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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2021AP939-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, THE
HONORABLE GREGORY J. POTTER, PRESIDING

**BRIEF AND SUPPLEMENTAL APPENDIX OF
PLAINTIFF-RESPONDENT**

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INTRODUCTION

This appeal concerns a Fourth Amendment issue, namely, whether an officer had reasonable suspicion to perform a temporary investigatory stop.

Defendant-Appellant Jere J. Meddaugh pleaded no contest to one count of possession of between 10 and 50 grams of methamphetamine with intent to deliver. The conviction was based on a police encounter at approximately 12:40 a.m. on Sunday, April 26, 2020. During that encounter, a patrolling deputy observed a man in dark clothing riding a bicycle through the parking lot or playground behind a closed elementary school. At that time, the Wisconsin Safer at Home Order was in effect. The man did not stop when the deputy shined a spotlight on him and called for him to stop. The deputy followed the man and eventually stopped him. The man, who was later identified as Meddaugh, appeared agitated, and was carrying a scanner with Wood County Sheriff's Department displayed on the screen. While the deputy was speaking to him, he abruptly mounted his bicycle and rode off. The officer caught up with him, and a struggle ensued, in which Meddaugh attempted to reach for his right pocket. After arresting Meddaugh, police found a blade knife in his right pocket and a white crystalline substance in his backpack that was later determined to be methamphetamine.

Meddaugh filed a motion to suppress the search, arguing that the officer lacked reasonable suspicion to stop him in the first place. The trial court denied the motion, ruling that the totality of the circumstances provided reasonable suspicion for the stop.

The trial court's ruling was correct. Meddaugh's presence at a closed elementary school in the middle of the night while the Safer at Home Order was in effect would cause an objectively reasonable police officer to infer that criminal activity may be occurring, which allowed the deputy to

conduct a temporary stop to quickly resolve any ambiguity in the situation. Meddaugh's initial refusal to stop reinforced the deputy's reasonable suspicion under these particular facts. Meddaugh's arguments to the contrary misunderstand the law and fail to account for the totality of the circumstances. This Court should affirm the circuit court.

ISSUE PRESENTED

Did Deputy Matthews have reasonable suspicion to temporarily detain Meddaugh in an investigatory stop, based on his observation that Meddaugh was dressed in dark clothing and pedaling a bike behind a closed elementary school at 12:40 in the morning while the COVID-19 Safer at Home Order was in effect?

The trial court answered yes.

This Court should answer yes.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Neither is warranted. This Court can resolve the issue presented with a straightforward application of well-settled Wisconsin law regarding reasonable suspicion to conduct an investigatory stop. Wis. Stat. § 809.23(1)(b)1.

STATEMENT OF THE CASE

Meddaugh files a motion to suppress, and the court holds a hearing.

Before pleading no contest to possession of methamphetamine, Meddaugh filed a motion to suppress, arguing that the search was conducted after an illegal stop.¹

¹ Meddaugh moved to suppress the search as well as any statements that were made. (R. 12–13.) Because there was no testimony regarding statements, that was no longer an issue when the trial court ruled on the motion. (R. 34:26.)

(R. 12–13.) A hearing was held on June 26, 2020. (R. 34.) Deputy John Matthews of the Wood County Sheriff's Department was the sole witness.

Matthews was on patrol in Wisconsin Rapids at approximately 12:40 a.m. on April 26, 2020. (R. 34:3.) A flashing red light behind a closed elementary school caught his attention. (R. 34:3–4.) When he saw the flashing light, he drove onto the school property to investigate. (R. 34:4.) He saw a man wearing dark clothing, riding a bicycle across the playground on school grounds.² (R. 33:5–6; 34:4, 6, 8.)

At that time, Wisconsin was under the Safer at Home Order, related to the COVID-19 pandemic. (R. 34:4.)³ Matthews had not seen other people walking or riding by, and at that time of night he was “unsure as to why anybody would be back there.” (R. 34:4.) Matthews noted that it was “[v]ery unusual.” (R. 34:4.)

Matthews approached and turned on his squad car spotlight to shine it on the individual. (R. 34:5.) He was about twenty feet away. (R. 34:5.) He began driving alongside the man with the spotlight still illuminated. (R. 34:6.) The man on the bike looked at Matthews and waved. (R. 34:6.) Matthews yelled for him to stop. (R. 34:6.) The man did not stop. (R. 34:6.) He continued riding southbound across the playground at what Matthews described was a normal pace. (R. 34:6–7.) As the bicyclist left the school grounds, he drove

² Matthews testified at the preliminary hearing that Meddaugh was wearing “all black” clothing. (R. 33:5.) He testified at the suppression hearing that Meddaugh was wearing “old,” “dark,” or “black” clothing. (R. 34:4, 8, 12.) The trial court found that he was wearing dark clothing. (R. 34:26.)

³ See also Emergency Order # 28, Safer at Home Order, Apr. 16, 2020, available at: <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>

around two posts connected by a cable, designed to block the driveway. (R. 34:7–8.)

Matthews thought it was suspicious that a man dressed in black was behind a school in the early morning hours. (R. 33:6; 34:8.) Matthews assumed that the man saw the marked squad car and the spotlight illuminating him, yet he “continued to ride and didn’t stop on my command to stop.” (R. 34:8.)

After leaving school grounds, the man rode onto a sidewalk and proceeded southbound on 7th Street. (R. 34:8.) Matthews drove ahead of him, continued to shine the spotlight on him, and then stopped the man. (R. 34:8–9.) Matthews was not blocking his path, but the man stopped pedaling and dismounted his bicycle. (R. 33:6; 34:9.)

Matthews exited his squad car and announced himself as law enforcement. (R. 34:9.) The man revealed that he had headphones covering his ears. (R. 36:9.) Matthews asked him why he did not stop, and the man responded that he was cutting through the school grounds to go to Kwik Trip. (R. 34:9.) Matthews informed the man that he stopped him because of the suspicious circumstances of him being behind a school at that time of night, wearing dark clothing. (R. 34:10.) Matthews asked him his name, and the man refused to give it. (R. 34:10.) During this exchange, the man “was agitated, uncooperative,” and “profusely sweating.” (R. 34:10.)

Matthews noticed that the man had attached to his black hoodie a hand-held scanner with a split screen that said Wood County Sheriff’s Department in “LD lighting.” (R. 34:10.) When Matthews asked the man about it, he said that it was a walkie-talkie. (R. 34:11.) When Matthews responded that it looked like a hand-held scanner, the man admitted that it was, but said that it “wasn’t illegal.” (R. 34:11.) Matthews asked him for his name again. The man

said that his first name was Jerry. (R. 34:11.) He did not give Matthews his last name. (R. 34:11–12.) He told Matthews that he did not have to identify himself, and he did not want to talk with Matthews. (R. 34:12.) He then mounted his bicycle and began “pedaling rapidly away.” (R. 34:12.)

According to Matthews, the total time from when Meddaugh stopped and when he pedaled away was approximately thirty seconds. (R. 34:13.) Given that the man was wearing dark clothing at a closed school during the Safer at Home Order, at approximately 12:40 a.m., that he did not stop for a marked squad car when Matthews yelled “stop” and had a light illuminated on him, and that he refused to give Matthews his name, lied and said he had a walkie talkie instead of a police scanner, Matthews said that “red flags” were “building up.” (R. 34:12–13.)

When Meddaugh began pedaling away, Matthews immediately yelled stop. (R. 34:13.) Meddaugh did not stop. (R. 34:13.) Matthews caught up with him and escorted Meddaugh off the bicycle and onto the ground. (R. 34:13.) “He continued to resist.” (R. 34:13.) Matthews told Meddaugh to give him his hand, to stop resisting. (R. 34:13–14.) Meddaugh did not give him his hand; rather, he “put out his arms to try to throw [Matthews] off.” (R. 34:14.) Meddaugh tried to reach into his right pocket. (R. 34:14.)

At that time, another officer arrived on the scene and the two officers were able to arrest and put restraints on Meddaugh. (R. 34:14.) After he was arrested, the officers searched him. (R. 34:14–15.) A large folding knife was found in his right pocket. (R. 34:15.) His backpack was also searched, and inside was “a larger baggie with four smaller zip baggies that contained a white-like substance” later confirmed to be methamphetamine. (R. 33:8; 34:15.)

The court denies Meddaugh's motion to suppress.

After Matthews testified, the parties argued, and then the court issued an oral ruling. (R. 34:22–26.) Viewing the totality of the circumstances, the court denied the motion. The court noted that when the Deputy first saw Meddaugh, it was around 12:30 or 12:40 in the morning. (R. 34:26, 27.) There was a stay-at-home order in effect, meaning there was “very little traffic on the roads,” “even less than what’s normal at 12:40 in the morning.” (R. 34:26, 27.) Meddaugh was found cycling in dark clothing behind “a school where no one should be around at that time of day.” (R. 34:27.) When the officer first made contact, Meddaugh did not respond to a verbal command. (R. 34:27–28.) When the officer shone a light on Meddaugh and issued a verbal command, “he doesn’t react.” (R. 34:28.)

The court went on to note that when Meddaugh did stop, he was non-cooperative: he would not provide a name, lied about the equipment he had, and while still being questioned, left the deputy’s presence, even though he was told to stop and stay there. (R. 34:28.) Based on these circumstances, the court ruled that the officer had reasonable suspicion for the stop. (R. 34:28.) The court denied Meddaugh’s motion to suppress. (R. 34:28.)

Meddaugh appealed. (R. 30.)

STANDARD OF REVIEW

Whether evidence should have been suppressed is a question of constitutional fact. *State v. VanBeek*, 2021 WI 51, ¶ 22, 397 Wis. 2d 311, 960 N.W.2d 32. An appellate court reviewing the denial of a motion to suppress will uphold the circuit court’s findings of fact unless clearly erroneous, but it reviews de novo whether those facts constitute reasonable suspicion. *State v. Young*, 2006 WI 98, ¶ 17, 294 Wis. 2d 1, 717 N.W.2d 729. Reviewing courts independently and objectively

examine the facts known to the officer at the time of the alleged seizure, applying constitutional principles to them. *VanBeek*, 397 Wis. 2d 311, ¶ 22. The burden is on the State to establish that the stop was reasonable. *State v. Pickens*, 2010 WI App. 5, ¶ 14, 323 Wis. 2d 226, 779 N.W. 2d 1.

ARGUMENT

Deputy Matthews had reasonable suspicion to conduct an investigatory stop when he saw a man in dark clothing riding his bicycle through an elementary school playground around 12:40 a.m. while Wisconsin's Safer at Home Order was in effect.

A. Deputy Matthews conducted a temporary, investigatory stop when he stopped Meddaugh on 7th Street.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Young*, 294 Wis. 2d 1, ¶ 17. Consistent with Fourth Amendment protections, law enforcement may conduct an investigatory or *Terry*⁴ stop of a person if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Id.* ¶ 20; Wis. Stat. § 968.24.

An investigatory stop is a seizure for Fourth Amendment purposes. *Id.* It usually involves only temporary questioning and thus, constitutes “only a minor infringement on personal liberty.” *Id.*

To constitute an investigatory stop, “an officer must make a show of authority, and the citizen must actually yield to that show of authority.” *In re Kelsey C.R.*, 2001 WI 54, ¶ 33, 243 Wis. 2d 422, 626 N.W.2d 777. “Yet, not every display of

⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

police authority rises to a ‘show of authority’ that constitutes a seizure.” *Young*, 294 Wis. 2d 1, ¶ 65. “A police officer’s actions must be assessed in view of all the circumstances surrounding the incident” to determine if the actions would “cause a reasonable person to believe that he [or she] was not free to leave.” *Id.*

Here, Deputy Matthews conducted a temporary, investigatory stop when he stopped Meddaugh on 7th Street and Meddaugh dismounted his bicycle. At that point in time, Matthews made a show of authority by announcing himself as law enforcement and stating the reason for his stop, and Meddaugh yielded to that authority by stopping and dismounting his bicycle. (R. 34:9–10.)

The moment of seizure limits what facts a reviewing court considers in evaluating reasonable suspicion. *See Young*, 294 Wis. 2d 1, ¶ 23. A reviewing court “independently and objectively examine[s] the facts known to the officer at the time of the alleged seizure.” *VanBeek*, 397 Wis. 2d 311, ¶ 22.

The sole issue in this appeal is whether Matthews had reasonable suspicion to conduct the investigatory stop on 7th Street.⁵ As explained below, he did. This Court should affirm the circuit court.

⁵ This appeal does not concern whether all of the circumstances, including the transpiring events after the stop, amount to probable cause for the arrest. Rather, Meddaugh’s sole argument is that his suppression motion should have been granted because Deputy Matthews lacked reasonable suspicion to stop him on 7th Street in the first place. (*See generally* Meddaugh Br.)

B. A police officer may conduct an investigatory stop when he or she can reasonably infer, based on the totality of the circumstances, that a person has committed or is about to commit a crime.

An investigatory stop is constitutional “if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed.” *Young*, 294 Wis. 2d 1, ¶ 20. Reasonable suspicion means that the police officer “possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *Id.* ¶ 21 (citation omitted); *VanBeek*, 397 Wis. 2d 311, ¶ 28. 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, 454 N.W.2d 763 (1990)). That suspicion cannot be inchoate, but rather must be particularized and articulable: “A mere hunch that a person . . . is . . . involved in criminal activity is insufficient.” *Young*, 294 Wis. 2d 1, ¶ 21 (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

A police officer has reasonable suspicion to stop a person when he or she observes acts that are individually lawful, but when taken together, allow that officer to objectively discern “a reasonable inference of unlawful conduct.” *Waldner*, 206 Wis. 2d at 60. In other words, police do not need “to rule out the possibility of innocent behavior before initiating a brief stop.” *Id.* at 59 (citing *Anderson*, 155 Wis. 2d at 84). The facts in *Terry*, as discussed in *Waldner* and other cases, illustrate that principle.

In *Terry*, the Court upheld the legality of a police officer's investigative stop where the officer "observed the defendants repeatedly walk back and forth in front of a store window at 2:30 in the afternoon, and then confer with each other. The officer suspected the two of contemplating a robbery and stopped them to investigate further." *Waldner*, 206 Wis. 2d at 59.

Even though walking "back and forth in front of a store is perfectly legal behavior . . . reasonable inferences of criminal activity can be drawn from such behavior." *Id.* Indeed, "the suspects in *Terry* 'might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store.'" *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989) (quoting 3 Wayne R. LaFare, *Search and Seizure* § 9.2(c) at 357–58 (2d ed. 1987)). But the officer in *Terry* permissibly stopped the defendants because "Terry's conduct though lawful was suspicious" and "gave rise to a reasonable inference that criminal activity was afoot." *Waldner*, 206 Wis. 2d at 60.

In other words, the presence of ambiguity does not defeat reasonable suspicion. "Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity." *Id.* (citing *Anderson*, 155 Wis. 2d at 84). "Thus, when a police officer observes lawful but suspicious conduct," if that officer can objectively discern "a reasonable inference of unlawful conduct . . . , notwithstanding the existence of other innocent inferences . . . ," that officer may "temporarily detain the individual for the purpose of inquiry." *Id.* (citing *Anderson*, 155 Wis. 2d at 84).

Relevant here, “visibility, isolation of the scene, and the number of people in an area may all contribute to the determination of reasonable suspicion. *State v. Kyles*, 2004 WI 15, ¶ 58 & n.44, 269 Wis. 2d 1, 675 N.W.2d 449 (collecting cases); *see also In re Kelsey C.R.*, 243 Wis. 2d 422, ¶ 43. “The hour of the day may also be relevant,” because a person’s activities “may or may not be consistent with the typical behavior of law-abiding citizens at that time.” *Kyles*, 269 Wis. 2d 1, ¶ 58; *see also State v. Morgan*, 197 Wis. 2d 200, 214, 539 N.W.2d 887 (1995) (holding that the time of night may be considered when determining the legality of a pat-down search).

Circumstances deriving from the COVID-19 pandemic, coupled with other factors, can give rise to reasonable suspicion. For example, in *United States of America v. Sanchez*, a case out of the District Court of New Mexico, an agent questioned a woman while she was a passenger on a Greyhound bus. *United States of America v. Sanchez*, No. 21-CR-1040 KG, 2021 WL 5003442, at *1–2 (D.N.M. Oct. 28, 2021) (unpublished).⁶ The agent noticed her sitting in a window seat, directly next to another passenger. *Id.* at *1. This raised the agent’s suspicion, given the ongoing COVID-19 pandemic and the relative emptiness of the bus—there were only seven to ten people on board out of 60 to 80 seats. *Id.* According to his experience and training, smugglers often travel and sit together as a precautionary measure. *Id.* The court ruled that the agent had reasonable suspicion of criminal activity. *Id.* at *3. “The fact that she and a fellow passenger were sitting directly next to each other on an empty

⁶ Unpublished federal court opinions may be cited for their persuasive value. *See State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶ 7 n.6, 246 Wis.2d 814, 632 N.W.2d 878.

bus in the middle of a pandemic and claimed not to know each other is suspicious.” *Id.*

Finally, when a person disregards a police officer’s command or engages in evasive action, this disregard, under certain circumstances, can reinforce reasonable suspicion. *Young*, 294 Wis. 2d 1, ¶ 75. In *Young*, an officer pulled alongside a parked car containing five people and illuminated his spotlight on the car. *Id.* ¶ 10. It was around midnight, and the car was parked in a “problem area” with several nearby bars. *Id.* ¶ 6. In the officer’s experience, there was a correlation between people remaining in their cars for an extended time and the use of alcohol and narcotics in their cars. *Id.* ¶ 62. When the officer pulled up and shone his light on the car, the people had been in their car for at least five to ten minutes. *Id.* ¶ 64.

The moment the officer shined the spotlight, Young got out of his car. *Id.* ¶ 71. The officer called out to Young, and Young either did not hear or ignored the officer’s call. *Id.* The Wisconsin Supreme Court observed that “[i]f there were any doubt that [the officer] had reasonable suspicion before he illuminated the car, there can be no doubt that [the officer] had reasonable suspicion after Young got out of the car and disregarded [the officer’s] first order.” *Id.* Young’s behavior “smacked of evasion and flight,” and set against the other circumstances, “reinforced reasonable suspicion.” *Id.* ¶ 75.

People have the right to disregard the police without giving rise to reasonable suspicion, when an officer approaches them *without reasonable suspicion or probable cause*. *Id.* ¶ 73. However, if a person disregards an officer’s order, he or she “assumes the risk that the officer cannot establish that he had reasonable suspicion for an investigatory stop.” *Id.* ¶ 74.

C. Deputy Matthews had reasonable suspicion to stop Meddaugh.

Here, Deputy Matthews made several specific and concrete observations that give rise to a reasonable inference of unlawful conduct under the circumstances. First, he saw Meddaugh bicycling behind an elementary school at about 12:40 a.m. on a Sunday night. (R. 34:3.) While the bike had a flashing light attached, the man was wearing dark clothing. (R. 34:3–4, 8.) The school was closed, and there was no one else around. (R. 34:4.) Second, Meddaugh was out riding in the middle of the night when Wisconsin’s Safer at Home Order was in effect. (R. 34:4.) The order required all individuals within Wisconsin to stay at their place of residence, with certain exceptions such as “essential activities.”⁷ Matthews “hadn’t seen any other individuals out walking, riding by,” and at that time of night, he was “unsure as to why anybody would be back there.” (R. 34:4.) Taking these facts together, Matthews objectively discerned “a reasonable inference of unlawful conduct.” *Waldner*, 206 Wis. 2d at 60.

That particularized, articulable inference is as follows: when a man is found bicycling by himself through an elementary school playground in dark clothing in the middle of the night, during a time when a statewide order requires people to stay at their residences except to go about certain limited activities, one could infer that the person was out for an unlawful purpose.

The fact that Meddaugh had a flasher on his bicycle does not negate this reasonable suspicion. Indeed, the suspect in *Kelsey* was sitting in plain sight outside a storefront where most of the stores were closed, yet her presence in that

⁷ See Emergency Order # 28, Safer at Home Order, Apr. 16, 2020, available at: <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>

location, at the particular hour of night, gave rise to reasonable suspicion. *In re Kelsey C.R.*, 243 Wis. 2d 422, ¶ 43. It is the late hour, the fact that the elementary school was closed and no one else was around, and the fact that the Safer at Home Order rendered even fewer people out than normal that gave rise to reasonable suspicion. Meddaugh's behavior under these circumstances was not "consistent with the typical behavior of law-abiding citizens at that time." *Kyles*, 269 Wis. 2d 1, ¶ 58.

Of course, it could have been exactly as Meddaugh said, that he was cutting across the school grounds to go to Kwik Trip. But as *Terry* shows, Matthews was not required to rule out that type of inference before initiating a temporary stop to "quickly resolve" the ambiguities that were present. *Waldner*, 206 Wis. 2d at 60 (citing *Anderson*, 155 Wis. 2d at 84). The circuit court correctly concluded that Deputy Matthews had reasonable suspicion to conduct an investigative stop of Meddaugh under the circumstances.

While these facts alone give rise to reasonable suspicion, the additional fact that Meddaugh disregarded Matthew's call to "stop" while he was riding through the school grounds "reinforced reasonable suspicion." *Young*, 294 Wis. 2d 1, ¶ 75. Meddaugh's apparent disregard of the deputy's call, coupled with the suspicious circumstances of the time of night, absence of any people, and riding his bike on closed school grounds, is not consistent with someone disregarding police presence and going about his business. Rather, it is more consistent with evasive action. *Id.* The fact that Meddaugh did not speed up or necessarily change course does not mean that he was not evading the officer at the point when the officer yelled for him to stop. The facts show that the officer had trained a spotlight on Meddaugh, and Meddaugh undoubtedly saw the officer. (R. 34:6.) Yet when the officer called for him to stop, Meddaugh did not. (R. 34:6.) Rather, he rode off school grounds, around two posts and a

cable designed to block the driveway. (R. 34:7.) The officer could reasonably infer evasion.

If any of the facts would have been different, it might have been a closer call. For example, if Meddaugh had been riding on a street in broad daylight or even at dusk, when the Safer at Home Order was not in effect, and an officer decided to shine a spotlight on him and yell “stop,” Meddaugh’s disregard of that command would have been consistent with going about his business. But under the circumstances, it contributed to reasonable suspicion.

Deputy Matthews’ suspicion was more than a mere hunch. He provided specific, articulable facts that objectively give rise to reasonable inferences that criminal activity was afoot. The stop was proper. And because the stop was supported by reasonable suspicion, Meddaugh had no right to terminate it and flee. (R. 34:12); *State v. Goyer*, 157 Wis. 2d 532, 537, 460 N.W.2d 424 (Ct. App. 1990) (“[i]f a consideration of all the circumstances shows that the [lawful Terry stop] has not been completed, a suspect does not have a right to terminate the [stop].”).

D. Meddaugh’s arguments misunderstand the law and fail to account for the totality of the circumstances.

1. Meddaugh’s presence at a closed elementary school in the middle of the night while the Safer at Home Order was in effect give rise to reasonable suspicion.

Meddaugh argues that the State failed to explain why Meddaugh’s presence on the school grounds after hours gives rise to reasonable suspicion. (Meddaugh Br. 26–27.) His argument appears to be that because no sign explicitly prohibited him from being on the grounds, then his presence there after hours cannot form the basis for reasonable

suspicion. This is incorrect. Simply because it might have been technically lawful for Meddaugh to be on school grounds does not mean that it was not suspicious. “[S]uspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity.” *Anderson*, 155 Wis. 2d at 84; *see also Waldner*, 206 Wis. 2d at 59 (same).

As explained above, a police officer has reasonable suspicion to stop a person when he or she observes acts that are individually lawful, but when taken together, allow that officer to objectively discern “a reasonable inference of unlawful conduct.” *Waldner*, 206 Wis. 2d at 60. Various cases have held that darkness, visibility, isolation of the scene, and the number of people in an area may all contribute to the determination of reasonable suspicion. *Kyles*, 269 Wis. 2d 1, ¶ 58 & n.44; *In re Kelsey C.R.*, 243 Wis. 2d 422, ¶ 43. Here, Meddaugh’s presence at a closed elementary school, in dark clothing, in the middle of the night, constitutes articulable facts showing reasonable suspicion. And the Safer at Home Order, which required people to stay at their residences except for certain essential activities, provided an additional basis for reasonable suspicion. *United States of America v. Sanchez*, No. 21-CR-1040 KG, 2021 WL 5003442 (D.N.M. Oct. 28, 2021) (unpublished) (circumstances deriving from the COVID-19 pandemic, coupled with other factors, can give rise to reasonable suspicion.)

Meddaugh appears to suggest that he was taking advantage of the Safer at Home Order’s “outdoor activity” exception in the middle of the night. (Meddaugh Br. 27–28.) The totality of the circumstances, including his dark clothing, the time of night, and his presence at a closed elementary school, defy that explanation.⁸ That aside, objectively

⁸ In any event, Meddaugh told Deputy Matthews that he was cutting across the parking lot to go to Kwik Trip. (R. 34:9.)

speaking, it was reasonable for Deputy Matthews to consider Meddaugh's presence there in light of the Safer at Home Order suspicious enough to warrant a temporary stop to resolve any ambiguity. A reasonable officer would not be required to conclude that Meddaugh was taking advantage of the Safer at Home Order's "outdoor activity" exception in the middle of the night at a closed school playground.

Meddaugh contends that Deputy Matthews' mention of the Safer at Home Order implied a belief that Meddaugh was violating the Order. (Meddaugh Br. 28.) This misunderstands Matthews' testimony and the Order's role in the reasonable suspicion analysis. It is reasonable to consider whether someone's presence in a location at a particular time is unusual. For example, in *In re Kelsey C.R.*, officers observed a young girl leaning against a store-front in a rough neighborhood "at a time when most of the stores were closed." *In re Kelsey C.R.*, 243 Wis. 2d 422, ¶ 43. This gave the officers reasonable suspicion that "something was amiss." *Id.* The same is true in this case. The Safer at Home Order and its general requirement that people stay home, coupled with Meddaugh's presence behind a closed elementary school in the middle of the night, gave rise to reasonable suspicion.

Meddaugh goes on to argue that "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." (Meddaugh Br. 29.) He is wrong as a matter of law that the time of night makes no difference. *Morgan*, 197 Wis. 2d at 214 (holding that the time of night may be considered when determining the legality of a pat-down search). Further, he fails to account for the totality of the circumstances, such as the fact that he was pedaling behind a closed elementary school while wearing dark clothing, during a time where virtually no one was out, given the Safer at Home Order.

Meddaugh argues that Deputy Matthews “did not have evidence that Meddaugh was doing anything illegal.” (Meddaugh Br. 30.) But Matthews did not need “evidence.” He only needed reasonable suspicion. As explained above, the facts provided that.

2. Meddaugh’s disregard of Deputy Matthews’ order to stop reinforced reasonable suspicion.

Meddaugh incorrectly argues that he was “free to keep riding” because Deputy Matthews did not have reasonable suspicion to stop him on school grounds. (Meddaugh Br. 21.) As explained, Matthews’ observations provided concrete and specific facts that gave rise to reasonable suspicion. “A person who disregards a police officer’s order assumes the risk that the officer cannot establish that he had reasonable suspicion for an investigatory stop.” *Young*, 294 Wis. 2d 1, ¶ 74. “The person who believes he is exercising his Fourth Amendment rights by disregarding the officer may be subjecting himself to criminal prosecution if the officer has reasonable suspicion to make a stop.” *Id.* Deputy Matthews had reasonable suspicion here.

Meddaugh cites *State v. Pendelton* and argues that “simply failing or refusing to respond to a command to stop is not ‘unprovoked flight’ or ‘evasive’ action,” and therefore, it does not add to the reasonable suspicion calculus. (Meddaugh Br. 31.) But *Pendelton* does not hold that a suspect’s disregard of a command to stop, without altering his pace or attempting to hide, categorically falls outside reasonable suspicion. Rather, the facts and context matter to whether a decision not to stop is lawfully going about one’s business, or whether it is evasive action that could reinforce reasonable suspicion.

A closer look at *Pendelton* shows why this is so. There, officers were investigating a complaint that at least one male wearing a black hooded sweatshirt was looking into vehicles around 1:45 a.m. in a closed church parking lot. *State v. Pendelton*, 2018 WI App 45, ¶¶ 5–6, 383 Wis. 2d 602, 918 N.W.2d 128 (unpublished). The caller reported that the suspicious males had run away, and officers arrived at the scene ten minutes after the call. *Id.* ¶ 26. One of the responding officers noticed a male exiting the parking lot and turning into an alley. *Id.* ¶ 7. This man was wearing a “nice” jacket, not a hooded sweatshirt. *Id.* ¶ 8. The officer asked the man to stop, and initially, the man continued to slowly walk on the sidewalk. *Id.* ¶ 27. This Court held that at that point, the officer lacked reasonable suspicion. *Id.* ¶ 26.

Because of this, the man had “every right” to continue on his way when the officer told him to stop. *Id.* ¶ 27. Putting all the facts in context, the man’s disregard of the officer’s command did not add to or create reasonable suspicion. The man did nothing to indicate that he was attempting to evade the officer. *Id.* ¶ 28. He did not alter his pace or take flight. *Id.* But further, and importantly, “*there were no facts presented that established that it was unusual for a person to be in that alley on a Saturday night.*” *Id.* (emphasis added). And, when the officers saw the man, it was shortly after the caller reported that the suspects had fled the scene. *Id.* ¶ 26. The man the officers saw was not dressed in the same way as the suspects. *Id.* ¶ 8. Placing the facts in context, the man’s disregard of the officer’s command to stop was lawful because there was no reasonable suspicion to stop him. *Id.* ¶ 27.

When the facts of this case are placed in context, Meddaugh's disregard of Deputy Matthew's call to stop reinforced reasonable suspicion.⁹ Unlike *Pendelton*, the hour of night, coupled with the Safer at Home Order, established it was unusual, and even suspicious, for someone to be behind an elementary school. And while there were concrete facts in *Pendelton* to show that the man the officers saw was not the suspect (such as the difference in clothing), similar negating facts are not present here.

Meddaugh argues that he was not engaging in evasive action because he did not alter his pace on the bike and did not try to hide when the officer trained the spotlight on him. (Meddaugh Br. 30–31.) This argument is unpersuasive. When Deputy Matthews shined a spotlight on him, there was nowhere for him to hide. Unlike the person who was slowly “meandering” in *Pendelton*, Meddaugh was pedaling on a bike, clearly saw the officer by virtue of his initial “wave,” did not stop when Matthews told him to stop and continued riding through the grounds and eventually around barriers onto a sidewalk.

In *Young*, the suspect's decision to get out of the car and ignore the officer's command to stop “smacked of evasion and flight,” as discussed above. *Young*, 294 Wis. 2d 1, ¶ 75. Granted, the suspect in *Young* arguably altered his conduct when he saw the officer, but that was because in that case, he was sitting inside a parked car before the officer illuminated

⁹ Meddaugh pointed out that he had headphones on, suggesting that he could not hear the officer. (Meddaugh Br. 20 n.2.) But the circuit court did not find that Deputy Matthews knew Meddaugh had headphones on or that he knew Meddaugh could not hear him when he was calling to Meddaugh to stop. The test for reasonable suspicion is what a reasonable officer would conclude under the circumstances presented to him or her. *State v. VanBeek*, 2021 WI 51, ¶ 22, 397 Wis. 2d 311, 960 N.W.2d 32. That said, when Matthews asked Meddaugh why he did not stop, Meddaugh did not say it was because he could not hear Matthews. (R. 34:9.)

the car with a spotlight. *Id.* ¶¶ 71–75. Meddaugh was already moving on a bicycle when the officer attempted to make contact with him, so the fact that he did not visibly alter his pace does not mean that he was not evading Deputy Matthews. One can reasonably infer evasive action even if there was no apparent change of pace on the bike.

Meddaugh cites *State v. Washington*, but that case is not on all fours with this case. (Meddaugh Br. 34); *State v. Washington*, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305. There, officers investigated a complaint of loitering and drug sales at an allegedly vacant house. *Washington*, 284 Wis. 2d 456, ¶ 2. Washington was in front of the suspect house, and after one of the officers recognized him, they ordered him to stop. *Id.* The trial court found the initial stop unreasonable, and this Court agreed. *Id.* ¶¶ 7, 17. “Investigating a vague complaint of loitering and observing Washington in the area near a house that the officer believed to be vacant, even taken in combination with the officer’s past experiences with Washington and his knowledge of the area, does not supply the requisite reasonable suspicion for a valid investigatory stop.” *Id.* ¶ 17.

This case presents materially different facts, and is therefore unhelpful. Unlike the suspect in *Washington*, Meddaugh was present in an area where no one should be.

Meddaugh argues that this case is like *Washington*, because “the state provided no basis to conclude Meddaugh was violating any law riding his bicycle across the school grounds.” (Meddaugh Br. 35.) As explained, the fact he may not have technically been violating the law does not mean that reasonable suspicion is not present. A police officer has reasonable suspicion to stop a person when he or she observes acts that are individually lawful, but when taken together, allow that officer to objectively discern “a reasonable inference of unlawful conduct.” *Waldner*, 206 Wis. 2d at 60. Meddaugh also argues that like the suspect in *Washington*,

he made no attempt to flee. (Meddaugh Br. 35.) That argument is also a nonstarter, for reasons already explained. And *Washington* does not hold that a suspect's disregard of a command to stop, without altering one's pace or attempting to hide, categorically falls outside reasonable suspicion.

Meddaugh also cites *State v. Pugh*, but if anything, that case supports the State's position. (Meddaugh Br. 35.) There, officers stopped and questioned a man who was seen parking below a "no parking" sign at a vacant and boarded-up apartment building. *State v. Pugh*, 2013 WI App 12, ¶¶ 2–3, 345 Wis. 2d 832, 826 N.W.2d 418. After the man said that he had been parking there since before the building was boarded up, the officers switched their line of questioning to a different topic. *Id.* ¶¶ 4–5. The court ultimately decided that the officers had at the outset reasonable suspicion that Pugh may be parking illegally. *Id.* ¶ 10. While this was not a crime, the officers "had a right to ask Pugh about it." *Id.* Once the officers had finished asking him questions about the parking matter, Pugh "was equally free to walk away." *Id.*

Similar to the suspect in *Pugh*, Meddaugh was in an elementary school playground in the middle of the night when, given the state order, very few people should be out. Deputy Matthews had reasonable suspicion to stop Meddaugh and inquire about his presence.

Meddaugh cites *Pugh* primarily because the Court held an unlawful seizure occurred after the officers switched topics, because the officers lacked reasonable suspicion from that point forward. *Id.* ¶¶ 5–6, 13. As such, "Pugh had the right to walk away [after the parking matter concluded]" and "without more, backing away from a police officer is not sufficient objective evidence supporting a reasonable suspicion." *Id.* ¶ 12. Meddaugh cites this part of the case to argue that he was likewise free to continue riding his bicycle after Deputy Matthews attempted to stop him. (Meddaugh

Br. 36.) As explained above, that argument fails because there was reasonable suspicion here.

Meddaugh also cites *State v. Diggins*, but that case has materially different facts, and is therefore unhelpful. (Meddaugh Br. 36–37.) There, an officer observed Diggins and another person with their backs against the wall of a gas station. *State v. Diggins*, 2013 WI App 105, ¶ 3, 349 Wis. 2d 787, 837 N.W.2d 177 (unpublished). The gas station was in a “high crime” area, and Diggins was dressed all in black. *Id.* The officer drove past the gas station several more times and concluded that Diggins was loitering. *Id.*

Diggins and his companion started walking away from the gas station, and the officer testified that it was his “impression,” although he could not testify with certainty, that Diggins actually saw the squad car before crossing the street. *Id.* ¶ 4. At that point, the officer stopped Diggins. *Id.* ¶ 5. This Court concluded that there was no reasonable suspicion that Diggins was loitering. *Id.* ¶¶ 12–17. On the record before the Court, “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.

Meddaugh argues his case is like *Diggins* because Meddaugh was in a public place, and there is no objective basis for concluding that he was there unlawfully. (Meddaugh Br. 38.) But in *Diggins*, the suspect was in a public place where the public was *invited*. *Diggins*, 349 Wis. 2d 787, ¶ 17. Here, Meddaugh was in a place where no one should have been. And the fact that Diggins walked away provides no insight into whether Meddaugh continuing to ride adds to reasonable suspicion. *Id.* ¶ 14.

Finally, Meddaugh cites *Pendelton* again, arguing that it “shows why all the circumstances in this case do not provide [reasonable suspicion].” (Meddaugh Br. 38–40.) *Pendelton*’s circumstances are too different to be helpful. In that case, the officers were looking for a suspect with specific descriptors. *Pendelton*, 383 Wis. 2d 602, ¶¶ 5–6. They came across, and tried to stop, someone who did not fit the description and who was not in the right location, since the suspect had run away. *Id.* ¶¶ 8, 26. Under those circumstances, the officers lacked reasonable suspicion. *Id.* ¶ 26. *Pendelton* does not require officers to be investigating reported unlawful activity in order to have reasonable suspicion. The case does not show that Deputy Matthews lacked reasonable suspicion here.

Meddaugh has cited no case that undermines the circuit court’s ruling. The investigatory stop was made pursuant to reasonable suspicion. The motion to suppress was properly denied.

CONCLUSION

The State respectfully requests that this Court affirm the judgment of conviction and the circuit court's denial of the motion to suppress.

Dated: November 16, 2021.

Respectfully submitted,

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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 7051 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of November 2021.

Electronically signed by:

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