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

REPLY BRIEF OF DEFENDANT-APPELLANT

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISION

OTHER AUTHORITIES CITED

ARGUMENT

The totality of the circumstances did not establish reasonable suspicion to justify the seizure of Jere Meddaugh; thus, the seizure and resulting search of Meddaugh were unlawful.

Meddaugh argued in his brief-in-chief (at 20-24) that he was seized for purposes of the Fourth Amendment when Deputy John Matthews drove his marked squad car ahead of Meddaugh, who was pedaling his bicycle on the sidewalk, and then got out and approached Meddaugh. The state agrees. (State's brief at 12). Thus, as the state notes, the issue is whether Deputy Matthews had reasonable suspicion to make an investigatory stop of Meddaugh at that point, as the circuit court held. (*Id.*).

To summarize the facts described in Meddaugh's brief-in-chief (at 7-12), these are the totality of the circumstances in this case: Due to the coronavirus pandemic, the statewide Safer 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 schoolyard. He had on dark clothing, but he had a flashing red rear light on his bicycle. Deputy Matthews, who was driving nearby, noticed the flashing red light and drove onto the schoolyard to see what it was. (33:4-5, 10-11; 34:3-5, 8, 16-17, 19-20; A-Ap. 8-10, 13, 21-22, 24-25, 39-40, 45-46).

Matthews began following Meddaugh and then illuminated him with the squad spotlight and called out to him to stop. Meddaugh did not stop. Instead, Meddaugh waved at Matthews and kept pedaling at the same pace across and then off the school grounds. As Meddaugh kept riding, Matthews, persisting in his attempt to talk to Meddaugh, drove ahead of Meddaugh, leading Meddaugh to stop and dismount his bicycle. (33:5-6; 34:5-6, 8-9, 13-14; A-Ap. 10-11, 13-14, 18-19, 40-41).

The circuit court concluded the totality of the circumstances gave Matthews reasonable suspicion to stop Meddaugh. (34:27-28; A-Ap. 32-33). The state defends this conclusion, arguing Matthews had reasonable suspicion because he was behind a closed school wearing dark clothing at a late hour and when fewer people were out because of the Safer at Home Order. (State's brief at 17-18, 19-22). These circumstances, the state says, lead to inference that Meddaugh "was out for an unlawful purpose." (State's brief at 17). It further argues that, while those circumstances are enough alone to establish reasonable suspicion, Meddaugh's failure to stop at Matthews's first command to do so amounted to evasive behavior that "reinforced" the reasonable suspicion already present. (State's brief at 18, 22-28). The state is wrong.

Begin with the circumstances the state believes are sufficient to support reasonable suspicion: riding a bicycle illuminated by a red flashing light across a school grounds while wearing dark clothing at

12:40 a.m. during a period when the Safer at Home Order was in effect. Meddaugh does not dispute these factors are all relevant to assessing reasonable suspicion. In particular, contrary to the state's misreading of his argument (state's brief at 21), Meddaugh does not contend that the time of day makes no difference, and he expressly addressed time of day in his brief-in-chief (at 32-33). Even considering all these factors together, however, does not support an inference Meddaugh "was out for an unlawful purpose."

Time of day "is relevant without being independently dispositive." *United States v. Pacheco*, 841 F.3d 384, 394 (6th Cir. 2016) (quoted sources omitted). This is so because while most people are out and about during the day, others are legitimately out and about in the middle of the night, whether from necessity (*e.g.*, employment) or choice (*e.g.*, night owls who prefer the quiet of midnight to the bustle of the day). While there are fewer such people, being out at 12:40 a.m. does not make one suspicious without more.

The Safer at Home Order does not change this fact. As Meddaugh argued (brief-in-chief at 27-29), and the state acknowledges (brief at 20), the Order did not impose a lockdown, but included broad exceptions for "essential activities." Thus, being out in public while the Order was in effect was not necessarily unusual or unlawful. Indeed, because there were generally fewer people out at 12:40 a.m. even before it was issued, the Order would have had a minimal effect on the activities of people in the overnight hours, but would

be more salient to the stop of someone during the daylight hours. Thus, it adds nothing to the reasonable suspicion calculus in this case.

This shows why the state's reliance on *United States v. Sanchez*, No. 21-cr-1040 KG, 2021 WL 5003442 (D.N.M. Oct. 28, 2021) (Reply App. 22-30), is misplaced. (State's brief at 15, 20). That case involved conduct one would *not* expect during the pandemic—two people who claimed not to know each other sitting in adjacent seats on a bus, contrary to social distancing rules. *Id.*, 2021 WL 5003442, *1, *3 (Reply App. 22, 24). On top of that, the conduct was deemed to support reasonable suspicion because it was consistent with another common behavior of drug smugglers—sitting together as a precautionary measure. *Id.* Again, being out at night by itself is not an inherently suspicious activity, so being out at night when there is also a Safer at Home Order is not inherently suspicious, either.

The question, then, is what more there is, what other facts allow an inference the person is out at that hour for an unlawful purpose? The time of day must be 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. *See, e.g., State v. Post*, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634. The other facts cited by the state do not provide any indicia of a criminal act that might be afoot at that hour.

Meddaugh's dark clothing? As noted in Meddaugh's brief-in-chief (at 32-33), a person's clothing could figure in the reasonable suspicion calculus based on the wearer's conduct. Meddaugh was not lurking in the shadows of the school in apparent contemplation of burglary or vandalism. He rode across school grounds with a bright, flashing red light that was intended to—and did—call immediate attention to himself. While the state asserts the red flashing light does not "negate" reasonable suspicion (brief at 17), it is an obvious part of the totality of the circumstances here and it cripples the inference that riding a bike across a schoolyard at 12:40 a.m. while wearing dark clothing shows Meddaugh "was out for an unlawful purpose" (*id.*). It is not reasonable to infer that someone "out for an unlawful purpose" would advertise so prominently his presence, his course of travel, his activities.

Further, there was no specific information about the schoolyard he was moving through that connected him to any unlawful activity—no reports of suspicious activity, no history of problems with vandalism or other unauthorized activity at the school (34:17; A-Ap. 22), no evidence this was a high-crime area. So Meddaugh's being out in dark clothing after midnight during the time a Safer at Home Order was in effect does not link up with specific and articulable facts warranting a belief he might be engaged in criminal activity.

This brings us to the fact that, when Meddaugh rode his bicycle across the school grounds, the school was closed. In the circuit court the state argued this was suspicious because Meddaugh "was where he shouldn't be." (34:23; A-Ap. 28). The circuit court agreed, saying Meddaugh was "where no one should be around at that time of the day…." (34:27; A-Ap. 32).

Yet the record does not show that Meddaugh was unlawfully pedaling across the schoolyard. As Meddaugh argued in his brief-in-chief (at 26-27), the gate to the schoolyard was open, which is why Matthews could drive his squad car onto the grounds. (34:17; A-Ap. 22). Matthews did not know of any posted signs prohibiting entry onto the grounds. (33:12; 34:17; A-Ap. 22, 47). He agreed the school is "a public location[.]" (33:11-12; A-Ap. 46-47). Thus, nothing in the record shows that riding across the school grounds was unlawful.

Instead of showing Meddaugh was unlawfully on the school grounds, the state now argues that it does not matter if he was lawfully pedaling across the grounds. After all, the state argues, reasonable suspicion can be based on entirely lawful conduct. Indeed, it faults Meddaugh for mistakenly believing unlawful conduct is a necessary predicate to a finding of reasonable suspicion. (State's brief at 14, 19-20). This misapprehends Meddaugh's argument.

Meddaugh acknowledges that "there need not be a violation of the law to give rise to reasonable suspicion." *State v. Anagnos*, 2012 WI 64, ¶56, 341

Wis. 2d 576, 815 N.W.2d 675. *See also State v. Waldner*, 206 Wis. 2d 51, 57, 59, 556 N.W.2d 681 (1996). But the lawfulness of Meddaugh's conduct is relevant here because, as noted, the state argued in the circuit court that Meddaugh was unlawfully on the grounds, and the circuit court agreed and cited that conclusion as a basis for finding reasonable suspicion. (34:23, 27; A-Ap. 28, 32). Thus, review of the circuit court's decision requires an assessment Meddaugh was acting unlawfully.

Furthermore, if the circuit court was wrong about the lawfulness of Meddaugh's conduct, then it erred in partially basing its finding of reasonable suspicion on inferences made from that incorrect belief. Even though unlawful activity is not required to find reasonable suspicion, the belief that Meddaugh is in a place no one is supposed to be is crucial to the inferences that can reasonably be drawn from Meddaugh's act of riding across the school grounds. As a matter of logic, when a person is in a place where he is not supposed to be, there is a reasonable basis to think the person may be up to illegal conduct. Thus, if Meddaugh was not violating any law by riding his bicycle across the schoolyard, the totality of the circumstances on which reasonable suspicion may be found consists of Meddaugh lawfully riding his properly illuminated bicycle in a public place wearing dark clothes, and at a late hour when the Safer at Home Order was still in effect.

Any one of these facts, standing alone, is insufficient—though of course that is not the test this court must apply: it must look to the totality of the facts taken together. "The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts." *Waldner*, 206 Wis. 2d at 58. The building blocks of facts here all involve lawful behavior: A man out alone riding his properly lighted bicycle across a publicly accessible schoolyard at 12:40 a.m. without stopping, conduct permitted by the Safer at Home Order. The cumulative effect of Meddaugh's lawful behavior is of a man engaging in lawful behavior only and from which no inference of criminal behavior arises.

Indeed, it is telling that Matthews could not articulate what Meddaugh might have been doing wrong. (34:18; A-Ap. 23). The inability to articulate what Meddaugh might be doing wrong illustrates the lack of linkage between what Matthews observed and a reasonable inference of criminal behavior and thus shows the officer was acting on an inarticulate hunch. For instance, the facts here are not like those in *Waldner* and *Anagnos*, where drivers made a series of lawful but unusual and impulsive driving choices that were suggestive of impairment. *Waldner*, 206 Wis. 2d at 60-61; *Anagnos*, 341 Wis. 2d 576, ¶¶57-58. Instead, the facts of Meddaugh's conduct suggest nothing but a man going about his business on his bicycle, albeit late at night during a pandemic. They do not support a reasonable inference of criminal activity, and

therefore the stop was not justified by reasonable suspicion.

This brings us to the state's argument that when Meddaugh continued to ride after Matthews shined his squad light and shouted "stop," Meddaugh's conduct "reinforced" the reasonable suspicion already established by the facts. (State's brief at 16, 18, 22-28). This argument is inconsistent with common sense and the case law.

First, if Matthews already had reasonable suspicion for the stop when he shined his light on and shouted at Meddaugh on the school grounds, the analysis is over. The subsequent stop was lawful, and what Meddaugh did after Matthews acted is superfluous to assessing the legality of the seizure. For the reasons given above, Matthews did *not* have reasonable suspicion to stop Meddaugh as he was riding across the school grounds.

To the extent the state is suggesting that Meddaugh's continuing to ride should be considered in assessing the totality of the circumstances to provide the reasonable suspicion he was lacking, then its argument must be rejected. The state acknowledges the case law cited by Meddaugh (brief-in-chief at 30-32, 34-40) holding that a person has a right to disregard the police when they approach and issue a command without reasonable suspicion. (State's brief at 16, 22-27). Again, if Matthews lacked reasonable suspicion to stop Meddaugh, then Meddaugh had the

right to continue on his ride without his refusal to stop being considered in the reasonable suspicion calculus.

Moreover, even if evasion or flight could be considered in the totality of the circumstances in this case, Meddaugh engaged in nothing of the sort. Doing nothing to change how one is going about one's business cannot constitute "evasive" conduct without changing the ordinary meaning of the word. *See Webster's Third New Int'l Dictionary* 786, 787 (unabr. ed. 1993) ("evasive" means "tending to evade"; "evade" means "to slip away: give someone the slip"). Nor, for the same reason, can continuing to pedal on the same course at the same pace constitute "flight." *Id.* at 870 ("flight" means "an act or instance of running away").

While it is true Meddaugh could not simply hide once Matthews trained his spotlight on the bicycle (state's brief at 24), a bicyclist can turn quickly and head off into areas a squad car cannot follow—yet Meddaugh pedaled on, straight ahead, pace unchanged. (34:7, 19; A-Ap. 12, 24). Nor is it significant that Meddaugh rode around the cable at the end of the school grounds, for Matthews did, too, as he continued to follow Meddaugh. (34:6-8; A-Ap. 11-13). To infer from the facts here that Meddaugh was fleeing or evading, as the state asks this court to do (brief at 25), would be to nullify the right to go about one's business.

Finally, the state's reliance on case law for this argument is misplaced. First, it relies prominently on *State v. Young*, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d

729. (State's brief at 16, 22, 24-25). The facts there are easily distinguished, for Young clearly "altered his course of conduct" in response to the officer's illumination of the parked car Young had been sitting in for at least 5 to 10 minutes before the officer acted. *Id.*, ¶75. Young then ignored two commands to return to the car and tried to flee. *Id.*, ¶¶11, 75. Again, Meddaugh was not stationary, only to flee when Matthews approached. He was moving legally across the schoolyard and did not alter his course of conduct in response to Matthews's presence.

Further, the state asserts that the cases Meddaugh cited (brief-in-chief at 34-40) are distinguishable or support its position. These arguments miss the mark.

To begin with *State v. Pendelton*, No. 2017AP2081-CR, unpub. slip op. (WI App June 19, 2018) (Reply App. 16-21), the state claims the facts there are distinguishable, pointing to the hour of night and the fact police had a description of a suspect that Pendelton did not match. (State's brief at 22-24, 28). But the time of night does not meaningfully differ—12:40 a.m. here, 1:45 a.m. in *Pendelton*. *Id.*, ¶5 (Reply App. 16). Further, while the defendant did not match the description of the suspect, the fact that there was a report of suspicious behavior in the area Pendelton was found—an area that was a "hot spot" for crime—is certainly relevant to reasonable suspicion. *Id.*, ¶¶28-29 (Reply App. 19). The absence of those factors here shows the lack of a basis for reasonable suspicion.

As to *State v. Washington*, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305, and *State v. Diggins*, No. 2012AP526-CR, unpub. slip op. (WI App July 30, 2013) (Reply App. 3-11), the state asserts they are not helpful because, unlike the defendant there, Meddaugh "was present in an area where no one should be." (State's brief at 25, 27). As noted above, the state has not shown that to be the case nor responded to Meddaugh's argument that he was lawfully riding across the schoolyard.

Finally, as to *State v. Pugh*, 2013 WI App 12, 345 Wis. 2d 832, 826 N.W.2d 418, the state asserts that case supports the conclusion Matthews could stop Meddaugh to inquire why he was riding through the schoolyard. But the initial encounter with Pugh was based on a clear violation of a parking restriction. *Id.*, ¶3. Again, there is no basis to conclude Meddaugh was violating any law by riding across school grounds on his way to the store.

In sum, even if Matthews found Meddaugh's riding through the schoolyard at 12:40 a.m. was "unusual" and "concern[ing]" (34:4; A-Ap. 9), those are not specific and articulable facts supporting reasonable suspicion he might be engaged in criminal activity. Thus, the seizure and resulting search of Meddaugh violated the Fourth Amendment.

CONCLUSION

For the reasons given above and in Meddaugh's brief-in-chief, 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 13th day of December, 2021.

Respectfully submitted,

Electronically signed by
Jefren E. Olsen

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Defendant-Appellant

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 2,985 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 13th day of December, 2021.

Signed:
Electronically signed by
Jefren E. Olsen
JEFREN E. OLSEN
Assistant State Public Defender