth Amendment purposes is reviewed independently. *Young*, 294 Wis. 2d 1, ¶17.

One type of seizure permitted under the Fourth Amendment is a temporary detention of a person for investigatory questioning. *VanBeek*, 397 Wis. 2d 311, ¶27; *Young*, 294 Wis. 2d 1, ¶20; *Terry*, 392 U.S. at 30. For such an investigatory stop to pass constitutional muster, the police must have "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *Young*, 294 Wis. 2d 1, ¶20. "The question of what constitutes reasonable suspicion is a common-sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. (Charles) Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). There must be "articulable facts" in the record that, when "taken together with rational inferences from those facts" and "viewed objectively," allow for an officer to reasonably conclude "that criminal activity may be afoot." *State v. Matthews*, 2011 WI App 92, ¶11, 334 Wis. 2d 455, 799 N.W.2d 911, citing *Terry*, 392 U.S. at 21-22, 30.

Because suspicion of criminal wrongdoing only becomes "reasonable suspicion" when it is based on "specific and articulable facts," a mere "hunch" is not sufficient. *VanBeek*, 397 Wis. 2d 311, ¶¶20, 52; *Young*, 294 Wis. 2d 1, ¶21, quoting *Terry*, 392 U.S. at 27. And because the test focuses on an objectively reasonable officer, "simple good faith on the part of the arresting officer is not enough." *State v. Pugh*, 2013 WI App 12, ¶11, 345 Wis. 2d 832, 841-842, 826 N.W.2d 418. "[I]f it were, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." *Id.*, quoting *Terry*, 392 U.S. at 22.

As with a review of whether a seizure has occurred, whether police had reasonable suspicion for the seizure is assessed with a two-part standard of review. *Young*, 294 Wis. 2d 1, ¶17. A circuit court's findings of fact are upheld unless clearly erroneous, but whether those facts constitute reasonable suspicion is reviewed independently. *Id.* The burden of proving that an investigative stop was reasonable is on the state. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634.

B. Meddaugh was seized when Deputy Matthews drove his marked squad car ahead of Meddaugh, pulled over, and then got out and approached Meddaugh, who had stopped pedaling and dismounted his bicycle.

As noted above, a seizure for purposes of the Fourth Amendment occurs where an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen[]." *Mendenhall*, 446 U.S. at 552. The focus is on whether a "reasonable person" would feel free to leave. *Id*. at 554. "As long as the person to whom the questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particular and objective justification." *Id. See also Young*, 294 Wis. 2d 1, ¶18.

This case does not involve a casual street encounter. Instead, Deputy Matthews initially made contact with Meddaugh from inside his marked squad car, when he followed and drew parallel to Meddaugh, shined his spotlight on Meddaugh, and yelled at Meddaugh to "stop." (34:6; App. 11). Meddaugh waved—indicating he saw the officer—but kept riding, without deviating from his apparent route or increasing his speed or trying to hide. (*Id.*).[2]

[2] It is apparent that Meddaugh did not hear Matthews's command to stop because he was wearing headphones with music playing. (33:6; 34:9; App. 14, 41).

Meddaugh was free to keep riding. "Where a police officer, 'without reasonable suspicion or probable cause, approaches an individual, the individual has a right *to ignore* the police and *go about his business*.'" *Young*, 294 Wis. 2d ¶73, quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (emphasis supplied by *Young*). Further, under those circumstances, "any 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a [stop] or [arrest].'" *Id.* (citation omitted).

In response to Meddaugh going about his business, Matthews persisted in showing his authority and, as he testified, attempting to make contact with and stop Meddaugh. (33:6; App. 11). Matthews did this by following Meddaugh through the school yard, around the barrier at the south end, and onto 7th Street. On 7th Street, Matthews continued to drive alongside and then pulled ahead of Meddaugh, all the while training his squad spotlight on Meddaugh. And Meddaugh yielded to this persistent show of authority: he stopped pedaling and dismounted. Matthews cemented the seizure by stopping his squad car, getting out, announcing himself as law enforcement, and telling Meddaugh why he had been stopped. (34:6-9; App. 11-14).

The circuit court's findings of fact and legal conclusions recognize that Meddaugh was seized at the point he stopped his bicycle and dismounted. In reciting the facts, the court found "the deputy comes parallel with [Meddaugh] and stops him and has the

ability to ask him questions…." (34:27; App. 32). In stating its legal conclusions, the court noted that, despite being illuminated with the spotlight and given a verbal command, Meddaugh does not react or respond; but then "[u]ltimately, when the deputy is able to get [Meddaugh] to stop," Meddaugh was not cooperative or forthcoming and ultimately tries to leave "even though he's [been] commanded to stop and stay there." (34:28; App. 33).

The circuit court was correct that this was the moment of a constitutionally cognizable seizure, for at this point, under these circumstances, a reasonable person would not have felt free to leave. The fact that police persist in trying to engage a citizen after the citizen has exercised the right to disregard the police and walk away is the kind of police action that a reasonable person will see as a show of authority intended to restrain the person's liberty. *See, e.g., Keenom v. State*, 80 S.W.3d 743, 747-48 (Ark. 2002) (the persistence of police in the face of a person's efforts to terminate an encounter may lead a reasonable person to conclude the police will not desist and cannot be ignored). In this case, a reasonable person in Meddaugh's position would believe that he was not at liberty to ignore the police and go on his way. That is because despite Meddaugh's attempt to terminate the encounter by continuing to ride, the officer in the marked squad car persisted in following and illuminating him with the squad spotlight and then pulling the squad ahead of him in a further assertion of authority.

The deputy's conduct in this case is similar to the conduct of officers in *State v. Pendelton*, No. 2017AP2081-CR, unpub. slip op. (WI App June 19, 2018) (App. 67-72). In that case, police investigating a suspicious person report saw the defendant in the area, walking down the sidewalk. *Id.*, ¶7 (App. 67). Officers followed in a squad car as the man walked and, when the man stepped into the street, one officer asked the man to stop; the man did not respond to the request and continued to walk. *Id.*, ¶¶8-9, 22 (App. 67-68, 69). The officers continued to follow the defendant in the squad car until one officer the exited squad car and instructed the defendant to "stop and come here." The defendant complied. *Id.*, ¶9 (App. 68). This court held the defendant was seized, for after the defendant "rightfully ignored" the initial request to stop, the police "escalated the situation and created an authoritative presence" by continuing to follow him. Based on that conduct, a reasonable person would no longer believe he was free to disregard the officer's instruction and continue to walk away. *Id.*, ¶23 (App. 70).

Like the officers in *Pendelton*, by following Meddaugh, Matthews escalated the situation and created an authoritative presence. That presence would lead a reasonable person to conclude he could not continue to ignore the officer. Indeed, that is the conclusion Meddaugh reached, for he stopped.

Meddaugh's reasonable belief that he was not free to ignore Matthews was reinforced when Matthews stopped his squad car, got out, and

announced himself as law enforcement (34:9; App. 14) —all of which showed the officer did not want Meddaugh to continue riding, but instead wanted him to stay put and talk to the officer in his official capacity. Further, Matthews immediately told Meddaugh he was being stopped because the officer was suspicious of Meddaugh for riding on the school grounds. (34:10; App. 15). Telling a person he is being stopped conveys to the person an implicit yet unmistakable command to stop, and being told that you are suspected of wrongful conduct reveals the officer's intent to detain until his or her investigatory questions are answered. *Cf. State v. Pitts*, 978 A.2d 14, 19-21 (Vt. 2009) (pointed questions about specific criminal activity may indicate to a person that he or she is the subject of a particularized investigation and is not free to leave (collecting cases)).

For all these reasons, Meddaugh was seized when he stopped riding his bicycle, dismounted, and stood standing while Matthews approached and addressed him. *See Kelsey C.R.*, 243 Wis. 2d 422, ¶30 (for show of authority to constitute a seizure, the citizen must yield to the show of authority).

C. The seizure of Meddaugh violated the Fourth Amendment because Matthews did not have reasonable suspicion that Meddaugh was engaged in criminal activity.

As noted above, police may stop and briefly detain a person for investigative purposes if, based on

the totality of the facts and circumstances, they possess specific and articulable facts warranting a reasonable belief that criminal activity may be afoot. *VanBeek*, 397 Wis. 2d 311, ¶28. At the time he stopped Meddaugh, Deputy Matthews did not have specific and articulable facts supporting a reasonable belief that Meddaugh had committed, was committing, or was going to commit a crime. Instead, Matthews had, at best, an "inchoate and unparticularized suspicion," and that is not enough. *Id.*, ¶52, citing *Terry*, 392 U.S. at 27.

To summarize the facts in the record as set forth above (at 4-7), the totality of the circumstances in this case are these: Due to the coronavirus pandemic, a stay-at-home order had been issued, which reduced the number of people out and about in public. At 12:40 one morning not long after the order was issued, Meddaugh was riding his bicycle through a school yard in a manner consistent with a person going to a convenience store, as Meddaugh ultimately told Matthews he was doing. He had on dark clothing, but his bicycle was illuminated with a flashing red rear light.[3] When a law enforcement officer saw the light and approached to see what it was, Meddaugh did not flee or attempt to evade the officer, even after the officer began following and illuminating him with the

[3] This light complied with the statutory requirement that bicycles operating during hours of darkness be equipped with a rear red reflector or light. Wis. Stat. § 347.489(1). The statute also requires a white head lamp. Matthews did not recall whether the bicycle had a head light. (33:11; App. 46).

squad spotlight. Instead, Meddaugh kept pedaling at the same pace until the officer, persisting in his attempt to talk to Meddaugh, drove ahead of Meddaugh, leading Meddaugh reasonably to conclude he must stop for the officer.

The officer saw Meddaugh wave at him, but did not testify to seeing Meddaugh make any furtive gestures or any attempt to conceal or discard any object while he was riding. The officer had not received any reports of illegal or suspicious behavior at or around the school, nor had the school been the target of vandalism or other criminal activity. Further, there was no evidence the school was in a high-crime area.

The circuit court concluded the totality of these circumstances gave Matthews reasonable suspicion to stop Meddaugh. But considered all together, they support no more than an inchoate suspicion that Meddaugh might be engaged in criminal activity.

Begin with the circuit court's conclusion that Meddaugh was in a place—the school grounds—"where no one should be around at that time of day…." (34:27; App. 32). The record does not support this conclusion.

While the state argued that by being on the school grounds at that time of day Meddaugh "was where he shouldn't be" (34:23; App. 28), it offered neither evidence nor legal authority to prove this claim. *Post*, 301 Wis. 2d 1, ¶12 (state has the burden of proving an investigative stop was reasonable). In fact, Matthews testified that the gate to the school

yard was open, which is why he could drive his squad car onto the grounds. (34:17; App. 22). He did not know of any posted signs prohibiting entry onto the grounds. (33:12; 34:17; App. 22, 47). He agreed the school is "a public location[.]" (33:11-12; App. 46-47). In the absence of any evidence or legal authority showing that Meddaugh was prohibited from riding his bicycle through the school grounds, nothing in the record shows Matthews had an objectively reasonable basis to conclude that riding across the school grounds was or even might be unlawful.

Next, consider the circuit court's and Matthews's references to the stay-at-home order then in effect due to the coronavirus pandemic. Matthews did not precisely identify the order, but, given the date of the stop, it is evident he was referring to the "safer at home" order issued 10 days earlier. *See* State of Wisconsin, Department of Health Services Emergency Order #28 (April 16, 2020).[4] While that order specified that everyone in the state was "to stay at home or at their place of residence," it also provided for clear, explicit exceptions. *Id.* at 2-3.

One exception was for "essential activities." *Id.* at 3. Essential activities were defined to include

[4] See https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf (last visited August 23, 2021). The order was held to be invalid and unenforceable on May 13, 2020, because it should have been—but was not—promulgated under the rulemaking procedures established in Wis. Stat. Ch. 227. *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

"outdoor activity," provided the persons engaged in the activity complied with specified social distancing requirements (six feet between people). *Id*. at 10-11, 20. Outdoor activity was expressly defined to include "walking, biking, hiking or running." *Id*. at 11. The exception also specified that playgrounds were closed, *id.*, but the context of that proscription—coming right after the limits on group outdoor activity due to social distance requirements—made it clear that the closure was intended to cover the typical use of playgrounds: physical activity by groups of children on playground equipment or in group games, as those activities would likely run afoul of the social distancing requirements. Under the plain terms of this exception, Meddaugh was not violating the order by riding his bicycle alone across the school grounds.

Deputy Matthews did not elaborate on how the stay-at-home order factored into his decision to stop Meddaugh, but his mention of it implies a belief that Meddaugh may have been violating the order. Yet Matthews did not refer to the specifics of the order or otherwise indicate he knew the scope of the order's exception for essential activities. Regardless of whether he was aware of the exception, however, Meddaugh was plainly not violating the order. While "an objectively reasonable mistake of law by a police officer can form the basis for reasonable suspicion to conduct a … stop[,]" *State v. Houghton*, 2015 WI 79, ¶52, 364 Wis. 2d 234, 868 N.W.2d 143, it would not be objectively reasonable to read the order as prohibiting Meddaugh from riding across the school grounds. Thus, reasonable suspicion cannot be based on a belief

that Meddaugh was violating the ordinance. *Id.*, ¶¶67-71 (a stop based on an officer's incorrect interpretation of an unambiguous statute would be unreasonable).[5]

The circuit court also cited the order as a factor supporting the stop, though it did so as an explanation of why there were fewer people outside than usual. (34:27; App. 32). Yet the fact fewer people were out and about generally, regardless of the time of day, does not itself provide a reasonable basis for concluding that those who *are* out may be committing a crime, especially given the order's exception for essential activities and the absence of any limitation on those activities to daytime hours. Moreover, Matthews acknowledged that, while he saw no one else out during his encounter with Meddaugh, he had seen other people out during recent weeks. (34:19-21; App. 24-26).

In short, there was no objectively reasonable basis to conclude that Meddaugh was violating any law when he rode his bicycle through the school yard at 12:40 a.m. because he was in a place "where no one should be around at that time." (34:27; App. 32). This is consistent with Matthews's affirmation at the suppression hearing that he was unsure what, if

[5] Matthews believed the order "did not create a crime." (34:21; App. 26). In fact, the order "purport[ed] to criminalize conduct pursuant to Wis. Stat. § 252.25" if a directive of the order was violated (such as leaving home without a proper purpose). *Palm*, 391 Wis. 2d 497, ¶36. Regardless of the deputy's misunderstanding, however, reasonable suspicion need not be linked to a specific crime. *Pugh*, 345 Wis. 2d 832, ¶¶9-10.

anything, Meddaugh was doing wrong and that he did not have evidence Meddaugh was doing anything illegal. (34:17, 18; App. 22, 23).

In addition to its unsupported conclusion that Meddaugh was in a place he was not supposed to be, the court cited the fact that Meddaugh did not stop when Matthews first drew parallel to Meddaugh and shined the squad spotlight on him. This does not and cannot provide reasonable suspicion in this case, for Meddaugh had the right to continue on his way.

As noted above, "when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about [their] business." *Young*, 294 Wis. 2d 1, ¶73, quoting *Wardlow*, 528 U.S. at 125. That means that when someone exercise the right to disregard the police and walk away, their doing so does not give rise to reasonable suspicion. *Id.*

Of course, the fact that a person responds to police presence with "unprovoked flight" may contribute to reasonable suspicion—but that is because "flight, by its very nature, is not 'going about one's business[.]'" *Wardlow*, 528 U.S. at 125. Similarly, "evasive" acts may be considered in the reasonable suspicion calculus. *State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989); *State v. Anderson*, 155 Wis. 2d 77, 82, 454 N.W.2d 763 (1990); *State v. Amos*, 220 Wis. 2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998). So, too, may an individual's repeated efforts to avoid police contact, engaging in possibly furtive

actions, or engaging in extreme means of avoidance, such as high-speed flight. *State v. Fields*, 2000 WI App 218, ¶19, 239 Wis. 2d 38, 619 N.W.2d.

But simply failing or refusing to respond to a command to stop is not "unprovoked flight" or "evasive" action; rather, it falls squarely into the category of "disregard[ing] the police and walk[ing] away[.]" *Young*, 294 Wis. 2d 1, ¶73. Thus, in *Pendelton*, this court held that the fact the defendant continued walking down a street without responding to an officer's order to stop did not add to the reasonable suspicion calculus. "After [the officer] asked Pendelton to stop, Pendelton did nothing to indicate that he was attempting to evade [the officer]. He did not alter his pace or route, take flight, attempt to hide, or engage in any other evasive conduct." *Pendelton*, No. 2017AP2081-CR, ¶28 (App. 70). Instead, he "continued to 'slowly kind of meander in a southeast direction on the sidewalk,' which he had every right to do." *Id.*, ¶27 (App. 70).

Like the defendant in *Pendelton*, Meddaugh's behavior was not "evasive" and did not amount to "flight." He did not run away from Matthews, or pick up his pedaling tempo, or alter his route. He did not try to hide from Matthews. He also did not try to hide or to conceal or throw away anything he was carrying. There is, in fact, no indication he changed his behavior in any way. He waved at Matthews and kept on his course, as he was entitled to do to exercise his right to refuse to engage with the police and to terminate the encounter. His doing so contributes nothing to the

reasonable suspicion calculus. *See also State v. Cummings*, No. 2017AP1583-CR, unpub. slip op. (WI App April 3, 2018), ¶¶4, 23 (App. 65) (although the defendant changed directions when he saw a squad car, he did not flee from the police, and so his change of direction did not add to reasonable suspicion calculus).

So there is no basis for believing that Meddaugh was violating a law by riding through the school yard or that it was suspicious for him to have disregarded Matthews's initial attempt to stop him. That leaves the two remaining factors the circuit court cited: Meddaugh's "dark" or "black" clothing and the time of day. These do not provide articulable suspicion to believe Meddaugh might be engaged in criminal activity.

The two factors considered together might suggest Meddaugh was trying to avoid being discovered or observed, and thus might be engaged in some unlawful activity. But whatever support that suggestion might offer for reasonable suspicion is immediately undermined by the fact Meddaugh had a flashing red light on his bicycle that was so noticeable it immediately drew the officer's attention. The suggestion is further undermined by Meddaugh's conduct once Matthews discovered and started following him. Again, Meddaugh did not try to hide from or evade the officer; he engaged in no furtiveness or attempt to hide or discard anything. He kept moving on his course, neither loitering nor evading. There was no specific information about the school

yard he was moving through that connected him to any unlawful activity—no reports of suspicious activity, no history of problems, no high-crime area.

Certainly, a person's clothing could figure in the reasonable suspicion calculus based on the wearer's conduct. *See State v. Matthews*, 2011 WI App 92, ¶¶11-14, 334 Wis. 2d 455, 799 N.W.2d 911 (finding reasonable suspicion where the defendant was walking late at night in a high-crime area wearing a ski mask and hooded sweatshirt and had an "unusual interaction" with a female who walked by him, and who the defendant then began following). The same is true for the time of day when it is linked to other indicia of possible illegal behavior that might commonly be committed at that time—for instance, observations of erratic driving around bar closing time. *Post*, 301 Wis. 2d 1, ¶36. But neither Meddaugh's clothes nor his being out after midnight link up with any of his conduct in a way that provides specific and articulable facts warranting a belief he might be engaged in criminal activity.

In sum, even if Matthews found Meddaugh's riding through the school yard at 12:40 a.m. was "unusual" and "concern[ing]" (34:4; App. 9), those are not specific and articulable facts supporting reasonable suspicion he might be engaged in criminal activity. A "quantum of individualized suspicion" is necessary for an investigatory stop; thus, the circumstances on which the stop is based "must not be so general that they risk sweeping into valid law-enforcement concerns persons on whom the requisite

individualized suspicion has not focused." *Gordon*, 353 Wis. 2d 468, ¶12. Stopping anyone on the school grounds at that time of day, as Matthews seemed to think was appropriate (34:18; App. 23), results in seizures based on a general circumstance rather than individualized suspicion.

It is true that "[n]o judicial opinion can comprehend the protean variety of the street encounter, and [a reviewing court] can only judge the facts of the case before [it]." *Terry*, 392 U.S. at 15. Nonetheless, comparing the facts in this case to the facts in cases finding a lack of reasonable suspicion offers further support for concluding the stop of Meddaugh was unreasonable.

First, in *State v. Washington*, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305, officers were "investigat[ing] a complaint of loitering and drug sales at an allegedly vacant house." *Id.*, ¶2. The officers saw Washington in front of the house and recognized him from previous encounters relating to narcotics sales. *Id.*, ¶¶2, 3. The officers ordered Washington to stop; he did, but then backed up a few steps and threw up his hands. When he did that, a towel concealing a bag of cocaine flew out of his hand. *Id.*, ¶2.

This court held there was no reasonable suspicion to stop Washington, as there was insufficient factual or legal basis in the record to support the officer's statement that they were going to cite him for loitering. *Id.*, ¶¶7, 17. Further, even though officers knew Washington had prior involvement with drugs

and was in front of a suspected drug house, that did not supply the requisite reasonable suspicion for a valid investigatory stop. *Id*. Additionally, though Washington had taken a couple of steps backwards after being ordered to stop, that was not evidence of an attempt to flee. *Id.*, ¶18.

As in *Washington*, where the state provided no basis to believe the defendant was loitering in front of the house, in this case the state provided no basis to conclude Meddaugh was violating any law riding his bicycle across the school grounds. Nor is there a basis to conclude that Meddaugh's initial disregard of Matthew's order to stop was an attempt to flee. Moreover, this case lacks anything like the more salient information police had in *Washington*. Meddaugh was not a known prior offender and he was not in proximity to a suspected site of criminal activity. As in *Washington*, the totality of the circumstances here does not support reasonable suspicion for an investigatory stop.

Similarly, in *Pugh*, 345 Wis. 2d 832, officers were patrolling an area where there was a vacant building known to be a drug house. *Id*., ¶4. They saw Pugh when he was "five-to-ten feet from two cars that were parked below a no-parking sign" at the back of that vacant building. *Id*., ¶3. Pugh admitted that one of the cars parked under the no-parking sign was his; instead of citing him for a parking violation, however, police asked him "if he had anything illegal on his person" based on the fact that the defendant had backed up a couple of steps and "bladed" away from

the officers. *Id.*, ¶¶4, 6. Pugh admitted that he had a gun in his possession, and he was charged with being a felon in possession of a firearm. *Id.*, ¶6.

This court held that Pugh was unlawfully detained. *Id.*, ¶13. In doing so, the court noted that being in an area of expected criminal activity, standing alone, is not enough to show particularized suspicion that the person is committing a crime. *Id.*, ¶12. Furthermore, while the police construed Pugh's "blading" away from them when he backed up to be suspicious, this court held that action added nothing to the reasonable suspicion calculus because it was a movement that was part and parcel of Pugh choosing—as was his right—to walk away and decline to engage with the officers. *Id.*, ¶12.

As in *Pugh*, Meddaugh's continuing to ride his bicycle adds nothing to the calculus, as he had the right to decline to engage with Deputy Matthews. And unlike in *Pugh*, Meddaugh was not parked illegally near a suspected drug house; he was riding his bicycle in an area with no known or suspected criminal activity, and the record does not show his presence in that area violated any law.

Next, in *State v. Diggins*, No. 2012AP526-CR, unpub. slip op. (WI App July 30, 2013) (App. 54-62), officers drove past Diggins, who was wearing "all black," and a companion, who was wearing lighter clothes. The men were leaning against the wall of a gas station. *Id.*, ¶3 (App. 54). The officers drove past the two men a few times, observed that they stood there

for about five minutes, and concluded the men were loitering. *Id*. The officers said that the gas station was in a "high crime area" and that "subjects [that] are usually dressed like that ... are either committing armed robberies or ... dealing drugs." *Id*. When the marked squad car arrived, Diggins and his companion walked to the opposite side of the street, and the officer testified it was his "impression" that Diggins saw the squad car before moving across the street. *Id*., ¶4 (App. 54). As two additional officers approached, officers conducted a field interview "to see if [Diggins] was [.] legally in the area, not committing any crimes or about to commit any crimes." *Id*., ¶5 (App. 54).

This court ruled that "standing for five minutes while doing nothing in a place to which the public is invited, while wearing black clothing, and then moving to another equally public place, even in a high crime area, is not a basis for a *Terry* stop." *Id*., ¶17 (App. 57). The officers' experience and opinion regarding how Diggins was dressed, without more, was not enough to establish reasonable suspicion of a crime. *Id*., ¶23 (App. 58). There were no complaints or concerns that anyone in the vicinity had "cause for alarm" nor a basis to conclude they were loitering. *Id*., ¶¶12-16 (App. 56-57). Further, this court noted the absence of a factual finding that Diggins's walk across the street to the bus stop was indicative of flight. *Id*., ¶13-14 (App. 56). As the court noted, "[m]ore than mere presence (*i.e*., hanging out) in a public place is required for reasonable suspicion that criminal activity is afoot." *Id*., ¶15 (App. 56).

Like Diggins, Meddaugh was in a public place, and there was no objective basis for concluding he was there unlawfully. Like Diggins, the fact he was wearing dark clothing adds nothing. As in *Diggins*, there was no indication of any complaint or "cause for alarm" about something going on around the school. Nor was there a finding—or a basis to find—that Meddaugh's continuing to ride after Matthew first hailed him was indicative of flight. To paraphrase *Diggins*, more than a bicycle ride through a school yard at 12:40 a.m. is required for reasonable suspicion that criminal activity is afoot.

Finally, Meddaugh has already argued that *Pendelton* supports concluding he was seized and that his continuing to ride after Matthews started following him does not support reasonable suspicion. This court's ruling in *Pendelton* also shows why all the circumstances in this case do not provide the necessary quantum of individualized suspicion.

In *Pendelton*, police responded to an early-morning call regarding two suspicious males who appeared to be loitering or looking in vehicles in a parking lot and had just run off. The only other description was that one was wearing "a black hoodie." 2017AP2081-CR, ¶¶5-6 (App. 67). An officer went to the lot and saw a black male in dark clothing who appeared to be leaving the parking lot and walking into a nearby alley. *Id.*, ¶7. (App. 67).

The officer drove through the alley, following the same path as the male for a short distance. *Id.*, ¶8 (App. 67-68). He could see that the male was not wearing a hoodie. *Id.* At the end of the alley, the male stepped into the street. *Id.*, ¶9 (App. 68). The officer asked the male to stop, but the male "continued to slowly kind of meander in a southeast direction on the sidewalk" towards a metal fence surrounding a residence, and walked south along the fence. *Id.* The officer got out of the squad car and instructed the male to stop and come to him. The male complied with the instruction, and in doing so turned his left side away from him and had his left arm across his body like a seatbelt formation, and he concealed his left hand in his left jacket pocket. The officer patted the man down and found a concealed weapon. *Id.*, ¶11 (App. 68).

This court held that the officers lacked articulable facts to support a reasonable suspicion for the seizure. The connection between Pendelton and the report of suspicious persons was weak because the caller also reported the males had just run away and the officers arrived ten minutes after the call. *Id.*, ¶26 (App. 70). There was no description other than two males wearing dark clothing, one of whom was wearing a black hoodie, but Pendelton was not wearing such a garment. *Id.* The fact that Pendelton did not stop when initially asked but instead continued to "slowly kind of meander" added nothing to reasonable suspicion because he had the right to ignore the request. *Id.*, ¶27 (App. 70). Nor, as noted above, did Pendelton do anything to indicate that he was attempting to evade the police. *Id.*, ¶28 (App. 70).

Though the officer testified they viewed the area as "a hot spot," mere presence in a high-crime area is insufficient to establish reasonable suspicion. Because the only facts connecting Pendelton to the caller's report were his presence in the area, his dark clothing, and his gender, the stop was unreasonable. *Id.*, ¶28 (App. 70).

The facts in this case show even less basis for a stop than in *Pendelton*. There was no call of suspicious activity, let alone a description, no matter how minimal, of a person engaged in such activity. There was no evidence the school ground is "a hot spot" of criminal activity. In addition to the absence of such specific, articulable facts, Meddaugh, like Pendelton, exercised his right not to engage with the police without altering his pace or route, taking flight, attempting to hide, or engaging in any other evasive conduct. Thus, as in *Pendelton*, the stop in this case was unreasonable.

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For all the reasons given above, Deputy Matthews stopped Meddaugh without having specific and articulable facts that warranted a belief Meddaugh might be engaged in criminal conduct. Therefore, the stop of Meddaugh violated the Fourth Amendment.

When an unlawful seizure occurs, the remedy is suppression of the evidence seized as a result of all the seizure. *Pugh*, 345 Wis. 2d 832, ¶13; *Washington*,

284 Wis. 2d 456, ¶19. Thus, the evidence seized from Meddaugh as a result of the stop must be suppressed.

CONCLUSION

For the reasons given above, this court should reverse the judgment of conviction and remand the case to the circuit court with directions that the judgment be vacated, that Meddaugh's suppression motion be granted, and that all evidence obtained as a result of the violation of Meddaugh's Fourth Amendment rights be suppressed.

Dated this 1st day of September, 2021.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 8,356 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 instead of full names of persons, 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.

Dated this 1st day of September, 2021.

Signed:
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