

STATE OF WISCONSIN
SUPREME COURT

FILED

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Case No. 2021AP000142 CR

~~STATE OF WISCONSIN SUPREME COURT~~
OF WISCONSIN

STATE OF WISCONSIN

Plaintiff - Respondent

v.

CHARLES W. RICHEY,

Defendant -Appellant-Petitioner

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**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2022

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2021AP142-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2018CF510

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES W. RICHEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY J. STRASSER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Gill, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Charles Richey appeals from a judgment convicting him, based upon a no-contest plea, of an eighth offense of operating a

motor vehicle while intoxicated (OWI-eighth). The sole issue on appeal is whether the circuit court properly denied Richey's suppression motion. *See* WIS. STAT. § 971.31(10) (2019-20)¹ (permitting appeal of a suppression ruling following a plea). We affirm.

BACKGROUND

¶2 At approximately 11:00 p.m. on April 28, 2018, in the Village of Weston, Deputy D'Acquisto of the Marathon County Sheriff's Office broadcast a report of a disabled motorcycle over a law enforcement dispatch radio. Fifteen seconds later, D'Acquisto cleared the call without explanation. Five minutes after clearing the call for a disabled motorcycle, D'Acquisto broadcast a new report that officers should be on the lookout for a Harley-Davidson motorcycle driving erratically and at a high rate of speed, headed northbound on Alderson Street from Jelinek Avenue.

¶3 Approximately five minutes later, about a half mile away, Officer Alexis Meier of the Everest Metro Police Department observed a Harley-Davidson motorcycle traveling eastbound on Schofield Avenue, just west of Alderson Street. The motorcycle Meier observed was not speeding or moving erratically, and its driver did not commit any traffic violations. Traffic was light at the time, however, and Meier had not noticed any other motorcycles in the area that evening, or even many motorcycles at all that early in the spring. After following

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

the motorcycle for about two and one-half blocks, Meier pulled it over, ascertained that Richey was the driver, and observed signs that Richey was intoxicated.²

¶4 After the State charged Richey with OWI-eighth offense, Richey moved to suppress all evidence obtained during the traffic stop, contending that there was no reasonable suspicion for the stop. The circuit court denied the suppression motion. Richey then pled guilty, and the court sentenced him. Richey now appeals his judgment of conviction, challenging the suppression ruling.

DISCUSSION

¶5 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. *State v. Drogsbold*, 104 Wis. 2d 247, 264, 311 N.W.2d 243 (Ct. App. 1981). It is constitutionally permissible, however, for a law enforcement officer to briefly detain an individual for investigative questioning when there exists a reasonable suspicion, based upon specific and articulable facts together with rational inferences drawn from those facts, that criminal activity may be afoot, and that the detention would be appropriate. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). “[S]uspicious conduct is by its very nature ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). “The question of what constitutes reasonable suspicion is a commonsense test. Under all the facts

² Deputy D’Acquisto arrived at the site of the traffic stop shortly thereafter and advised Officer Meier that Richey’s motorcycle was not the one that D’Acquisto had observed traveling erratically earlier. However, Richey does not argue that reasonable suspicion of a violation of law dissipated during the stop, only that there was no reasonable suspicion to initiate the stop in the first instance.

and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?” *State v. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶6 When reviewing a motion to suppress evidence based upon an allegedly unconstitutional seizure, we will uphold the circuit court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48. We will independently determine, however, whether the facts as found by the circuit court satisfy applicable constitutional provisions. *Hindsley*, 237 Wis. 2d 358, ¶22.

¶7 Here, the circumstances cited in support of the traffic stop were: (1) a report by a law enforcement officer about a motorcycle moving erratically and at a high rate of speed; (2) a description of the speeding motorcycle as a Harley-Davidson; (3) an observation by a second law enforcement officer, about five minutes later, of a Harley-Davidson motorcycle about half a mile from the last reported location of the speeding motorcycle; and (4) the second law enforcement officer’s further observations that there were few motorcycles out that early in the spring and that late at night.

¶8 Richey contends that his mere presence in the area of a suspected crime or traffic offense involving a Harley-Davidson while himself riding a Harley-Davidson was insufficient to establish reasonable suspicion for a traffic stop. *See generally Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). We disagree.

¶9 Richey’s motorcycle was observed within a close proximity—in both time and place—of the last reported sighting of the speeding motorcycle. Moreover, the two motorcycles were produced by the same manufacturer. Finally, at the time of day and time of year, motorcycle sightings were rare. While none of

these facts standing alone may be sufficient to support reasonable suspicion, when combined, they would lead a reasonable officer to suspect that the two Harley-Davidson motorcycles could be one and the same. The reasonable purpose of the traffic stop was to temporarily freeze the situation in order to either confirm or disprove that suspicion.

¶10 Richey contends that *State v. Pickens*, 2010 WI App 5, ¶11 n.1, 323 Wis. 2d 226, 779 N.W.2d 1 (2009), which allows the knowledge of one police officer to be imputed to another officer for the purpose of determining reasonable suspicion for a detention (commonly known as the “collective knowledge” doctrine), also requires the State to prove the collective knowledge through the testimony of the original officer. This is not a *Pickens* situation, however. In *Pickens*, law enforcement officers detained a man based upon a flyer indicating that the man had been involved in a prior shooting. However, the detaining officers in that case were not provided with any of the underlying facts that led to the issuance of the flier, and therefore could not testify as to those facts. Here, the detaining officer heard a contemporaneous broadcast from another officer that specified the facts—namely, the observation of a speeding Harley Davidson at a particular time in a particular location—upon which the detaining officer then relied to form reasonable suspicion. Thus, the facts giving rise to reasonable suspicion here were not “unspecified” as in *Pickens*, and they did not require the testimony of an additional officer to be established.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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I N D E X

WITNESS

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1 **WHEREUPON, THE PROCEEDINGS WERE HAD:**

2 THE COURT: We're going to call the
3 case of State of Wisconsin vs. Charles Richey,
4 18-CF-510.

5 Appearances, Mr. Plaunt.

6 MR. PLAUNT: Chris Plaunt appearing
7 for the State. The defendant appears in person,
8 in custody, along with Attorney Dan Cveykus.

9 Your Honor, we are here for a motion
10 hearing challenging a traffic stop.

11 THE COURT: Mr. Cveykus, are you ready
12 to proceed?

13 MR. CVEYKUS: We are ready to proceed,
14 Your Honor.

15 THE COURT: State ready to proceed?

16 MS. PLAUNT: Yes, Judge.

17 THE COURT: As a precursor to all
18 this, I would note I have reviewed the DVD that
19 was presented to me in this case showing events
20 that occurred on April 28, 2018.

21 There was a video from -- well, there
22 was a portion, a 30-minute and 4-second portion,
23 from Officer Alexis, A-L-E-X-I-S, Meier,
24 M-E-I-E-R. Then, there was a portion that was
25 from Sergeant John Resinek, R-E-S-I-N-E-K.

1 Another portion from Officer Meier's cam. And,
2 then, another portion which was the phone call
3 on a blood draw and McNeely warrant from Officer
4 Meier to myself.

5 So I have reviewed all of that in
6 preparation for this hearing. This was actually
7 scheduled for October 2nd, so I had reviewed it
8 on the 23rd of September. When I was reviewing
9 it, I took notes and I reviewed those notes
10 prior to this hearing to refresh my memory as to
11 what I had listened to, I'm sorry, and with that
12 I wanted everybody to know that's already been
13 accomplished.

14 So, Mr. Plaunt, you can proceed.

15 MR. PLAUNT: The State would call
16 Officer Alexis Meier to the stand.

17 THE COURT: Come forward and be sworn.

18 **ALEXIS MEIER,**

19 After having been first duly sworn,
20 was examined and testified as follows.

21 **DIRECT EXAMINATION BY MR. PLAUNT:**

22 Q. Please, state your name and spell your last for
23 the record?

24 A. Alexis Meier, M-E-I-E-R.

25 Q. And how are you employed?

1 A. Could you repeat the question?

2 Q. How are you employed?

3 A. I am an officer with the Everest Metro Police
4 Department.

5 Q. How long have you been in law enforcement?

6 A. Just over two and a half years.

7 Q. And were you working on April 28, 2018?

8 A. I was.

9 Q. Was there an incident around 11:00 p.m. that
10 night?

11 A. There was.

12 Q. And what was that incident?

13 A. At, approximately, 11:00 p.m. on the 28th of
14 April, 2018, Deputy D'Acquisto with the Marathon
15 County Sheriff's Office had called out,
16 broadcast over the radio, a disabled motorcycle
17 at the intersection of Business 51 and Schofield
18 Avenue in the Village of Weston. Shortly after,
19 he cleared from that disabled motorcycle.

20 Shortly after that he did state that
21 he wished Everest Metro officers to check the
22 area for a motorcycle which he had observed
23 driving erratically at a high rate of speed
24 northbound on Alderson Street from Jelinek
25 Avenue in the Village of Weston.

1 Q. And when Deputy D'Acquisto requested that, did
2 he give a description of a motorcycle?

3 A. He gave a description of a Harley-Davidson
4 motorcycle.

5 Q. So the information you had was that there was a
6 Harley-Davidson driving erratically at a high
7 rate of speed?

8 A. Yes.

9 Q. Was there any mention of a number of occupants?

10 A. I would have to refer to my report.

11 Q. And where were you at the time you received this
12 information?

13 A. I do not recall exactly where I was when I
14 received the information; however, I was in the
15 general vicinity in the area.

16 Q. And was -- so it was 11 at night, how would you
17 describe the traffic at that time?

18 A. Traffic, I recall was very light. Yes, it was
19 very light.

20 Q. Had you observed any motorcycles around that
21 time?

22 A. I had not.

23 Q. And at any point did you observe a motorcycle?

24 A. I did.

25 Q. And what was the general description of that

1 motorcycle?

2 A. The motorcycle I observed was a Harley-Davidson
3 traveling westbound on -- sorry, eastbound on
4 Schofield Avenue just west of Alderson Street.

5 Q. And was that in the same area as where Deputy
6 D'Acquisto had stated he last saw the
7 motorcycle?

8 A. It was, it was within a half a mile of that
9 area.

10 Q. What did you do when you observed that
11 motorcycle?

12 A. When I observed that motorcycle, I did a
13 registration check showing that this motorcycle
14 was indeed a Harley-Davidson motorcycle and I
15 performed a traffic stop on that motorcycle.

16 Q. Where did you perform the traffic stop?

17 A. The traffic stop was performed in the area of
18 Schofield Avenue and Glad Street in the Village
19 of Weston.

20 Q. That's Marathon County, Wisconsin?

21 A. Yes.

22 THE COURT: What was the side street,
23 I'm sorry?

24 THE WITNESS: Glad.

25 THE COURT: Thank you.

1 MR. PLAUNT: May I approach, Judge?

2 THE COURT: Yes.

3 **BY MR. PLAUNT:**

4 Q. So, Officer, I'm showing you a map, do you
5 recognize the area of this map?

6 A. I do.

7 Q. What is that area?

8 A. This is the area of Alderson Street and
9 Schofield Avenue.

10 Q. If you could mark on there where Deputy
11 D'Acquisto had stated the motorcycle was.

12 A. (The witness complies.)

13 Q. All right. Could you mark that with a "D."

14 A. (The witness complies.)

15 Q. And, then, where you observed the motorcycle,
16 could you mark that.

17 A. (The witness complies.)

18 Q. And, then, could you put an "A" next to that.

19 A. (The witness complies.)

20 Q. Where you pulled the motorcycle over?

21 A. (The witness complies.)

22 Q. And, then, put an "S" next to that.

23 A. (The witness complies.)

24 Q. All right. And, then, I see you drew an arrow
25 where Deputy D'Acquisto stated he saw the

1 motorcycle. What was the purpose for the arrow?

2 A. The purpose of the arrow, just that Deputy
3 D'Acquisto had believed that the motorcycle had
4 last been travelling northbound on Alderson
5 Street, so that is what the arrow indicates.

6 Q. Is this an accurate depiction, to your
7 knowledge, of the general area?

8 A. It is.

9 MR. PLAUNT: At this time, Your Honor,
10 I would like to enter Exhibit 1 into evidence.

11 THE COURT: Can you show it to
12 Mr. Cveykus, please, and see if he has any
13 objection to that.

14 MR. CVEYKUS: Judge, I have no
15 objection except that I think you need to
16 clarify. The first mark on it was "D" and the
17 direction; that was where he made a report of an
18 individual driving reckless and speeding.
19 That's not the first time he saw it, it was a
20 disabled motorcycle at a different intersection.

21 THE COURT: All right.

22 MR. CVEYKUS: I think, the officer
23 indicates that's true; if that's the case, I
24 have no objection.

25 THE COURT: First of all, let's get

1 this marked.

2 Now then, Mr. Cveykus, as to Exhibit 1
3 you're saying that the "D" that's by Kennedy
4 Park there on Aldersen pointing north, what is
5 your dispute with that?

6 MR. CVEYKUS: I think, that is where
7 the last call of Deputy D'Acquisto indicated
8 that he saw the motorcycle traveling at a high
9 rate of speed and erratically.

10 THE COURT: Okay.

11 MR. CVEYKUS: There was a report at
12 11:00 that he reported to a disabled motorcycle
13 at a different intersection; that's not the same
14 intersection.

15 THE COURT: The intersection would
16 have been back further from that location?

17 MR. CVEYKUS: Correct. Back by Log
18 Cabin.

19 THE COURT: Can we get the officer to
20 clarify that. When you put "D" up here, what
21 did you mean? That's where it was disabled or
22 that's where it was reported -- the motorcycle
23 was reported traveling at high rate of speed?

24 THE WITNESS: That was where the
25 motorcycle was last seen traveling at a high

1 rate of speed.

2 THE COURT: Is there anyplace on this
3 map where it was reported as being disabled?

4 THE WITNESS: Yes.

5 THE COURT: Can you put --

6 THE WITNESS: Can I show you?

7 THE COURT: Well, why don't you take
8 my pen and write "disabled," the word disabled,
9 and then an arrow to the point where that was.

10 THE WITNESS: Yes. Sure. (The
11 witness indicates.)

12 THE COURT: Hand it back to me.

13 The witness has complied with my
14 request, Mr. Cveykus, and what she's done is she
15 has, as you noted up in the area where you
16 called the area of the Log Cabin but it's
17 actually the Log Cabin is on this map, as a
18 pinpoint in blue ink put "disabled" in that
19 area. Is that going to help clarify what you
20 were talking about?

21 MR. CVEYKUS: That's fine, Judge.

22 THE COURT: I'll accept Exhibit 1 with
23 that change.

24 (Exhibit 1 received into evidence.)

25 THE COURT: Go ahead, Mr. Plaunt.

1 **BY MR. PLAUNT:**

2 Q. Now, between the time when Deputy D'Acquisto had
3 called out on the radio to the time you observed
4 the motorcycle that you pulled over, about how
5 much time had elapsed?

6 A. Approximately, five minutes.

7 Q. And you state you hadn't seen any other
8 motorcycles around that time?

9 A. Correct.

10 Q. Do you recall if this time of the year, that day
11 in particular, was a high number of motorcycles
12 driving around?

13 A. Not to my recollection, no.

14 Q. So the information you got was that there was a
15 Harley-Davidson driving in your general area and
16 this was the first one you saw within that
17 five-minute time period?

18 A. Correct.

19 Q. And, then, you made a traffic stop on that
20 motorcycle. Why did you make the traffic stop?

21 A. I made the traffic stop due to the information
22 in which Deputy D'Acquisto had broadcast
23 regarding the Harley-Davidson traveling at a
24 high rate of speed and driving erratically
25 within the area, and due to the fact it was the

1 only Harley-Davidson motorcycle which I had
2 observed in the area. Also due to, as you had
3 stated, it was early in the year and I had not
4 observed many motorcycles out at that time of
5 year as well as the time of night being
6 11:00 p.m. There was very light traffic at that
7 time.

8 Q. And when you made -- did you make contact with
9 the driver of the motorcycle?

10 A. I did.

11 Q. Who did you make contact with?

12 A. Mr. Charles Richey.

13 Q. What was the nature of your interaction with
14 Mr. Richey?

15 A. I approached Mr. Richey after he had gotten off
16 his motorcycle and parked it in a parking spot
17 of the Jim Bar off of Schofield Avenue. As he
18 approached me, I did make contact. I identified
19 myself and advised him of the reason for the
20 traffic stop and I asked Mr. Richey for his
21 identification at that time as well. Deputy
22 D'Acquisto arrived on scene to assist at that
23 time.

24 Q. And after deputy arrived, did you obtain any new
25 information?

1 A. I did. Deputy D'Acquisto advised that this was
2 not the Harley-Davidson which he had observed.

3 Q. So you didn't get that information until after
4 you had stopped and made initial contact with
5 the driver?

6 A. Correct.

7 Q. And when you made contact with Mr. Richey, could
8 you describe his general appearance?

9 A. His general appearance, physical general
10 appearance?

11 Q. Yes.

12 A. I guess, I would have to refer to the video as
13 to what he physically was wearing.

14 Q. I guess, I asked that poorly. Did you observe
15 anything about Mr. Richey that made you believe
16 there was a different crime that was occurring?

17 A. I did.

18 MR. CVEYKUS: I am going to object at
19 this point. The motion to suppress is based
20 upon lack of probable cause for the stop, this
21 clearly goes to something after the traffic stop
22 has taken place.

23 THE COURT: All right. Just so I
24 understand so we can clarify this then. Your
25 argument stops with -- better way to put it --

1 your argument is he should have never been
2 stopped in the first place.

3 MR. CVEYKUS: That's my motion, Judge.

4 THE COURT: No reasonable suspicion to
5 stop.

6 MR. CVEYKUS: Correct.

7 THE COURT: All right. On that basis
8 -- if that's all further we're going on the
9 analysis that's -- Mr. Plaunt, do you understand
10 what his argument is in that regard?

11 MR. PLAUNT: I do, Judge.

12 THE COURT: I mean, I think that the
13 question is whether you're stopping there or
14 whether you're saying that at some point during
15 the stop they longer had a right to continue to
16 make inquiry and should have let him go.

17 That's not your argument, though,
18 Mr. Cveykus. Your argument today is no
19 reasonable suspicion to stop him in the first
20 place.

21 MR. CVEYKUS: That's my argument.

22 THE COURT: Okay. Then, I am going to
23 say that that's all, hopefully, we're going is
24 what was in this officer's mind when she stopped
25 and pulled Mr. Richey over.

1 MR. PLAUNT: Just so I am clear --

2 THE COURT: Sustained.

3 MR. PLAUNT: Just so I am clear,
4 Judge. I guess, the defense would be conceding
5 there was reasonable suspicion and probable
6 cause at the time contact was made with the
7 driver to continue the investigation.

8 THE COURT: No, I think he's saying
9 she -- this officer should not have pulled
10 Mr. Richey over at all. There was no reasonable
11 suspicion given the fact that this officer
12 testified to so far, I guess, up to this point
13 unless there's something else; that's the
14 motion.

15 The motion is not -- and may be coming
16 in the future pending a decision today -- but
17 the motion is not that the mission was over, you
18 needed to disengage. You didn't have -- all
19 evidence after certain point. It's a reasonable
20 suspicion motion exclusively; right?

21 MR. CVEYKUS: Yes. There you go.

22 MR. PLAUNT: I guess, I just -- that
23 concerns me if we're going to have another
24 motion hearing for the second part of this being
25 the OWI investigation. We have both officers

1 involved here and, then, we're going to have to
2 come back and have another hour with the Court
3 to do a hearing.

4 I just want to make it clear that
5 we're prepared to go forward with that and I
6 hope we don't have to -- not that it's a waste
7 of time -- but have to take time out of the
8 officer's and deputy's, multiple days, for
9 something we could accomplish today.

10 MR. CVEYKUS: Since I don't believe
11 we're going to need to go that far because I
12 don't believe there was probable cause for the
13 stop.

14 THE COURT: It's not probable cause,
15 it's reasonable suspicion.

16 MR. CVEYKUS: Reasonable suspicion for
17 the --

18 THE COURT: There's a big difference.

19 MR. CVEYKUS: Correct. I'm going to
20 point out why.

21 THE COURT: All right. Well, that's
22 -- I can't force them to have a motion hearing
23 they do not want to have, Mr. Plaunt. So
24 knowing that that's the definition of the
25 motion, you may proceed as you seem fit -- deem

1 fit.

2 **BY MR. PLAUNT:**

3 Q. I guess, finally, Officer, do you see the person
4 that you stopped on the motorcycle?

5 A. I do.

6 Q. Can you point him out and describe what he's
7 wearing?

8 A. He's wearing the orange jumpsuit.

9 MR. PLAUNT: I would ask the record
10 reflect the witness identified the defendant as
11 the driver Charles Richey.

12 THE COURT: For purposes of today's
13 hearing that identification is established.

14 MR. PLAUNT: Nothing further.

15 THE COURT: Mr. Cveykus.

16 MR. CVEYKUS: Okay.

17 **CROSS EXAMINATION BY MR. CVEYKUS:**

18 Q. Officer you drafted up a report in regard to
19 this incident, did you not?

20 A. I did.

21 Q. And what time did you start shift that day?

22 A. 6:00 p.m.

23 Q. And at -- so you worked from 6:00 p.m. until,
24 approximately, 11 when you heard a Deputy
25 D'Acquisto say there he was stopping for a

1 disabled motorcycle on Highway 51 on Schofield
2 Avenue; is that correct?

3 A. Correct.

4 Q. During that period of time, did you notice any
5 other motorcycles out?

6 A. I did not.

7 Q. Isn't it true, that there are clubs that had
8 motorcycle rides that day?

9 A. I do not recall.

10 Q. You don't recall that or there weren't any?

11 A. I do not recall if there were.

12 Q. Okay. So there may have been, but you don't
13 recall; is that correct?

14 A. Correct.

15 Q. Okay. Then, at 10:59 you get a broadcast by
16 Deputy D'Acquisto indicating that he was
17 stopping for a disabled motorcycle on Highway 51
18 on Schofield Avenue; isn't that correct?

19 A. Correct.

20 Q. And, approximately, 15 seconds after that with
21 no explanation he cleared that stop; is that
22 correct?

23 A. Correct.

24 Q. And that stop was pointed out by the Judge where
25 you wrote in blue ink on the map; is that

1 correct?

2 A. Correct.

3 Q. You have no idea which way or direction he was
4 going after that; is that correct?

5 A. I do not.

6 Q. Now, at 11:04 he calls in that, check the area
7 for a Harley-Davidson traveling at a high rate
8 of speed and, I believe, you said erratically;
9 is that correct?

10 A. Correct.

11 Q. That was -- the vehicle was traveling north on
12 -- is it Aldersen? Is that correct?

13 A. Correct.

14 Q. So at 11:04, he's traveling north on Aldersen;
15 is that correct?

16 A. Correct.

17 Q. He said that motorcycle would be heading back
18 towards Business 51 or I should say Schofield
19 Avenue, sorry.

20 A. Correct.

21 Q. Now, after that is when you start looking for
22 motorcycles; is that correct?

23 A. Correct.

24 Q. Okay. You were traveling eastbound on Schofield
25 Avenue?

1 A. Correct.

2 Q. You saw a motorcycle at some point in your
3 travels at that time; is that correct?

4 A. I did.

5 Q. You had to turn around and get behind that
6 motorcycle that you saw; is that correct?

7 A. I did.

8 Q. Where did you do the turn-around at?

9 A. Aldersen Street and Schofield Avenue.

10 Q. So you turned around and got behind the
11 individual at Aldersen Street and Schofield
12 Avenue?

13 A. Correct.

14 Q. Are you sure?

15 A. Within that area, yes, Aldersen Street and
16 Schofield Avenue.

17 Q. Would you be surprised to say that I watched the
18 video of your squad -- you did have a video
19 playing in your squad; is that correct?

20 A. Correct.

21 Q. You were behind the defendant's Harley-Davidson
22 before -- traveling eastbound on Schofield
23 Avenue before Aldersen Street; would you be
24 surprised if I told you that?

25 A. I would not, it was within that area of Aldersen

1 Street and Schofield Avenue.

2 Q. Do you recall turning around by Log Cabin to
3 follow that motorcycle?

4 A. It was within -- sorry, Log Cabin?

5 Q. By Log Cabin, that intersection.

6 A. I do not.

7 Q. You don't recall exactly where, somewhere in
8 that area?

9 A. Like I said, Aldersen Street and Schofield
10 Avenue.

11 Q. Now, in regard to this, you indicate he gave no
12 other description other than a Harley-Davidson;
13 is that correct?

14 A. That's correct.

15 Q. He didn't indicate the type of motorcycle; did
16 he?

17 A. Harley-Davidson motorcycle was the only
18 description.

19 Q. Harley-Davidson is a brand much like a Ford or
20 Toyota or Chevy; is that right?

21 A. Correct.

22 Q. There's different types of brands of
23 motorcycles, you've got Suzuki, Gold Wings;
24 things like that?

25 A. Correct.

1 Q. All you had was a Harley-Davidson?

2 A. Correct.

3 Q. Did he indicate the type of Harley-Davidson,
4 like, a Sportster, Road Glide, Softail, Touring
5 big bike; anything like that?

6 A. No that I recall, no.

7 Q. Did he indicate the color of the bike?

8 A. Not that I recall.

9 Q. Did he indicate how many individuals on the
10 bike, to your knowledge?

11 A. Not that I recall.

12 Q. Did he indicate anything about the bike that he
13 said was driving in an erratic and high-speed
14 fashion?

15 A. That it was a Harley-Davidson.

16 Q. That's it, okay. Now, you see this
17 Harley-Davidson and you, then, turn around and
18 pulled behind it; is that correct?

19 A. Correct.

20 Q. Somewhere by, I think your report said, you were
21 behind it by West Street which is just east of
22 Cherry Avenue; is that correct?

23 A. Did you say West Street?

24 Q. Let me just check here. West of Willow Street,
25 sorry.

1 A. Correct, west of Willow Street.

2 Q. And you're behind it at that point in time; is
3 that correct?

4 A. I believe, it was west of Willow Street when I
5 first observed it.

6 Q. Okay. You did not observe the defendant
7 speeding; is that correct?

8 A. I did not.

9 Q. You did not observe the defendant driving in an
10 erratic manner; is that correct?

11 A. I did not.

12 Q. You did not observe him weaving in his lane; is
13 that correct?

14 A. Correct.

15 Q. You didn't observe any rules of road violations;
16 is that correct?

17 A. Correct.

18 Q. You didn't see any erratic driving, is that
19 correct, of the defendant?

20 A. Correct.

21 Q. And at this point in time, you still had no
22 description of a motorcycle or the driver or
23 even whether that driver had a helmet?

24 A. I had a description of a Harley-Davidson; that
25 it was a Harley-Davidson, sorry.

1 Q. And so is it your indication that you would have
2 pulled over any Harley-Davidson that you saw on
3 the road that night?

4 A. I pulled over this Harley-Davidson due to the
5 circumstances which I had mentioned before.

6 Q. Well, five minutes previously Deputy D'Acquisto
7 says that a Harley-Davidson traveling north on
8 Aldersen; is that correct?

9 A. Correct.

10 Q. That would have taken that bike, what, a couple
11 minutes to travel to Schofield Avenue; is that
12 right?

13 A. Approximately.

14 Q. Now, within five minutes you see a bike
15 traveling towards Aldersen; is that correct?

16 A. Correct.

17 Q. And Deputy D'Acquisto says the bike he sees is
18 at a high rate of speed and driving erratically;
19 is that correct?

20 A. Correct.

21 Q. That's not anything you saw of the bike that you
22 stopped?

23 A. Correct.

24 Q. And did you make any radio contact with the
25 Deputy D'Acquisto to get a better description of

1 this vehicle?

2 A. I do not recall.

3 Q. Do you recall whether or not you had any
4 knowledge that it might be a different type of
5 model that was talked about over the radio?

6 MR. PLAUNT: Judge, asked and
7 answered.

8 THE COURT: You've already gone
9 through with her that she didn't ever find out
10 that it was a particular model. So I'll sustain
11 that in that regard.

12 **BY MR. CVEYKUS:**

13 Q. While behind it -- I just want to make sure --
14 while behind it you never made a call on the
15 radio to get a better description?

16 A. Not that I recall.

17 Q. You travelled at least two and a half blocks
18 behind the defendant; is that correct?

19 A. Approximately.

20 Q. And, then, you turned on your lights and he
21 pulled over; correct?

22 A. Correct.

23 Q. Now, Deputy D'Acquisto was in a marked squad
24 car, to your knowledge?

25 MR. PLAUNT: Objection, relevance.

1 THE COURT: What is the relevance,
2 Counsel?

3 MR. CVEYKUS: Well, Judge, if Deputy
4 D'Acquisto is in a marked squad car and she
5 knows that and this individual on a bike is
6 trying to flee -- because I believe her police
7 reports indicate she thought he might be trying
8 to flee -- this individual is now in front of
9 another, apparently, squad car yet there was no
10 erratic driving.

11 I want to point out the fact that,
12 okay if he's in a marked squad and this
13 individual is trying to flee from the police,
14 yet, the vehicle you get behind doesn't; that
15 should be a general issue about what should be
16 thinking or going through your mind at that
17 point.

18 THE COURT: Can you clarify with this
19 witness what she knew about that situation with
20 Officer D'Acquisto before? I'm going to sustain
21 the objection because I don't think you've laid
22 the foundation as to what this witness's
23 knowledge was about the previous interaction.

24 MR. CVEYKUS: All right.

25 **BY MR. CVEYKUS:**

1 Q. Do you know whether or not Deputy D'Acquisto --
2 I'm going get his name wrong, I apologize -- do
3 you know whether or not he was in a marked squad
4 car that night?

5 MR. PLAUNT: Objection, relevance. I
6 don't see the relevance of this line of
7 questioning. The defense is trying to create
8 inferences that the officer may not have had
9 direct knowledge of at the time.

10 MR. CVEYKUS: That's what I'm asking

11 --

12 THE COURT: This is what I am trying
13 to establish. I'll overrule. I am trying to
14 establish -- I am sure the officer can't wait to
15 tell us -- I am going to overrule. Ask the
16 questions.

17 I know what you're driving at, we've
18 got to lay the foundation. Figure out what this
19 officer knew or didn't know about what Officer
20 D'Acquisto did in his pursuit and whether his
21 squad car made the person flee or not, if this
22 witness knew that.

23 MR. CVEYKUS: That's what I was trying
24 to.

25 THE COURT: Please do.

1 **BY MR. CVEYKUS:**

2 Q. Do you know whether or not he was driving a
3 marked squad car?

4 A. He was.

5 Q. And I think in your report, you believed that
6 based upon how fast he cleared the scene and how
7 -- and in his next report at 11:09 that he
8 observed a motorcycle traveling at a high rate
9 of speed, do you believe that that individual,
10 that was the same bike that he stopped for? Is
11 that what your thoughts were?

12 A. I believe, you mean 11:05.

13 Q. Yeah, 10:59 he calls in for disabled.

14 A. Mm-hmm.

15 Q. 15 seconds later he says he clears that scene.

16 A. Correct.

17 Q. At 11:04 he calls in saying check the area for a
18 Harley-Davidson.

19 A. Correct.

20 Q. So through that period of span there, you
21 believe it was the same vehicle he had tried to
22 stop for a disabled vehicle; is that right?

23 A. I came to that conclusion.

24 Q. Okay. So you believe that the vehicle that he
25 was then -- the vehicle he tried to stop was the

1 same vehicle that was trying to elude him at a
2 later point?

3 A. I came to that conclusion, yes.

4 Q. When you got behind the defendant, you did not
5 see him trying to drive erratically or flee from
6 you; is that correct?

7 A. Correct.

8 Q. To your recollection, you made no call or radio
9 contact trying to get a further description of
10 that motorcycle that was fleeing Deputy
11 D'Acquisto; is that correct?

12 A. Correct, as far as I recall.

13 Q. Do you recall what the defendant's bike looked
14 like?

15 A. I do not.

16 Q. So you don't recall anything, other than it was
17 a Harley-Davidson that you ran through
18 registration; is that correct?

19 A. Correct.

20 Q. Did you have the registration of that vehicle
21 prior to your stop, prior to turning your lights
22 on?

23 A. Prior to turning my lights on, yes.

24 Q. Did you have it on prior to Schofield Avenue and
25 Aldersen; if you recall?

1 A. As far as I recall, it would have been within
2 that area of Aldersen Street and Schofield
3 Avenue, due to the fact I obtained it once I got
4 behind the motorcycle.

5 Q. In regard to your squad video, that records any
6 dispatches that comes over the radio; is that
7 correct?

8 A. I'm sorry, could you repeat that question?

9 Q. The squad video, it records any dispatches that
10 comes over the radio; is that right?

11 A. Correct.

12 Q. Did you call in to dispatch to run this or does
13 it run through the computer?

14 A. I would have to refer to the video, but as far
15 as a recall I ran it through the computer
16 through MDT.

17 Q. So, to your recollection, you don't recall if it
18 went through dispatch or not?

19 A. I do not recall.

20 Q. The only reason you had for pulling it over was
21 because of the call made by Deputy D'Acquisto;
22 is that correct? That's the only reason you
23 pulled him over.

24 A. Due to the information obtained from him.

25 Q. That information was a Harley-Davidson traveling

1 at a high rate of speed.

2 A. As well as driving erratically.

3 MR. CVEYKUS: Nothing further.

4 THE COURT: Mr. Plaunt.

5 MR. PLAUNT: So, just to be clear, you
6 prior to observing the bike on Schofield, did
7 you have a license plate number of the bike
8 fleeing Deputy D'Acquisto?

9 THE WITNESS: I did not.

10 MR. PLAUNT: Nothing further.

11 THE COURT: Any follow-up?

12 MR. CVEYKUS: No.

13 THE COURT: You're excused. Thank
14 you.

15 Do you have another witness?

16 MR. PLAUNT: No, Judge.

17 THE COURT: All right. Are you going
18 to call any witnesses relative to your motion,
19 Mr. Cveykus?

20 MR. CVEYKUS: No.

21 THE COURT: All right. So my
22 understanding, just so I understand, is that
23 we're only talking here about reasonable
24 suspicion of this officer to stop and make an
25 inquiry with Mr. Richey; that's the only issue.

1 Is that correct, Mr. Cveykus?

2 MR. CVEYKUS: That is correct.

3 THE COURT: And what's your argument
4 on that, Mr. Cveykus. Mr. Plaunt has the burden
5 of proof, I'll have you -- it doesn't really
6 matter to me but Mr. Plaunt has the burden of
7 proof, so I'll let you go first and, then, I'll
8 let him respond.

9 MR. CVEYKUS: In regard to this,
10 Judge, you're correct. This officer has
11 reasonable suspicion to believe that the
12 defendant, in this case it would be Mr. Richey,
13 has committed a crime or traffic violation or
14 will be committed by the defendant.

15 I think if you look at the facts,
16 Deputy D'Acquisto at 10:59 calls out for a
17 disabled motorcycle on Business 51 and Schofield
18 Avenue; that's the corner by Log Cabin as we all
19 know it by Krueger Floral. 15 seconds later he,
20 then, clears the scene with no explanation.
21 That five minutes total, at 11:04, that he calls
22 out over the radio again that there's a
23 Harley-Davidson at a high rate of speed on
24 Aldersen going north from Jelinek, that makes
25 sense, but now that motorcycle is traveling

1 towards Schofield Avenue.

2 Now this officer testified it takes a
3 couple of minutes to get to Schofield Avenue,
4 yet at 11:09 she sees somewhere by Schofield
5 Avenue just west of Willow Street -- I think
6 that's an indication of what she testified to --
7 that she sees a motorcycle; that she is
8 traveling east and that motorcycle is traveling
9 -- no.

10 She's traveling west and that
11 motorcycle is traveling east towards where this
12 other motorcycle would have been coming from.
13 So it's very strange that you would see another
14 motorcycle coming back towards the crime,
15 alleged crime scene, at that time she gets
16 behind that motorcycle.

17 And as the Court already reviewed the
18 videotape, that videotape indicates, or squad
19 video, indicates that she is behind that vehicle
20 by Willow Street. You can clearly see the
21 stoplights in that video that the defendant,
22 then, goes on Green and the squad is directly
23 behind him at that point. Then, at this time
24 she has nothing further than, other than the
25 fact there's this other vehicle traveling at a

1 high rate of speed.

2 Now, she knows that he's in a marked
3 squad, so she said it today it was going through
4 her mind that this other vehicle was trying to
5 flee this officer. Yet, she then stays behind
6 him, I think it was over two blocks, before she
7 turns the lights on.

8 During that period of time he didn't
9 speed; there was no erratic driving; there was
10 no rules of road violation; there's no light
11 violation; no weaving in his lane. All she had
12 was a description of a Harley-Davidson. Yet,
13 she doesn't call in to dispatch or to Deputy
14 D'Acquisto to indicate, hey, what -- give me a
15 description of the bike; only that it's a
16 Harley-Davidson.

17 Harley-Davidson, Judge, is a brand;
18 that's what I was trying to get to, and I think
19 the officer agreed, it's a brand like Ford,
20 Chevy, Toyota. This officer had no knowledge
21 that the other bike, other than by brand name,
22 didn't know it was a Sportster, Road Glide,
23 Softail, a Touring bike.

24 You might say, well, it's a
25 Harley-Davidson, Dan; that's what it is. I own

1 a Harley-Davidson, I can tell you I know there's
2 different models: There's small ones, there's
3 big ones, touring bikes. This officer has no
4 knowledge of any type of bike; that's like
5 saying it's a Ford. I don't know if it's a
6 pickup truck. I don't know if it's an Escape.
7 I don't know if it's a Taurus, but it's a Ford
8 driving down on that road and you should pull it
9 over; that's exactly what this is in regard to
10 what this officer pulled over.

11 You have to compare it as apples to
12 apples and when you compare an apple to an apple
13 in this case, saying a Harley-Davidson is saying
14 there's a Ford out in that road or Chevy out in
15 that road or Toyota on that road with no further
16 description of the model; no description of the
17 color; no description of whether or not the
18 driver had a helmet or what he was wearing. No
19 description of a color. No description of
20 anything other than there's a Ford out on the
21 road to pull over.

22 Now, you say that was at night but
23 this officer doesn't recall whether or not the
24 clubs had a ride on that night. She doesn't
25 recall if there were other bikes on the road

1 that night. She doesn't recall seeing one
2 during the time frame.

3 When we look at this, the officer must
4 have more than a suspicion or hunch to pull over
5 a person. You have to look at whether or not a
6 reasonable police officer, in light of training
7 and experience, that this client was going to --
8 that this defendant was going to commit a crime
9 to pull over.

10 Yet, she knows that this other
11 motorcycle was fleeing another officer in a
12 marked squad, yet she's behind him and doesn't
13 see anything, doesn't see fleeing, doesn't see
14 anything wrong. To me, there's not a reasonable
15 suspicion that these are the same bikes.
16 They're not going in the same direction within,
17 what, a couple of minutes of going -- actually
18 going in different directions: One was going
19 north and the other one is coming to that
20 intersection.

21 You don't have any further
22 description. I don't see how, without further
23 evidence, without further belief, that this may
24 have been the same vehicle that you can stop
25 this individual. I could have been driving on

1 the road that night, I'm going to say, what,
2 without some kind of description.

3 I don't think that this point there
4 has been sufficient evidence to say that this
5 officer had reasonable suspicion to believe this
6 defendant has committed or will commit a traffic
7 crime based upon what she saw and what she heard
8 at the time. Thank you.

9 THE COURT: Thank you. Mr. Plaunt.

10 MR. PLAUNT: Judge, when we're looking
11 at reasonable suspicion, we have to look to the
12 totality of the circumstances forming the basis
13 of the officer's reasonable suspicion for making
14 the stop.

15 Here, we have the officer with certain
16 information that there's a Harley-Davidson that
17 fled at a high rate of speed. A lot of what the
18 defense's argument rest on is this improper
19 inference that they're trying to have the Court
20 make of just because at one point somebody was
21 fleeing an officer that they're going to
22 continue to flee if there's another officer that
23 pursues them. That's nothing that's been, you
24 know, brought into court today. There's no
25 evidence saying that.

1 Really, they're trying to jump to
2 conclusions without having any nexus between
3 them. Saying a description of a bike was
4 insufficient to people who aren't avid bike
5 riders or don't know motorcycles, myself
6 included. I think saying a Harley is pretty
7 specific and that's all I think most people
8 would be able to describe.

9 Saying or equating that to calling out
10 whether it's a Ford, you know, you have
11 different types of Fords; it could have been a
12 truck, van, pickup, but there's no way for most
13 people to know the difference between the
14 different types of motorcycles, the differences
15 aren't that obvious.

16 So we have the motorcycle observed
17 within a short period of time in the same
18 general area that it was last seen. It was
19 reasonable for the officer to stop that bike and
20 investigate to see if that was, in fact, the
21 person. Deputy D'Acquisto later showed up, and
22 that's not at issue here, but we have the
23 reasonable suspicion.

24 At the time was it reasonable for the
25 officer to believe that this bike could have

1 been the one that was involved when Deputy
2 D'Acquisto made the call. She observed no other
3 bikes in the area at the time; this was the only
4 bike she saw. The general vicinity was the same
5 as the -- was the same general area as the last
6 known direction; it's not unreasonable that it
7 could have been where Officer Meier saw the
8 bike.

9 I believe, what the defense is doing
10 is trying to have the Court make all these
11 inferences without actually having any evidence
12 to the contrary. When just looking at what the
13 officer knew at the time of the time of the
14 stop, I believe, that it is reasonable.

15 It was a Harley, which is distinctive
16 enough to narrow it down from, say, a Kawasaki
17 or something like that that has a different
18 sound and general appearance than most Harleys,
19 and it was the same time and general area; that
20 is reasonable suspicion to make a stop.

21 So I think based on all of that,
22 Officer Meier's stop, she did have reasonable
23 suspicion at that time based on the information
24 that she knew at the time.

25 THE COURT: All right. We're

1 you can have a suspicion and it still can be
2 appropriate but it has to be a suspicion that
3 really has no explanation or no logical or
4 reasonable explanation.

5 It's almost as if to say, I'm pulling
6 this person over because I have a funny feeling
7 that day. Or I don't really have anything
8 physically to tie this person to what just
9 occurred, but I have this feeling based upon the
10 direction they were traveling. Or the vehicle,
11 maybe, is not matching the description but. Or,
12 maybe, the way the person looked in the vehicle
13 and I didn't like the way that person looked.
14 Or they were driving too safe. That's a
15 suspicion. That's a hunch.

16 What I am looking at here is was it
17 inchoate or an unparticularized suspicion or
18 hunch. And State v. Post, 207 -- I'm sorry,
19 2007 Wisconsin 60, which is basically quoting
20 the *Terry* case says that. It's the same thing
21 as a *Terry* stop; right? It says you can't just
22 walk up to somebody and say I don't like the
23 look of your face, I don't like the way you
24 walk out of that building. I don't like the way
25 you're dressed today. You remind me of somebody

1 who I dislike. Those are all hunches and
2 suspicions.

3 You have to say I am stopping this
4 person because in my mind here are the facts
5 that mean that it's more than an
6 unparticularized hunch. Under the -- the
7 crucial question is whether the facts of the
8 case would warrant a reasonable police officer,
9 in light of his or her training and experience,
10 to suspect that the individual has committed a
11 crime; that's really what we're talking about
12 here. Obviously, there are other instances but
13 I'm focussing on this and that's the *Post* case,
14 2007 Wis. 2d -- Wisconsin 60, sorry.

15 So reasonable suspicion is, what?
16 Common sense, and that turns on the totality of
17 the facts of the circumstance. So what we have
18 to do is say, was there a mere hunch or is this
19 a suspicion where we can look at what the facts
20 are and say, yeah, a reasonable officer in
21 Officer Meier's position would say, gees, I've
22 got to pull this person over. This is just too
23 -- the facts are just such that this person may
24 have been the person who was being reported by
25 Officer D'Acquisto.

1 Now, in looking at Exhibit 1 certainly
2 this is rather odd because we know we have at
3 least two motorcycles driving around in the same
4 area on this April night, late at night. We
5 have the one that was involved in the actual
6 crimes, or alleged crimes, whatever they would
7 be, and we have Mr. Richey who happens to be
8 driving in the same area.

9 We know that Mr. Richey was not the
10 person who was driving by Kennedy Park in an
11 erratic and fast manner, but we have to remember
12 this Officer Meier doesn't know that. Officer
13 Meier simply knows that there is a
14 Harley-Davidson within several blocks of where
15 she first sees Mr. Richey that has been engaging
16 in this behavior. Officer Meier knows that
17 Officer D'Acquisto has been pursuing the person,
18 but given her experience -- she was probably on
19 the force about a year at that time -- she's
20 looking for a Harley-Davidson motorcycle in the
21 area.

22 Now, she testified to -- and this was
23 somewhat significant to the Court -- this
24 wasn't, like, a summer night where people are
25 out cruising around; it's April. Certainly,

1 people drive their bikes in April but it's at
2 the beginning, very beginning, of the season.
3 So there probably aren't a lot.

4 Mr. Cveykus insinuated there was some
5 sort of event that would lead to the
6 accumulation of bikes in the area, but that
7 wasn't ever proven. It was insinuated but not
8 shown to be true.

9 So what does this officer know. This
10 officer is saying, you know, I'm out here late
11 at night in April when it is rare to see bikes.
12 She testified she didn't see any other bikes and
13 now she has a bike that's causing trouble in the
14 area. She knows more than just that it's a
15 bike, she knows that it's a Harley-Davidson.

16 And I agree with Mr. Cveykus that all
17 things considered to say it's a Ford or Chevy or
18 something is not very particularized, but the
19 thing that separates it is it's a motorcycle on
20 a night where it's rare to see them and it's a
21 very particular type. So, in other words, it's
22 not a Suzuki, it's not a different type; it's a
23 particular type on a night where it would be
24 rare to see them.

25 So to use your analogy, it would be

1 like, well, Fords don't usually drive this early
2 in the season. There's a reason that draws your
3 attention to this particular bike; it's not just
4 the model. It's the fact that it's a motorcycle
5 more than the model.

6 She sees a motorcycle and immediately
7 her interest is peaked because there are very
8 few motorcycles she seen. It's in the area
9 where it was just reported, relatively recently,
10 that there was a motorcycle driving erratically
11 and at a high rate of speed and it's the same
12 model.

13 So the model itself doesn't control
14 the analysis, it simply forms a building block
15 in the officer's mind to say, okay, now I see a
16 rare sight which is a motorcycle late at night
17 on a April evening. I see it in the -- very
18 close to the area, within several blocks, where
19 recently it's been reported that there's erratic
20 driving and high speed or illegal behavior and
21 it's the same model of motorcycle as well.

22 So those are the thoughts that are
23 going through the officer's mind, as I
24 understand it, based upon her testimony when she
25 decides to get behind Mr. Richey and decides to

1 pull him over for further inquiry. I agree that
2 she could have called Officer D'Acquisto and
3 said now I am behind a Harley-Davidson and --
4 but I don't know if she doesn't know
5 motorcycles, if she doesn't know a Sportster
6 from a bag or whatever.

7 What is she going to say to him, can
8 you tell me a little bit more about this
9 motorcycle knowing, as she does that the
10 motorcycle that was there, as you pointed out,
11 Mr. Cveykus, maybe susceptible to taking off on
12 her or eluding her in some way. She makes the
13 decision to pull the bike over as quickly as
14 possible to make a simple inquiry. And at the
15 end of her testimony, it was effective what she
16 did; she pulled him over and found out, yeah,
17 this is not the person I'm looking for. We know
18 it wasn't Mr. Richey.

19 So, then, I look what are the totality
20 of the circumstances, you know, there's the case
21 law says that driver's actions need not be
22 erratic or unsafe or illegal to give rise to
23 reasonable suspicion. The inference was that
24 because he was driving, fine, you should let him
25 go; that happened. She didn't observe that and

1 she did not need to observe it.

2 Again, under the *Bohman* case, she
3 cannot simply -- *Bohman* is 683 F. Third 861.
4 She can't simply pull over a vehicle on a road
5 and hope that the person is the violator; I
6 agree with that wholeheartedly. But what she
7 does need to do is come up and sit on the stand
8 and articulate facts as to why she suspected
9 this particular motorcycle as being potentially,
10 not the one, but potentially the one that was
11 involved in the illegal activity and I think
12 that the State has met its burden.

13 They've shown me that this officer, in
14 this officer's mind, had the location, the time,
15 all the factors I've cited such that make it
16 that she had a reasonable suspicion, an
17 articulated suspicion, based upon reasonable
18 facts given her experience and her position to
19 show that she had reasonable suspicion to pull
20 Mr. Richey over. So I'll deny the motion on
21 that, in that respect.

22 Where are we at now in this case?

23 Mr. Cveykus, are you -- you are not
24 involved?

25 MR. CVEYKUS: I am still on this case.

1 I'm not on his other cases. I withdrew on those
2 based upon the fact that he's locked up. There
3 are, I know, a motion for bond reduction and a
4 motion to take bond but he doesn't have an
5 attorney yet in regard to those. I am unsure if
6 the public defender is going to appoint or
7 whether or not the Court is going to hold a
8 hearing to allow court appointment.

9 THE COURT: Right. What I was
10 wondering is if Mr. Richey cannot get a public
11 defender appointment, if you would take an
12 appointment by the Court for the rest of his
13 cases, if that came to that.

14 MR. CVEYKUS: Yes, Judge, I would.

15 THE COURT: Make sure Mr. Richey gets
16 through the process with the public defender's
17 office. If he's rejected, please, help him have
18 an indigency hearing so we can get to that so,
19 if he wants to, we can move forward I think on
20 these matters. I can't tell you to do that but
21 I'm hoping that you will for his sake.

22 MR. CVEYKUS: I can.

23 THE COURT: As far as activity in
24 these matters, we have nothing further. Can we
25 set it for -- I'm sorry, there's nothing

1 further; is there?

2 MR. CVEYKUS: No.

3 THE COURT: Can we set it for a
4 calendar call? When is attorney -- now is it
5 Attorney Boeck on this?

6 MR. PLAUNT: Yes, Judge, on this case
7 and I am assigned to the rest of the cases.

8 THE COURT: So somebody --

9 MR. CVEYKUS: That's part of the
10 problem. You've got two different DAs and so we
11 scheduled something that comes up for one DA and
12 not the other; we can't resolve. I tried to
13 resolve his other cases earlier but usually
14 Hannah showed up and, of course, I thought I
15 couldn't talk to you about getting a resolution.

16 THE COURT: Can I set it for a
17 calendar call this Thursday or next Thursday?
18 What's your preference?

19 MR. CVEYKUS: Doesn't matter, Judge.

20 MR. PLAUNT: Judge, if we could do
21 next Thursday, I know Attorney Boeck has a trial
22 this week.

23 THE COURT: We'll set it for next
24 Thursday at 1:00.

25 THE CLERK: 16th.

1 THE COURT: 16th of January.

2 Anything else, Mr. Plaunt?

3 MR. PLAUNT: No.

4 THE COURT: Mr. Cveykus?

5 MR. CVEYKUS: Can we have both DAs
6 show up so that we can --

7 THE COURT: I would hope that whoever
8 shows up can get you what you need.

9 MR. CVEYKUS: All right.

10 MR. PLAUNT: As long as I'm not in
11 trial.

12 THE COURT: Anything else from the
13 clerk?

14 THE CLERK: No.

15 THE COURT: Thank you. All we are
16 adjourned.

17 (Proceedings ended at 3:05 p.m.)

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Unpublished Disposition

See Rules of Appellate Procedure, Rule 809.23(3),
regarding citation of unpublished opinions.

Unpublished opinions issued before July 1, 2009, are
of no precedential value and may not be cited except
in limited instances. Unpublished opinions issued on
or after July 1, 2009 may be cited for persuasive value.

NOTE: THIS OPINION WILL NOT
APPEAR IN A PRINTED VOLUME. THE
DISPOSITION WILL APPEAR IN A REPORTER.

Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Brady R. ADAMS, Defendant-Appellant.

Appeal No.

2018AP174

-CR

|

DATED AND FILED January 15, 2019

APPEAL from a judgment of the circuit court for Forest
County, Cir. Ct. No. 2017CM68: LEON D. STENZ, Judge.
Reversed and cause remanded with directions.

Opinion

SEIDL, J.¹

*1 ¶1 Brady Adams appeals a judgment, entered upon his
no-contest pleas, convicting him of second-offense operating
a motor vehicle while intoxicated (OWI) and possession
of a firearm while intoxicated. Adams argues the circuit
court erred by denying his motion to suppress evidence
obtained from a traffic stop because the sheriff's deputy
lacked reasonable suspicion to stop him. We agree, reverse
the judgment, and remand with directions to grant Adams's
motion to suppress.

BACKGROUND

¶2 At the hearing on Adams's motion to suppress, Forest
County sheriff's deputy William Hujet testified that late in
the evening of March 4, 2017, he responded to another deputy's
request for backup after a traffic stop.² The stopped vehicle

contained several individuals. During the stop, one individual
fled the scene on foot. Hujet was told the direction of the
fleeing individual and that the individual was seen weaving
in and out of the woods. Hujet began searching the area near
the traffic stop.

¶3 Approximately thirty minutes after Hujet's search began,
a deputy notified Hujet about an oncoming vehicle. Adams
was later identified as the vehicle's driver. Adams was driving
within approximately one mile or less of where the suspect
had fled the traffic stop at the time Hujet began to follow
Adams's vehicle. At one point, Adams turned off Airport
Road onto a different road that had no houses or lights,
had woods on one side, and had a somewhat open space
on the other. Hujet believed the road led to a dead end.
Hujet continued on Airport Road past the side road on which
Adams had turned, but Hujet could see Adams's vehicle in his
rearview mirror. Hujet watched Adams apply his brake lights,
stop, reverse back onto Airport Road, and then proceed in
the direction he had come from—i.e., driving in the opposite
direction as Hujet. Adams made a turn onto another road and
was now "going right back towards the [fleeing suspect's]
traffic stop." Hujet turned around and then initiated a traffic
stop of Adams.

¶4 When asked at the suppression hearing the purpose for
stopping Adams, Hujet testified that he "was searching for the
person that ran from [the deputy]'s traffic stop." He explained,
based on his prior experiences, that somebody fleeing on foot
would use his or her cell phone to request to be picked up.
With that in mind, Hujet explained that what "really caught
[his] attention" was Adams's stopping and turning around,
specifically on an unlit road with no houses that was mostly
surrounded by woods. Hujet testified that he did not recall
anything wrong with Adams's driving before stopping him.

¶5 Upon making contact with Adams, Hujet detected the
odor of intoxicants coming from within the vehicle. He also
observed that Adams's speech was "slow and slurred." Adams
was arrested for second-offense OWI and subsequently
charged with operation of a motor vehicle with a prohibited
alcohol concentration (PAC), second offense, contrary to Wis.
Stat. § 346.63(1)(b). Adams was also charged with carrying
an unauthorized concealed weapon, contrary to Wis. Stat.
§ 941.23, and possession of a firearm while intoxicated,
contrary to Wis. Stat. § 941.20(1)(b).

*2 ¶6 Adams moved to suppress all evidence obtained as a
result of the traffic stop based upon Hujet's lack of reasonable

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suspicion to stop his vehicle. Following Hujet's testimony, the circuit court denied Adams's motion, concluding Hujet had reasonable suspicion to stop Adams. The court stated:

I think that the fact that someone flees from an officer is reasonable suspicion that he has committed a crime or [is] about to commit a crime [Adams] was in the area where the [suspect] could have been [Adams] may have had no contact at all or connection with [the suspect] who was fleeing from the officer. But that's not necessarily the criteria. It was basically to freeze the situation and to find out, based upon what [Hujet] saw and based upon the totality of the circumstances that [Adams] could have been picking up the [suspect] that was running from law enforcement, travel of the vehicle, and its stops and turns, that it did, were consistent with that.

Adams filed a reconsideration motion, which the court also denied. Adams entered no-contest pleas to the second-offense OWI and possession of a firearm while intoxicated charges. The court dismissed the PAC charge and dismissed but read in the carrying an unauthorized concealed weapon charge. Adams now appeals.

DISCUSSION

¶7 Adams argues the circuit court erred in denying his motion to suppress because Hujet lacked reasonable suspicion to stop Adams's vehicle. A traffic stop does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures when an officer has reasonable suspicion to believe a crime or traffic violation has been or will be committed by the vehicle's occupants. *See* Wis. Stat. § 968.24; *State v. Houghton*, 2015 WI 79, ¶21, 364 Wis. 2d 234, 868 N.W.2d 143. This standard requires that the stop be based on more than an officer's "inchoate and unparticularized suspicion or hunch." *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Rather, an officer's reasonable suspicion must be supported by articulable facts that wrongful activity may be afoot. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989). "The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *Post*, 301 Wis. 2d 1, ¶13.

¶8 Whether an officer's suspicion is reasonable is a common sense test that turns on the totality of the facts

and circumstances. *Id.* In assessing the totality of the circumstances for a traffic stop, "a driver's actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion." *Id.*, ¶24. "But police cannot simply pull over all vehicles on a certain road in hopes of finding violators." *United States v. Bohman*, 683 F.3d 861, 866 (7th Cir. 2012) (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 35-36 (2000)).

¶9 We apply a two-step standard when reviewing a circuit court's ruling on a motion to suppress evidence on Fourth Amendment grounds. *See State v. Martin*, 2012 WI 96, ¶28, 343 Wis. 2d 278, 816 N.W.2d 270. We will uphold the court's factual findings unless they are clearly erroneous. *State v. Eskridge*, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434. However, we independently decide whether the facts establish that a particular search or seizure occurred and, if so, whether it violated constitutional standards. *See State v. Richardson*, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990). Where an unlawful stop occurs, the remedy is to suppress the evidence it produced. *See State v. Washington*, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305.

*3 ¶10 The issue presented here is whether a reasonable officer in Hujet's position would reasonably suspect, under the totality of the circumstances, that wrongful activity by an occupant of Adams's vehicle might be afoot. Here, the State argues Hujet reasonably suspected that Adams was attempting to assist a suspect fleeing the police based upon the totality of the following circumstances: "the time of night, the direction of the fleeing subject on foot, the concurrent location of the ... Adams vehicle to that of the person being sought, and the vehicle stopping and then reversing directions." The State argues that these facts permitted Hujet to make a reasonable inference that Adams was in the area to pick up the fleeing suspect. Adams does not dispute these facts, or that the circuit court found those facts as a basis for its decision. He also does not assert the court erred by finding Hujet's testimony—and therefore the facts surrounding the traffic stop—to be credible. Rather, Adams asserts that the totality of these facts and circumstances were insufficient, as a matter of law, to create reasonable suspicion to stop his vehicle.

¶11 No Wisconsin precedent provides us a clear resolution of this issue under the unique facts of this case. However, we agree with Adams that Hujet lacked reasonable suspicion to stop Adams under the totality of the circumstances here. We cannot conclude that Adams's driving late at night, one-half hour or more after a suspect had fled the scene of a traffic stop within the vicinity of an active police search for that

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suspect, paired with Adams's turning around on a street with a dead end, would lead a reasonable officer to suspect that Adams "ha[d] committed, was committing, or [was] about to commit a crime," or any wrongdoing for that matter. *See Post*, 301 Wis. 2d 1, ¶13. Despite Hujet's prior experiences that fleeing suspects attempt to make arrangements by cell phone for a ride, there is no record here indicating that Hujet knew: (1) the fleeing suspect actually had a cell phone; (2) Adams actually had a cell phone (before he was stopped); (3) that there was any relationship between Adams and the fleeing suspect; (4) that anyone entered the vehicle while Adams stopped and turned around; or (5) even assuming both the suspect and Adams had cell phones and knew each other, that the fleeing suspect had asked Adams to pick him up *because he was fleeing police*. Without such evidence, we cannot determine that Hujet had a reasonable suspicion that Adams was attempting to wrongfully aid the suspect in flight from the police.

¶12 In short, there are no facts to support Hujet's "inchoate and unparticularized suspicion or hunch" that the fleeing suspect may have tried to use a cell phone to request that Adams pick him up. *See id.*, ¶10. Hujet lacked that "quantum of individualized, articulable suspicion" required for a constitutionally permissible traffic stop. *See Delaware v. Prouse*, 440 U.S. 648, 662 (1979). A different deputy notified Hujet that Adams's vehicle was entering into the search area. From that moment until when Hujet stopped Adams's vehicle, Hujet learned of no other facts indicating that Adams was in some way aiding, or otherwise had a connection to, the fleeing suspect. Presence in a suspect area cannot generally be used to impute suspicion onto another individual. *See Bohman*, 683 F.3d at 865. Without some articulable fact that connected Adams to the fleeing suspect, we conclude that, under the totality of the circumstances, the traffic stop was impermissible.

¶13 We determine the facts surrounding Hujet's stop of Adams are akin to those in *Bohman*, a Seventh Circuit case. In *Bohman*, the question presented on appeal was "whether the police may stop a vehicle only because it emerged from a site suspected of drug activity." *Id.* at 862. Sheriff's deputies in Lincoln County, Wisconsin, received reliable information about a known methamphetamine cook. *Id.* This information included a description of the cook's car and the location of a rural cabin where he was cooking the methamphetamine. *Id.* The deputies found the property described by the informant and surveilled it. *Id.* at 863. After witnessing "unusual" vehicle activity that the court later discredited, the deputies

stopped a vehicle leaving the property when the vehicle started to approach the deputies' surveillance position. *Id.* The vehicle was not the one described by the informant as related to the methamphetamine cook. *Id.* However, during the traffic stop, one of the deputies, a seventeen-year veteran methamphetamine investigator, smelled the distinctive odor of a methamphetamine ingredient coming from the vehicle. *Id.* The deputies thus determined that they had uncovered the methamphetamine cooking site. *Id.*

*4 ¶14 The Seventh Circuit concluded that the deputies lacked reasonable suspicion to stop the vehicle. *Id.* at 865-66. The court determined that the deputies' stop of the defendant was based only on a hunch. *Id.* at 866. In so doing, the court relied on its prior decision in *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999). In *Johnson*, which the *Bohman* court found to be "indistinguishable," the court held that the "mere suspicion of illegal activity" in one place was not enough to transfer that suspicion to another person leaving the suspicious place. *Bohman*, 683 F.3d at 865 (citing *Johnson*, 170 F.3d at 720). This conclusion was because the stop would be "based on nothing more than generalized suspicions." *Id.* at 866 n.1.

¶15 We conclude that Hujet's stop of Adams's vehicle warrants the same outcome as *Bohman*. Hujet stopped Adams because he was driving in an area containing an at-large suspect, similar to *Bohman* being stopped within the vicinity of known illegal drug activity. Adams was also driving late at night in a secluded area, and exhibited some unusual, but legal, driving activity. Hujet transferred the reasonable suspicion of criminal activity attributed to the fleeing suspect onto Adams simply because he was driving within the search area, with Hujet having no knowledge of a connection between the fleeing suspect and Adams. We determine that these circumstances are similar to how the deputies in *Bohman* transferred their suspicion of criminal activity onto *Bohman* only because he left a suspected methamphetamine cooking site. Accordingly, like the Seventh Circuit in *Bohman*, we are persuaded that Hujet's stop of Adams was constitutionally impermissible. We therefore reverse Adams's judgment of conviction and remand the matter to the circuit court with directions to suppress the evidence obtained from Adams's traffic stop.

By the Court.—Judgment reversed and cause remanded with directions.

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This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)4.

All Citations

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Footnotes

- 1 This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.
- 2 During the suppression hearing, Hujet did not explain the reason for that traffic stop, but it is irrelevant to our analysis.

End of Document

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first name and last initials 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 the confidentiality and with appropriate references to the record.

Dated this 28th day of February 2015.

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