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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2024AP000931-CF

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

JOSEPH PAUL MORELLO,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Circuit Court
for Rock County, the Honorable Barbara W. McCrory, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Did officers have a reasonable suspicion to stop Morello's vehicle.

Answered by the Circuit Court: Yes.

This Court should answer: Yes.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Oral Argument is not requested because it is expected that the briefs will fully address the issue.

Publication is not warranted.

STATEMENT OF THE CASE

On May 2nd, 2022, Officer Asilis of the Beloit Police Department was working in his capacity as a law enforcement officer. (24:6:20-22). At approximately 12:04 a.m. there was a dispatch regarding shots fired in the area of the 1600 block of Hackett in the City of Beloit. (24:7:8-15, 22:1). An officer advised he heard two gunshots to the south and no evidence was located at the scene in the 1600 block of Hackett. (24:9:4-9). There was another call regarding shots fired that came from the 1900 block of Afton Road in the Township of Beloit. (24:9:10-14). Fired cartridge casings were found in that area. (24:10:1-2).

A Beloit Township officer advised that a witness on Afton Road reported seeing a black Chevy Avalanche leaving the area

approximately 15 minutes after the initial call for service came in. (24:10-11:20-4). Asilis described an Avalanche as having a flatbed similar to a pickup and stated it looks like a pickup truck. (24:17:8-11). The Township officer was advised the vehicle was seen leaving north on Afton Road. (24:11:4-5).

A witness observed a black dark-colored pickup truck that was pointing a laser in the area of Whipple and Grant. (24:13:16-18). The witness observed that, shortly before the original shots fired from the 1600 block of Hackett was reported, and law enforcement became aware of that at 12:36. (24:13-14:12-2). At approximately 12:50 or 12:51, Officer Muniz advised she saw a black colored Chevy Avalanche traveling at a high rate of speed on Division from Liberty. (24:14:15-25).

Asilis first came across a Chevy Avalanche at 12:51. (24:15:15-16). The first Avalanche was in the Woodman's parking lot on South Madison Road. (24:15:15-23). Asilis conducted a high-risk traffic stop of the Avalanche and had contact with the occupant. (24:14-15). Through the course of that contact Asilis and other officers determined that the vehicle was not involved. (24:16:13-19). That contact lasted approximately eight minutes and the occupant was released. (24:16:11-21). Asilis indicated at that point they were looking for someone who had been involved in or was a witness to the shots fired. (24:16:2-25). The Woodman's was 1.7 miles from the place where the casings were found. (24:17:14-20).

Asilis testified that the highest level used to approach a vehicle was a high-risk vehicle contact or a high-risk traffic stop. (24:18:2-5,

10-11). The next step down from a high-risk vehicle contact is a non-approach vehicle contact (24:18:6-8). For a high-risk traffic stop it's multiple officers with their firearms directed towards the vehicle and law enforcement orders the occupants out one at a time. (24:18:10-13). For a non-approach, law enforcement does not have firearms out at all. (24:18:13-14). Law enforcement stands next to their vehicles and gives commands to the occupants to step out. (24:18:14-17).

Asilis came across a second Chevy Avalanche at approximately 1:05 a.m. in the area of Burton and Grant. (24:18-19:22-2; 22:2). At that time he observed a black Chevy Avalanche traveling southbound on Grant from Burton. (24:19:18-19). Asilis observed the windows appeared darkly tinted. (24:19-20-23). Asilis noted in his report "Due to the dark tinted windows, I was unable to distinguish any features of the occupants within the vehicle." (22:2) The location where he saw the black Avalanche was approximately 0.9 miles from where the empty cases (casings) were found. (24:19-20:24-1). Asilis stated the vehicle pulled over almost simultaneously when he activated his lights and sirens and he conducted a non-approach traffic stop. (24:20:4-14). The reason he performed a non-approach was his supervisor instructed him to conduct a non-approach. (24:20:17-18). Asilis testified his supervisor advised that they were not going to do a high-risk traffic stop on every Chevy Avalanche that they came across. (24:20:20-22).

Asilis testified that before he stopped the vehicle he did not think he would have an opportunity to speak to the driver of the

vehicle at later point in time if he didn't stop the vehicle. (24:21:17-21).

Asilis was asked "Did you have any concerns about the tinting level of the windows?" (24:21:22-24). Asilis responded "Yes." (24:21:24). He was then asked "And what concerns were those?" (24:21:25). Asilis responded, "I believe that the – that the front windows may have had excessive window tint, which is illegal." (24:22:1-2). Asilis did not have an opportunity to test the windows because he did not have a tint meter on his person. (24:22:3-7). Furthermore, an OWI investigation was conducted. (24:22:8-11). Asilis testified he was familiar with how the tint meter works and had training with it. (24:22:12-15). Asilis further testified that he had used the device after forming an opinion about whether a window was tinted too far. (24:22:16-18). He further testified he was able to gain experience on what level of tint was appropriate and what wasn't. (24:22:19-21). Asilis was asked "And in your opinion was the tint too dark in this case?" and stated "Yes." (24:22-24).

Asilis testified it was Sunday going into Monday and there was "very low vehicle traffic, very little". (24:23:3-6). Asilis testified that the first five spots marked on Motion Exhibit #1 (Beloit Map) were all within five minutes of each other. (24:26:2-8).

On cross examination Asilis was asked "When you pulled Mr. – my client over, had you observed him doing anything illegal?". (24:28:7-8). Asilis responded "Aside from the dark tints." (24:28:9). Asilis was also asked if everything happened between essentially midnight and 1:05 a.m. and Asilis responded "Yes." (24:30:16-20).

Asilis stated there were other vehicles but he didn't see any pickup trucks. (24:31:4-7).

During the motion hearing, after Asilis stated he was looking for "a vehicle that matched that description" of a "dark Avalanche" the trial court asked "And that was the only – that was the main reason you pulled Mr. Morello over?" (24:34:14-24). To which Asilis responded "Yes, ma'am." (24:34:25). To which the trial court stated "But you also then also saw the windows had dark tinting?" and Asilis responded "Yes, I did see that." (28:35:1-3).

On redirect, Asilis stated "yes" when asked "Did the tinting of the vehicle that the defendant was in, did that tinting prevent you from – or cause it difficult for you to see inside the vehicle." (24:35:15-18). He also said he briefly observed the tinting before he stopped the vehicle and before he activated his emergency lights and siren. (24:35:19-23).

At the suppression motion hearing, after argument, the circuit court denied Morello's motion to suppress. The circuit court noted "we all know that we're not really looking for a person. They were looking for a vehicle." (24:50:7-8). The circuit court noted "...Officer Muniz's report came in after the initial calls as well. So in the general area there was the black Chevy Avalanche that was driving at a higher rate of speed, which is suspicious in and of itself." (24:54:1-4). The circuit court denied the motion to suppress.

After State v. Richey, 2022 WI 106, 405 Wis. 2d 132, 938 N.W. 2d 617 came out, Morello moved for reconsideration. (25:1). A Motion

Hearing was held on March 6th, 2023. The court stated “I’m not really sure that Richey did a whole lot to change the analysis.” (47:12:15-16). The circuit court noted the officer who stopped Morello conducted a non-approach. (47:15:20-22). The circuit court also stated at the time he (Asilis) also noticed there was the tinting of the windows. (47:15:22-4). The circuit court noted Richey was a case where law enforcement was looking for someone they suspected of drunk driving. (47:16:16-19). The circuit court continued stating in Morello’s case they were looking for an active shooter. (47:17:15-19). The circuit court noted “And I understand why the city of Beloit has concern about that. The number of shootings has gone up unfortunately dramatically in the community right now.” (47:17:22-25). They were looking for either “first and foremost, the active shooter; secondly, the possibility that it might have been someone who was injured; or third, someone who had witnessed it and was trying to get away because they were afraid.” (47:18:1-6).

The circuit court also addressed the tinted windows stating, “And as I said, the initial – additional information of the tinted – tinted windows also provides for some more information, but I think that probably also addresses the issues of the driving – or not the driving, but the shooting.” (47:19:24-4). “In this situation the police weren’t looking for someone who was with bad driving. The police were looking for either witnesses, victim, or shooter or an active shooting situation in the city. And that is something that may take more time as well to kind of, you know, so – when we’re looking at the time frame.” (47:19:12-17).

The circuit court stated looking at it from the standpoint of the totality of the circumstances it met the requirement. (47:19:20-22) The circuit court denied the motion for reconsideration. (47:19:22-23).

After the motion to suppress and the motion to reconsider were denied Morello entered a No Contest plea to Count 1 OWI 2nd and Count 2 Ignition Interlock Device Tampering/Failure to Install/Violate Court Order. (49:9:20-25). The trial court found Morello guilty of both charges and imposed fines for both. (34:1-2). The trial court sentenced Morello to 30 days jail. (34:1). The defendant now appeals.

ARGUMENT

Police did have a reasonable suspicion to stop Morello.

The warrantless traffic stop conducted on Morello was reasonable because the officer did reasonably believe Morello was violating a traffic law regarding window tint and/or had a reasonable suspicion to believe the occupant of the vehicle was engaging, had engaged in, or would soon be engaging in criminal conduct.

A. Legal Principles and Standard of Review

The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures.” Investigative stops, including traffic stops, are seizures and must therefore comply with the Fourth Amendment. State v. Richey, 405 Wis. 2d 132 at 139, 20022 WI 106, ¶8, 983 N.W. 2d 617 at 621 (2022)(citing State v. Floyd, 2017 WI 78, ¶20, 377 Wis. 2d 394, 898 N.W. 2d 560.

“To conduct an investigation the police must have “reasonable, articulable suspicion that criminal activity is afoot”. Id. at ¶9.

“Reasonable suspicion must be founded on concrete, particularized facts warranting suspicion of a specific individual, not “ ‘inchoate and unparticularized suspicion[s] or hunch[es].” Id. The Wisconsin Supreme Court went on to say “We assess reasonable suspicion in light of the totality of the circumstances.” Id. The Court continued stating “Thus, we look at the “whole picture” to determine whether the officer had reasonable suspicion, not each fact in isolation.” Id.

The burden of establishing that an investigative stop is reasonable falls on the State. State v. Post, 301 Wis. 2d 1 at 9, 2007 WI 60 at ¶12, 733 N.W. 2d 634 at 638 (2007)(citing State v. Taylor, 60 Wis. 2d 506, 519, 210 N.W. 2d 873 (1973).

Whether officers have reasonable suspicion to conduct a traffic stop is a legal question that the appellate court reviews de novo. Richey, 2022 WI 106, ¶7. The Appellate Court accepts the circuit court’s finding of fact unless they are clearly erroneous. Id.

B. Officer Asilis’ had reasonable suspicion a traffic law had been or was being violated.

The Wisconsin Supreme in State v. Houghton, stated “We conclude that reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops. State v. Houghton, 364 Wis. 2d 234 at 250, 2015 WI 79 ¶30, 868 N.W. 2d 143 151(2015).

The Wisconsin Department of Transportation, Administrative Code section 305.32(4)(b) and (2) addresses the level of tinting on the front side windows. WI ADC ¶ Trans 305.32 (2024). It states in part: The windows are tinted by the application of tinting film to the inside of the glazing provided that the combination of the glazing and tinting film permits the passage through the windows of at least 50% of the visible light striking the windows. Id. Unless a different penalty is provided by statute, any violation of chapter 305 shall be punishable as prescribed in 110.075, Stats. WI ADC ¶ Trans 305.04 (2024).

Wisconsin State Statute 110.075(7) states:

Any person producing, manufacturing or using an inspection sticker or causing the same to be done to subvert the provisions of this section shall forfeit not less than \$100 nor more than \$500. Any persons otherwise violating this section, s. 110.06, ch. 347 or rules issued thereto, unless otherwise provided by statute, shall forfeit not less than \$10 nor more than \$200.

Wis. State ¶110.075.

The Wisconsin Court of Appeals dealt with the issue of window tint as it applied to rear windows in State v. Conaway, 323 Wis. 2d 250, 2010 WI App 7, 779 N.W. 2d 182 (2009). In that case an officer observed a vehicle exiting the highway “appeared to [have] dark window tint.” Id. at ¶2. The officer activated his flashing lights and stopped the car based on that observation. Id. The trial court granted the defendant’s motion to suppress which asserted the stop was not supported by reasonable suspicion that the rear window failed to meet the applicable light-pass-through standard in the administrative code. Id. at ¶1. On appeal, the State argued the circuit court erred by

applying an erroneous standard. Id. at ¶6. The appellate court noted it was true that the officer in the case did not need to be able to ascertain with certainty that there was a window tint violation. Id. at ¶7. The court noted “reasonable suspicion does not require such precision”. Id. “Rather, the officer need only reasonably suspect that the window violates the regulation.” Id.

The appellate court, focusing solely on the 35%-light-pass-through requirement for rear windows, noted it would be enough, if an officer testified that he or she was familiar with how dark a minimally complying window appears and that the suspect window appeared similarly dark or darker, taking into account the circumstances of the viewing. Id. at ¶7.

The State in Conaway relied on the following assertions by the officer: 1) that he had more than thirteen years of experience as a state trooper, which included training on use of a tint meter, a device that measures how much light is passing through a window; 2) he was aware of the rear window 35% requirement; 3) he stopped between ten and one hundred vehicles for illegal window tint; 4) he stopped the defendant’s vehicle because the rear window “appeared to [have] dark window tint.” Id. at ¶8.

The appellate court in Conaway noted the officer made no connection between his longevity or his tint meter training and his ability to differentiate between legally and illegally tinted glass. Id. at ¶ 9. “Second, the fact that an officer knew that a tinted rear window must allow at least 35% of light to pass through does not show that he had the ability to look at a particular window and estimate whether

it might fail the standard.” Id. at ¶ 10. “Third, the fact that the officer had stopped numerous other vehicles for suspected window tint adds nothing.” Id. at ¶11. The court went on to say the officer did not testify whether his prior suspicions were ever verified by subsequent testing. Id. Fourth, the officer stopping the defendant for dark window tint says nothing about the officer’s ability to distinguish between legal tinting and tinting that comes anywhere close to violating the code. Id. at ¶12.

The Appellant states the complaint mentions that Morello’s windows appeared tinted but the first time Asilis mentioned any suspicion of illegal tinting was in response to leading questions¹ asked by the assistant district attorney at the suppression hearing almost seven months after the stop. Brief of Appellant, page 25 of 30. Asilis’s report clearly states “I observed a darkly tinted, black in color Chevy Avalanche WI/PC ...traveling south on Grant at Burton.” (22:2). The report further states “Due to the dark tinted windows, I was unable to distinguish any features of the occupants within the vehicle.” (22:2). Asilis clearly identified the vehicle as darkly tinted in his report which was prepared mere hours after stopping Morello.

At the suppression hearing, the prosecutor asked Asilis “Did you have concerns about the tinting level of the windows?” Asilis stated “yes.” (24:21:21-24). Asilis stated he believed the front windows “may have had excessive tint, which is illegal. (24:22:1-2).

¹ No objection was made regarding leading questions. (22:21-22:22-24).

The prosecutor at the motion hearing then asked Asilis if he had an opportunity to test the windows, which Asilis said he did not, because he did not have a tint meter on his person and the incident transitioned into an OWI investigation. (24:22:11).

Asilis did testify he was familiar with how the tint meter works and had training with it. (24:22:12-15). Asilis also testified he had used a tint meter after making an opinion about whether a window was tinted too far and had gained experience on what level of tint was appropriate and what wasn't. (24:22:16-21). Asilis stated in his opinion the tint was too dark in Morello's case. (24:22:22-24). Asilis's testimony about his training and experience on window tinting connected his training to his ability to determine the difference between legal and illegal tint. Unlike the trooper in Conaway, Asilis testified he did have experience on what level of tint was appropriate and what wasn't and he did testify to using the tint meter after making an opinion about whether a window was tinted too far.

Appellant also states the trial court did not find the window tint was a reason for stopping Morello. Brief of Appellant, pg. 26. The trial court did note the tinting of the windows during the hearing on the Motion for Reconsideration. (47:15:22-24). Specifically, the trial court stated "[a]nd at the time he also noticed that there was the tinting of the windows." (47:15:22-24). After that statement, the trial court referenced the additional information of the tinted windows when discussing Morello's stop. (47:18-19:24-4).

The circuit court's ruling at the motion for reconsideration shows the tinted windows was a consideration for the court.

C. Officer Asilis had a reasonable suspicion that Morello's vehicle was involved in a shooting.

The Wisconsin Supreme Court noted in State v. Harris, that they had weighed the conduct of officers with reference to six factors itemized by Professor LaFave. State v. Harris, 206 Wis 2d 243 at 260, 557 N.W. 245 at 252 (1996). The six factors were:

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

State v. Harris, Id.

1. Description of the Vehicle

In Richey, the description of the vehicle was a Harley Davidson motorcycle. Richey, 2022 WI 106 at ¶2. A deputy reported a disabled motorcycle and after just 15 seconds cleared the stop without explanation. Id. Five minutes later that same deputy told nearby officers to be on the lookout for a Harley-Davidson motorcycle driving erratically and speeding approximately a mile away from the location he had given for the disabled motorcycle. Id. No additional details were provided about the motorcycle or its driver. Id.

Five minutes after that deputy's report, Officer Meier spotted a motorcycle driving east on Shofield Avenue a little more than a block west of the intersection with Alderson Street - about a half mile from

the reported location of the speeding Harley. Id. at ¶3 Traffic was light and Officer Meier had seen relatively few motorcycles out that early in the year and none around the time of the deputy's report. Id. Officer Meier ran the registration which showed it was a Harley-Davidson. Id. She followed the vehicle for several blocks, not seeing any erratic driving, speeding or other violations, and performed a traffic stop. Id. Richey was eventually arrested for OWI 8th. Id. at 4.

The circuit court in Richey denied the defense's motion to suppress in large part on the fact that Richey's motorcycle was a Harley Davidson, that Richey was driving in the same general area as the reported erratic driver five minutes after the deputy's report, and the officer's testimony that there were relatively few motorcycles on the road that early in the year and at that time of night. Id. at 6. The court of appeals affirmed on essentially the same grounds. Id.

It was undisputed that the only reason Officer Meier pulled Richey over is she suspected he was the erratic diver the deputy saw five minutes earlier. Id. at ¶10. The Wisconsin Supreme Court noted the question was "whether that suspicion was reasonable." Id.

The Wisconsin Supreme Court noted, except for the manufacturer, Officer Meier knew nothing specific about the Harley the deputy saw, not the model, type, size or color, let alone a license plate number. Id. at 11. The State in Richey stated Richey's motorcycle fit a highly specific and particular description." Id. at 12. The Wisconsin Supreme Court stated the "highly specific" description of a Harley-Davidson could apply to a large number of vehicles. Id. "Although reasonable suspicion is a low bar, it is not so low that it

allows the State to stop so many otherwise law abiding citizens based on such a generic description.” Id.

Appellant argues that the generic information of a dark Chevy Avalanche means that a large number of people could have been swept into a broad search conducted by police. Appellants Brief, pg. 20 of 30. However, Asilis’s testimony indicates a total of two people were stopped for driving a dark Chevy Avalanche. There was no indication anyone driving a vehicle other than a dark Chevy Avalanche was stopped. The description of a dark Chevy Avalanche is not a description that applies to a large number of people.

In the instant case, unlike Richey, the description of the vehicle includes the manufacturer, Chevrolet, the model, Avalanche, and the color, black. The description in the instant case is significantly more specific than the one in Richey and addresses several of the descriptive factors mentioned as missing in Richey.

It does not apply to people in/on motorcycles; cars; light colored Chevy Avalanches; Fords, Dodges, or any vehicles manufactured by any international car companies like Toyota; or any none Avalanche Chevrolet models.

2. Size of the area

The initial shooting report in this matter occurred at 12:04 a.m. (22:1). A second shooting report came in at approximately 12:19 a.m. (24:12:8-12). A witness saw a black Chevy Avalanche leaving the area. At approximately 12:50, Officer Muniz saw a black colored

Chevy Avalanche traveling at a high rate of speed north on Division from Liberty. (24:14:15-18; 22:1).

The Appellant argues that the size of the area the offender could have been found in was large based on using the initial spot of the shots fired and applying the distance a vehicle could travel legally in 61 minutes. However, that fails to take into account the suspicious driving observed by Officer Muniz at 12:50 a.m. It is reasonable for law enforcement to consider that the vehicle observed by Muniz could be the same vehicle observed by the civilian witnesses. When taking that into consideration, the time the offender could be driving away from the location is reduced from 61 minutes to 15 minutes.

Additionally, if it is reasonable that the vehicle stayed in the area for 46 minutes, it is not unreasonable to believe the vehicle might continue to stay in the area for a longer period of time, including the fifteen minutes between when Muniz saw the Avalanche at 12:50 a.m., and when Asilis stopped the second Avalanche at 1:05 a.m.

The Wisconsin Supreme Court, in State v. Nimmer, cited a Seventh Circuit case which concluded “even five-and-a-half minutes was not “[a]s both a matter of fact and law ... unduly long.” State v. Nimmer, 402 Wis. 2d 416 at 432, 2022 WI 47 at ¶29, 975 N.W. 2d 598 at 605. (citing United States v. Rickmon, 952 F.3d 876, 883 (7th Cir. 2020)(cert denied, --- U.S. ---, 141, S. Ct. 2502, 209 L.Ed.2d 540 (2021)).

Nimmer addressed a situation where law enforcement was responding to a ShotSpotter report. Id. at ¶¶6. The way ShotSpotter worked was “when the acoustic sensors pick-up the sounds of gunfire, [they] send[] an alert to an office in California. There is somebody standing by in an office listens to the audio and ... if it sounds like actual gunshots they send an alert[.]” Id. at ¶¶4. Nimmer did not argue the time that elapses between ShotSpotter detecting gunfire and notifying an officer is sufficiently long to be a material fact. Id. at ¶¶4. When officers arrived on scene no more than one minute after receiving the ShotSpotter report they encountered Nimmer. Id. at ¶¶8. One officer testified Nimmer was at “basically the exact location where the ShotSpotter came in.” Id. That officer further testified the officers did not see anyone else – only Nimmer Id.

Nimmer observed the squad car and immediately accelerated his pace away from it. Id. at ¶¶9. The officer testified Nimmer “Began digging around his left side with his left hand.” Id. The officer described Nimmer as “blading” which he defined as moving his left side away from me where the officer could only see his right side. Id. at 10. A gun was found on Nimmer and the State charged him with felon in possession. Id. at 12.

The Wisconsin Supreme Court noted several facts known to the officers and accepted by the circuit court collectively gave rise to reasonable suspicion that Nimmer was involved in criminal activity: 1) ShotSpotter generates reliable reports of gunfire in near real-time; 2) within minutes of receiving the ShotSpotter report, the officers arrived on scene; 3) Nimmer was at nearly the exact location where

ShotSpotter reported gunfire; 4) Nimmer was the only person officers saw; and 5) Nimmer made furtive movements upon noticing the officers. Id. at ¶27. “In addition, the criminal activity being investigated – a shooting in a highly residential area – supplemented the reasonableness of the officers’ actions. Id. at ¶28 (citing State v. Rutzinski, 2001 WI 22, ¶26, 241 Wis. 2d 729, 623 N.W. 2d 516 (“[E]xigency can in some circumstances supplement the reliability of an informant’s tip in order to form the basis for an investigative stop.” (emphasis added)(citation omitted))).

The Wisconsin Supreme Court continued to cite the Seventh Circuit stating it “determined reasonable suspicion exists to stop those present in the area within this timeframe (five-and-a-half minutes) because “[c]ommon sense counsels that a person may take minutes rather than seconds to flee for any number of reasons, including the destruction of evidence, an injury sustained in the shooting, or a need to hide in place.” Id. at ¶29.

The Wisconsin Supreme Court noted, given the officer’s quick response and in light of their observations upon arrival, they could reasonably suspect Nimmer was the shooter and that he had not left the scene for any number of reasons. Id. at ¶30 (citing Rickmon, 952 F.3d at 883. They further noted “[w]hile Nimmer could have been a random pedestrian out for a walk, the officers were not required to rule out any alternative explanation for his presence at the scene. Id. They continued stating, “common sense counsels that innocent pedestrians do not normally gather immediately near the location of gunfire, particularly at night. Id.

“While proximity in time to the crime is a relevant factor in determining the constitutionality of an investigative detention of a suspect, there is no fixed requirement of how soon after the crime the stop must occur.” State v. Williams, 258 Wis. 2d 396 405, 2002 WI App 306 at ¶17, 655 N.W. 2d 462 at 465 (2002).

In Williams, Officer Mary Garcia responded to a domestic complaint on June 16th, 2001 and was informed by the complainant that her boyfriend, Phillips, had a handgun and was disorderly at the house. Id. at ¶2. The complainant described Phillips as a black male in his twenties, approximately five feet six, 150 lbs. to 160lbs., and stated he was driving a dark blue Chevrolet Euro 90’s model with a red pinstripe and tinted windows. Id. at ¶2. Officer Garcia had never met Phillips but by June 20th of 2001 had seen a 1999 photo of Phillips. Id.

On June 20th, Garcia observed a young black male driving a four-door blue Chevrolet Euro with a red pinstripe at an intersection a few blocks from the scene of the domestic incident. Id. at ¶3. Garcia could not remember at the hearing if the windows were tinted. Id. Garcia stopped the vehicle. Id. The driver identified himself as Vernell T. Williams but did not have a driver’s license. Id.

Williams contended that the stop was unreasonable because four days had passed since the domestic abuse incident. Id. at ¶17. The Wisconsin Supreme Court noted Garcia did have knowledge of facts sufficient to provide a reasonable suspicion that the driver of the vehicle had been involved in a domestic abuse incident. Id. at ¶14. The vehicle stopped was sufficiently similar to the one described by

the complainant and a young black male was driving the vehicle. Id. That Garcia saw the vehicle within a few blocks of the scene of the domestic was another relevant factor. Id. It was reasonable to infer Phillips frequented the area where his girlfriend lived. Id. “Finally, stopping the vehicle to determine if Phillips was the driver was a means to quickly find that out with minimal intrusion. Id. The Wisconsin Supreme Court concluded that Garcia had reasonable suspicion to investigate whether the driver was Phillips. Id.

In Richey, the Wisconsin Supreme Court noted that Richey’s Harley being spotted close to the location of the deputy’s call just five minutes later did not add much to the particularity of Officer Meier’s suspicions. Richey, 2022 Wis. At ¶13. The Court noted, based on the map used in that case, “Richey was driving towards the reported location of the erratic and speeding driver when Officer Meier first saw him.” Id. The court further noted that since Officer Meier thought the driver was fleeing police, that would be an odd choice. Id.

The officers in Morello’s case had not one report of gun fire but two. While both of the reports were from citizens calling law enforcement dispatch, fired casing were found at the second location, corroborating that there were fired shots. No witnesses stated they observed shots fired from a dark pickup or a dark Chevy Avalanche, nor did any witness see someone who fired shots get into that type of vehicle. However, witnesses observed a dark colored pickup truck in the area of Whipple and Grant shining a laser just before the first shots were heard, then a witness on Afton Road saw a black Chevy Avalanche leaving the area about 15 minutes after the shooting, and

then Officer Muniz saw a black in color Chevy Avalanche traveling at a high rate of speed northbound on Division from Liberty. Asilis testified a Chevy Avalanche looks like a pickup and all three reports were of a dark vehicle. Hence, three different sightings of a vehicle with a similar description. While the descriptions are not as specific as Williams, they are far more descriptive than Richey. All the sightings were confined to area that could be traveled in 5 minutes. In Morello's case, officers were relying on individually weak pieces of information than ShotSpotter. However, when added together they show a "whole picture" which involves multiple sightings of a vehicle near two different shooting scenes, one of which law enforcement located spent casings at. In Nimmer, there was no mention of fired casings being found, only a gun on the defendant, and no indication there was more than one shooting, like the two different shootings that exist in the instant case.

Appellant argues that the timing and location in the instant case raises questions similar to Richey. Why would Morello still be in so close to the scene if he was the shooter? Appellant Brief, pg. 22-23. Appellant goes on to say "In order for the theory that Mr. Morello was the shooter to be plausible, Mr. Morello would have had to either remain in the area for an extended period while somehow avoiding police, or drive away only to knowingly return to the area where he had recently illegally fired a gun." Appellant Brief, pg. 23.

Appellant's argument ignores the testimony that there was two separate shootings. It is reasonable to assume a dark Chevy Avalanche involved in both shootings when witnesses saw it close in

time and proximity to both shootings. It is not unreasonable to assume adversarial participants in a shooting would leave the scene of one shooting, come into contact with each other at another location, and continue to shoot. To assume that the vehicle was involved in the first shooting, and then immediately left the area as quickly as possible and a separate shooting occurred where a dark pickup like truck was again seen, is unreasonable. Hence, if the vehicle didn't leave after the first shooting, for any myriad of reasons, those same reasons could apply as to why it didn't leave the area after the second shooting.

In Richey, a suspected OWI case, it's logical that someone who is driving while impaired would want to get away from law enforcement and arrive at their intended destination as quickly as possible to avoid any additional contact with law enforcement. As noted in Nimmer, a person may have reasons for taking longer to flee, including destruction of evidence, an injury sustained in the shooting, or needing a place to hide. Nimmer, 2022 WI 47 at ¶29. Additional reasons may include a continuation of the feud that led to a shooting while in the heat of passion, a desire to complete the original shooting goal of wounding or killing the original intended target, or an attempt to eliminate a witness. None of these considerations would be in play in an OWI situation like Richey.

Appellant's argument further ignores the possibility that the unknown occupants of the dark vehicle could be witnesses to the incident, the intended victims, or injured from the incident. Witnesses may or may not have a reason to flee. If the shooting involved

adversarial parties that were both involved in criminal activity, the party being shot at, or injured, may have a reason to avoid law enforcement but not to flee as far from the scene as possible. Citizen witnesses conceivably could be driving around trying to determine if they should or should not contact law enforcement. An intended victim may be attempting to avoid contact with anyone for fear of that contact being with the shooter and the incident continuing. An injured person or a party with an injured person may be distracted by the injury.

3. Number of Persons in the Area

In Nimmer, Nimmer was the only person the officer observed temporally and spatially proximate to the scene. Nimmer, 2022 WI 47 at ¶33. In Richey, the deputy's radio call to be on the lookout for a motorcycle was at 11:04 p.m., traffic was light, it was a Saturday, and Officer Meier had seen relatively few motorcycles out that early in the year and none around the time of the deputies report. Richey, 2022 WI 106 at ¶2-3.

In Morello's case, traffic was "very low vehicle traffic, very little". (24:3:4-6). Instead of it being a Saturday night before midnight, it was just after midnight on a Monday. (24:23:3).

4. Observed Activity

Appellant is correct in pointing out law enforcement did not observe Morello swerving or speeding. However, Appellant is wrong in stating police lacked reasonable suspicion to stop Morello for committing a traffic infraction. Asilis testified regarding his training and

experience on tinted windows and his opinion that the window in this matter was tinted too darkly.

5. Direction of travel

Unlike the single sighting in Richey, law enforcement was dealing with three sightings in the instant case. The earliest sighting by the time the witness saw the vehicle, shortly before the initial shooting, was the sighting of the dark colored pickup truck in the area of Whipple and Grant. (22:1). No direction of travel was noted. The second sighting was on Afton road and the vehicle was heading North. (22:1) The third sighting was by Officer Muniz with a black Chevy Avalanche traveling at a high rate of speed northbound on Division from Liberty. (22:1).

The sightings in the instant case are consistent with a vehicle moving around the location rather than attempting to flee the area.

6. Other Suspicious Activity

Outside of the three sightings of a similar vehicle in the proximity of reports of shots fired that evening, there was no evidence of a Chevy Avalanche being involved in previous shootings. While Asilis was stopping Morello's dark Chevy Avalanche at 1:05 a.m. there was no evidence of any observed bullet holes in Morello's vehicle. The only suspicious activity was the windows which were tinted so dark that Asilis was unable to distinguish any features of the occupants within the vehicle. (22:2).

D. Minimal Intrusion

“[C]ertain investigative stops, prompted by an officer’s suspicion that the occupants have committed a crime, may in certain circumstances be constitutionally permissible even though the officer lacks probable cause to arrest. State v. Guzy, 139 Wis. 2d 663 at 675, 407 N.W. 548 at 554 (1987)(citing United States v. Hensely, 469 U.S. 221, 226, 105 S.Ct.675, 679, 83 L.Ed.2d 604 (1985). “This test focuses on the reasonableness of the government intrusion. Id. It “balances the nature and quality of the intrusion on personal security against the importance of the government interests alleged to justify the intrusion.” Id.

The Supreme Court of Wisconsin in Guzy addressed the six factors outlined above. Id. It noted that the presence of some or all of the factors frequently did not end the problem for the law enforcement officers or the courts because questions remained. Id. at 678. The Court noted, “How many factors must be present in a given stop?” Id. “What weight do we give these facts?” Id. “Are alternative means of further investigation available, such as a license plate check, closer observation of the subjects, or obtaining additional information?” Id. The Court noted if those options were available the reasonableness of the stop based on scant facts may well be questionable. Id. The Court then asked “Is there a possibility that if law enforcement officers do not act immediately the opportunity for further investigation would be lost?”; “What actions would be necessary following the stop for law enforcement officers to determine whether to arrest or release the suspected individual?”; “Will the stop create the opportunity to

corroborate a known physical feature of a suspect or clothing description with minimal intrusion on personal security?” Id. at 678 & 679.

In Guzy, law enforcement knew an armed robbery had occurred within the last one-half hour. Id. at 680. Law enforcement knew the robber was male and had dark shoulder length hair. Id. The passenger in the truck they stopped appeared to be a male with dark shoulder length hair. Id. The Court noted the current uniqueness of men with shoulder length hair rendered the match particularly significant. Id. The Court concluded that the uniqueness of long hair, coupled with the fact that there were very few vehicles on the road at 2:30 a.m., increased the likelihood that the truck’s occupants were involved in the robbery. Id. at 681. The Court also noted the time that law enforcement sighted the vehicle and its location were consistent with the time of the robbery and the distance a vehicle could have traveled from the robbery scene in that amount of time. Id.

The Court then looked at the circumstances surrounding the stop. Id. at 682. Law enforcement had received a fairly specific physical description of the armed robber. Id. The truck they were following was traveling at highway speeds at night and law enforcement had no means of corroborating the physical description short of stopping the vehicle. Id. There was a very real concern that law enforcement could lose their opportunity to investigate because the truck was within two miles of the Minnesota border. Id. Finally, law enforcement knew that briefly stopping the truck and getting a closer look at the truck’s occupants would allow them to quickly

corroborate the physical description or determine if the occupants did not fit the description. Id.

The Court concluded that law enforcement acted reasonably in freezing the situation by means of the vehicle stop in order to investigate further. Id. The Court further noted it would have been poor law enforcement work if the vehicle had been permitted to leave their jurisdiction without further investigation. Id.

Asilis had a description of a vehicle, not a subject. (22:1-2). Furthermore, the level of tinting prevented Asilis from distinguishing any features of the occupants within the vehicle. (22:2). Hence, additional observation of the vehicle would have likely produced little benefit. Running the license plate may have produced a benefit if the registered owner of the vehicle had a criminal history involving shootings. However, if the shooter or other occupants weren't the registered owner, then there would be no benefit from that investigation. Based on the testimony it's unclear if further information could have been obtained. Certainly Officer Muniz had no ability to provide further information regarding the car she observed driving away at a high rate of speed. It's reasonable to assume the civilian witnesses had already provided all the information they had. As Appellant suggests, Asilis could have examined the moving vehicle in the dark for bullet holes. However, just because a shooting occurred does not mean that the vehicle observed by witnesses was struck by bullets. Furthermore, any examination of the vehicle for bullet holes would be conducted more efficiently when the car is stopped.

Running the license plate, calling for additional information, and further observation would not have revealed whether the occupant was armed or whether the vehicle contained a firearm.

Asilis did not think he would have another opportunity to speak to the driver of the vehicle if he did not stop the vehicle. (24:21:17-21). Furthermore, Asilis testified it would take less than 10 minutes to flee the jurisdiction and get to Illinois. (24:32:8-10).

Asilis stopped two Avalanches that morning. (24:24:17-19). We know how long the government intrusion would be to investigate the matter because Asilis stopped an Avalanche before he stopped Morello. (24:16:6-8). The intrusion took approximately eight minutes. (24:16:12). Asilis and other officers conducted a high risk traffic stop and determined that the vehicle was not involved because there were no firearms located on the occupant or in the vehicle. (24:16:14-19). Running the license plate, calling for additional information, and further observation would not have revealed whether the occupant or the vehicle contained a firearm.

Asilis testified that as time passed his supervisor instructed him to go from a high risk traffic stop to a non-approach stop. (24:20:17-22). Consequently, the traffic stop of Morello had the potential to be less intrusive than the stop of the Avalanche Asilis conducted before Morello.

The situation in the instant case is similar to that of Guzy. There was little additional investigation Asilis could perform while Morello's vehicle was in motion. There was concern that if Asilis did not stop

the vehicle he would not have an opportunity to investigate at a later point in time. Morello's vehicle was within 10 minutes of leaving Wisconsin's jurisdiction.

The importance of the government interests is high. As the circuit court noted, firearms and shootings in the City of Beloit were relatively high at the time of the hearing, and it was something the police department was really working on. (24:52:8-11). There is a strong governmental interest in law enforcement investigating shootings and bringing criminals who commit shootings to justice.

CONCLUSION

Therefore, for the above stated reasons, the State respectfully asks the Court to deny Morello's appeal, reaffirm the circuit court, and allow Morello's judgment to stand.

Dated this 4th day of September, 2024

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 7391 words.

Dated this 4th day of September, 2024

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