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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2024AP000931-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH PAUL MORELLO,

Defendant-Appellant.

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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
ARGUMENT.....	5
I. Police did not have reasonable suspicion to stop Mr. Morello.....	5
A. Police lacked reasonable suspicion to believe Mr. Morello fired shots first heard almost an hour before he was stopped.	5
1. Particularity of description of the vehicle and of police suspicion of Mr. Morello.	5
2. The size of the area in which the offender may be found based on how far the stop was from the gunshots and how long after the gunshots the stop took place.....	6
3. The number of other people in the area.....	10
4. Whether Mr. Morello exhibited any suspicious behavior.....	11
5. Mr. Morello's location as compared to the offender's probable direction of travel.	11

6. Lack of knowledge of Mr. Morello being involved with any type of gun-related crime. 12

7. Level of intrusion. 12

B. The stop cannot be justified by Officer Asilis’ observation regarding window tint..... 15

CONCLUSION 17

CASES CITED

State v. Conway,
 2010 WI App 7, 323 Wis. 2d 250,
 779 N.W.2d 182..... 15, 16, 17

State v. Guzy,
 139 Wis. 2d 663, 407 N.W.2d 548 (1987).. 13, 14

State v. Nimmer,
 2022 WI 47, 402 Wis. 2d 416,
 975 N.W.2d 598..... 9, 13

State v. Richey,
 2022 WI 106, 405 Wis. 2d 132,
 938 N.W.2d 6175 passim

State v. Williams,
 2002 WI App 306, 258 Wis. 2d 396,
 655 N.W.2d 462..... 9, 10

U.S. v. Rickmon,
 952 F.3d 876 (7th Cir. 2020)..... 9

CONSTITUTIONAL PROVISION

United States Constitution

Fourth Amendment 6, 14

OTHER AUTHORITIES CITED

Wis. Admin Code 305.32(4)(b)..... 16

ARGUMENT

I. Police did not have reasonable suspicion to stop Mr. Morello.

A. Police lacked reasonable suspicion to believe Mr. Morello fired shots first heard almost an hour before he was stopped.

1. Particularity of description of the vehicle and of police suspicion of Mr. Morello.

In *State v. Richey*, 2022 WI 106, ¶11, 405 Wis. 2d 132, 938 N.W.2d 617, the Wisconsin Supreme Court found an officer's description of a Harley Davidson motorcycle too generic to warrant a stop of a specific motorcycle. The state wrongly claims the vehicle description in this case was substantially more specific than in *Richey*. First, the state claims police knew the Avalanche was black. But one witness described it as a dark colored pickup truck, not black. (10:2). In this case and *Richey*, police knew the manufacturer (Chevrolet in one and Harley Davidson in the other) and the model of the vehicle (Avalanche and motorcycle). Police here knew too that the vehicle was dark but that description encompasses too many vehicles to be substantially helpful. Because the court found the description too generic in *Richey*, this court should find the same.

Suspicion must be particularized to the vehicle stopped. *Id.* The Fourth Amendment does not allow for “broad dragnets.” *Id.*, ¶12. The state says there was no dragnet here because the “description of a dark Chevy Avalanche is not a description that applies to a large number of people.” State’s Br. at 19. But a Chevy Avalanche looks similar to other types of pickup trucks and the circuit court noted there were many in the area. (47:14). The state cannot rely on the fact police only pulled two Avalanches over after the shots were fired as an indication there were few on the road. To the contrary, if police could spot two black Chevy Avalanches on the road at approximately 1:00am within 15 minutes of each other (12:51am-1:05am), and within a few blocks of each other, there is reason to believe there were many more on the road. This is especially true given the vast area in which the described car could be found.

2. The size of the area in which the offender may be found based on how far the stop was from the gunshots and how long after the gunshots the stop took place.

It is unlikely the Avalanche police saw at 12:50am was involved with the gunshots heard at 12:04am and 12:19am because a shooter would flee quickly. But even if police believed the vehicle seen at 12:50am was involved, they did not have reasonable suspicion to believe Morello’s car was that car at the time and location they stopped him. The speeding driver of the Avalanche seen at 12:50am could have

been completely out of Beloit and close to Rockford by the time Mr. Morello was stopped.

The state asserts if it was reasonable for the Avalanche to stay in the area from 12:04-12:50am, it would be reasonable to believe it would stay in the area to be stopped at 1:05am. But the first premise is wrong. It is not reasonable to believe an Avalanche involved in two shootings would stay in the area for 46 minutes. It defies common sense to believe a shooter would stay in the area he fired shots and risk being detained. The state relies on the assumption that the shooter would sit or circle the area where he fired shots for over 30 minutes (12:19am-12:50am) and then suddenly speed off.

It was unreasonable to believe Mr. Morello's car was involved in the shootings or was the Avalanche seen earlier. When police pulled Mr. Morello over, he was not speeding or driving erratically. Thus, his driving was inconsistent with the Avalanche seen speeding away earlier. In *Richey* part of the reason there was no reasonable suspicion was because the driver police sought had been driving erratically, speeding, and fleeing from police. *Id.*, ¶13. It would thus be strange for that same driver to turn around and drive back to the direction of where he was initially observed by police. *Id.* The same is true here, if an Avalanche was seen speeding away, why would it suddenly stop speeding and continue to drive at legal speeds in the exact area where shots had been fired?

The state argues the shooter may have stayed at the scene for “the destruction of evidence, an injury sustained in the shooting, or a need to hide in place.” State’s Br. at 22. However, none of those potential reasons apply. The shooter did nothing to remove any evidence – cartridge casings were found at the location of the gunfire. (24:10). There was no indication anyone was actually shot or injured. Finally, if police believed the Avalanche they saw at 12:50am was involved with the gunfire, the fact that it was speeding away is inconsistent with a theory of hiding in place.

The state says the Avalanche could have stayed in the area to continue the feud that led to the shooting, to harm the original target, or to “eliminate a witness.” State’s Br. at 26. These are all speculative. The record does not indicate the shooter meant to hit anyone rather than shoot to frighten. There is no evidence of a feud or that more than one party was involved. There is no evidence anyone was shot or that shots were meant to wound, kill, or “eliminate a witness.” The state cannot rely on these speculations without a basis in the record.

Next the state argued people in the Avalanche could have been witnesses or victims and thus did not have a reason to flee the area. This argument is contrary to the state’s argument that the Avalanche must have contained the shooter. If the state believes the people in the Avalanche were victims or witnesses, it follows police had no reasonable suspicion to stop an Avalanche for fear it contained a shooter when they stopped Mr. Morello.

Even if any of the state's speculative reasons for staying in the area did apply, the state cites no authority establishing police would have reasonable suspicion to stop Mr. Morello after so much time passed. The state cites no gunshot case that came close to having as much time pass between gunshots and a stop as exists in this case. It cited *State v. Nimmer*, 2022 WI 47, ¶8, 402 Wis. 2d 416, 975 N.W.2d 598, where the delay between the shots and stopping the person was one minute. It also referenced *U.S. v. Rickmon*, 952 F.3d 876, 879 (7th Cir. 2020), in which the delay was five and half minutes. Neither of those come close to the amount of time between when the first shots were heard and the time of the stop (12:04am-1:05am) or even the time from police seeing an Avalanche and the time Mr. Morello was stopped (12:50am-1:05am).

The state's reliance on *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 396, 655 N.W.2d 462, is misplaced. In *Williams*, police had an open investigation regarding a specifically described suspect of domestic violence who had a very specific and rare car. *Id.*, ¶2. Days after the investigation began, police saw a man matching the suspect's description driving in the rare car described and pulled him over. *Id.*, ¶3. The court found there was reasonable suspicion to believe the driver had been involved in the domestic abuse thus allowing the stop. *Id.*, ¶14.

Mr. Morello's case is nothing like *Williams*. *Williams* involved an open investigation of domestic

violence; this case involves police searching for a shooter before he could leave the area. Unlike in *Williams*, police had no description of the alleged shooter to match with the driver they saw on the road. Further, in *Williams* police had a direct link between the suspect and the car they pulled over – the victim stated the suspect drove the specific vehicle. *Id.*, ¶2. But in this case, police did not have a direct link between the shots fired and a black Avalanche. Instead all they had was Avalanche sightings around the same time shots were fired.

Finally, the car in *Williams* was so rare it was almost certain a car matching its description in the area of the incident would be the suspect's. Specifically, Williams drove a dark blue Chevrolet Euro with a red pinstripe and tinted windows. *Id.*, ¶2. In contrast, the car here was only generally described, was common in the area, and looked similar to other types of trucks.

3. The number of other people in the area.

In *Richey*, it was late, traffic was light, and few motorcycles were on the road especially because it was early in the motorcycling season. *Richey*, 2022 WI 106, ¶2-3. There, the court found despite these things, there were still enough motorcycles on the road to negate the assumption that Richey's motorcycle must have been the one seen by police earlier.

It was late in this case like in *Richey* but businesses were still open (24:30-31) and multiple

dark pickup trucks were in the area and were on the road at the time police saw Morello. (47:14). In fact, so many were on the road that police pulled over two in a 15-minute timeframe within a 10-block radius. (10:2).

If there were enough other motorcycles on the road in *Richey*, there surely were enough dark colored pickup trucks or Avalanches on the road to negate an assumption Morello was the shooter.

4. Whether Mr. Morello exhibited any suspicious behavior.

The state agrees police did not observe Mr. Morello doing anything suspicious. State's Br. at 27. This factor weighs against reasonable suspicion.

5. Mr. Morello's location as compared to the offender's probable direction of travel.

The state does not argue Morello's direction of travel matches the direction of an Avalanche sighting. Instead it argues the Avalanche sightings are consistent with "a vehicle moving around the location..."

The direction the Avalanche seen at 12:50am was traveling does not match the direction Morello was traveling in. (10:2). Further, even if it did, so much time had passed Morello's car could not be the same as the one seen unless Mr. Morello had continued to circle around the area aimlessly before he was pulled over.

For the reasons discussed above, such actions would not be consistent with someone who had fired shots and was trying to elude police.

6. Lack of knowledge of Mr. Morello being involved with any type of gun-related crime.

The state concedes police knew nothing about Mr. Morello or his car that could indicate he had been involved in previous shootings. State's Br. at 28. No suspicious behavior was reported, police did not run the license plate and learn of prior gun offenses, and there were no bullet holes in the car. This factor weighs against reasonable suspicion.

7. Level of intrusion.

The state argues police could stop Mr. Morello because to do so represented a minimal intrusion on his rights which was justified by the state's interest in preventing gun violence.

First, the state is remiss in arguing the state's interest was high because there were a number of shootings in Beloit during this time. State's Br. at 33. The court said shootings in Beloit were "relatively high" (24:52) but there is no actual data about Beloit shootings in the record. The state also cited no authority for the proposition that if there are more shootings in an area, the state's interest increases in some predictable increment that would have allowed police to stop Mr. Morello.

Further, the state's interest in dealing with gun violence decreased with every minute that passed from when gunshots were heard because each minute represents how much further a suspect could have traveled from the scene.

The state cited *State v. Guzy*, 139 Wis. 2d 663, 407 N.W.2d 548 (1987), regarding alternative means of investigation. Such alternative means may have been available here. Instead of pulling every Avalanche over, police could have collected video data from nearby or interviewed witnesses.

The state also argued the intrusion was justified because police had to act immediately to avoid losing an opportunity for further investigation. That argument works in a case like *Nimmer* where police saw Nimmer in the area of the gunfire only one minute after it was heard. But it does not work here where too much time passed since gunfire was heard to assume that an Avalanche on the road, which could have gotten at least 35 miles away, was involved in the shooting. This is especially true because police did not have direct evidence linking the Avalanche to the gunfire.

In *Guzy*, 139 Wis. 2d 663, police had a specific description of a long-haired male robbery suspect, it was 2:30am, and very few vehicles were on the road. *Id.*, 667-68. Police came up behind a vehicle they could see was occupied by two males both with long hair. *Id.*, 667, 681. The court held that because most men do not have long hair and because so few people were on

the road, it would be very unlikely that vehicle they saw did not contain the suspect they were searching for. *Id.* The court also based its decision on the fact the time police saw the vehicle and its location were consistent with the time of the robbery and the distance a car could have traveled from the scene. *Id.*

Guzy differs from this case. Here, there were multiple vehicles matching the description witnesses provided. In fact, two were pulled over within 15 minutes of each other. (10:2). Further, where Mr. Morello's car was spotted was not consistent with where a shooter would have been had he left the scene after the shootings. If the car left the area at 12:19am after the second shots were heard, it could have been as far as Stoughton or Fort Atkinson by the time Mr. Morello was stopped. Additionally, in *Guzy* the combination of a unique looking suspect and so few people on the road led to a conclusion that it was very likely the car police pulled over contained the suspect. The same is not true here.

The state argues there was no harm because Mr. Morello would have been stopped for 8 minutes or less. But any Fourth Amendment intrusion is problematic. The state's logic creates a slippery slope. If police can stop innocent people for 8 minutes 45 minutes after gunfire, what is next? Police can stop someone for 20 minutes, 2 hours after gunfire?

Additionally, caselaw does not indicate any intrusion on Fourth Amendment rights is acceptable just because there is a government interest. In *Richey*,

the government had an interest in getting an erratic or drunk driver off the road but the court still found the stop was illegal.

B. The stop cannot be justified by Officer Asilis' observation regarding window tint.

The state claims the stop was justified by reasonable suspicion to believe Mr. Morello had illegally tinted windows. But in reality, the record does not support this argument.

The state says *State v. Conway*, 2010 WI App 7, ¶7, 323 Wis. 2d 250, 779 N.W.2d 182, says police need not be certain windows violate window tint laws to pull a car over. But *Conway* still says police need to reasonably suspect windows violate the regulation and that was not so here. *Id.*

Officer Asilis did not state in his report or the complaint that he believed the windows were illegally dark. (10;22). He mentioned that the windows were dark but only to explain why he could not see the driver inside. (22:2). Asilis testified at the suppression hearing he believed the windows “may have had excessive tint, which is illegal” but that testimony is suspect given he did not make such a statement in any of his paperwork at the time of the stop. (24:22). The testimony was also not credited by the circuit court which made no decision about whether police reasonably believed windows were illegally tinted.

The record indicates police stopped Mr. Morello solely because they believed he could have been involved with the gunshots. Asilis' report says this and he testified his supervisor wanted him to pull over Chevy Avalanches and he was actively searching for Avalanches specifically. (22:2; 24:27, 32, 34). He also told Morello the stop was to investigate dark-colored Avalanches and said nothing about stopping him because of window tint. (22:2).

The record also does not establish that the windows were illegally dark. Police did not use a tint meter to establish that fact. It was after 1:00am and dark outside so windows would have appeared dark no matter what. Further, some amount of window tint is allowed. Wis. Admin Code 305.32(4)(b). If Morello's windows were tinted but at a legal amount and it was dark, it would make sense that police could not see inside the windows.

In *Conway*, 2010 WI App 7, ¶8, the officer testified he had training and experience with a tint meter and with pulling over up to 100 people for suspected illegal tint. The court held testimony was insufficient because the state did not link that experience to whether the officer had verification his tint assessments were correct. *Id.*, ¶9. Officer Asilis' testimony suffers from the same problem. He testified he had training on the tint meter but he did not testify as to what percentage of the time the tint meter confirmed his suspicions about illegal tint. Asilis saying he had been able to gain experience on what level of tint is appropriate, was not sufficient to

establish how often he could confirm his assumptions about illegal tint. (24:22). As such, his testimony suffers from the same problem the testimony in *Conway* did and is insufficient to justify the stop.

CONCLUSION

For the reasons stated above and in his initial brief, Mr. Morello asks the court to vacate his judgment of conviction and remand the case with an order to suppress all evidence obtained as a result of the traffic stop.

Dated this 19th day of September, 2024.

Respectfully submitted,

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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 2,993 words.

Dated this 19th day of September, 2024.

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