COURT OF APPEALS
DECISION
DATED AND RELEASED

July 2, 1997

NOTICE

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

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

No. 97-0492-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

v.

GLEN E. KELLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

SNYDER, P.J. Glen E. Kelly appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant contrary to § 346.63(1)(b), STATS. Kelly contends that the trial court erred when it denied a motion to suppress based on his claim that he was subjected to an unlawful search and seizure by an officer who "did not have reliable and credible information to form a reasonable suspicion ...." We conclude that Deputy Ken

Roth possessed the requisite reasonable suspicion to effect a ***Terry*** stop,[1] and that the result of his subsequent investigation gave rise to probable cause to arrest Kelly. Consequently, we affirm.

At approximately 1:00 a.m., a City of Whitewater police officer observed a car weaving. The officer, who was outside of his jurisdiction but in a squad car, radioed in a report of a possible drunk driver to the Walworth County Sheriff's Department. While continuing to follow the vehicle, he advised the dispatcher of his observations and asked for assistance. The dispatcher directed a deputy to respond. The police officer continued to follow the vehicle, staying in contact with the dispatcher and relaying his observations. He observed the car at one point driving on the wrong side of the road. When this occurred, Roth, who had been made aware by the dispatcher of the officer's observations, advised him to stop the vehicle. The officer advised the dispatcher that he was outside of his jurisdiction. Roth relayed permission to the officer to stop the vehicle. *See* § 66.305, STATS. (the law enforcement mutual assistance statute).

Before the officer could stop the car, the driver turned into a driveway.[2] The officer stopped his vehicle and parked.[3] Roth arrived shortly thereafter and after speaking with the officer approached the driver, who identified himself as Kelly. Based on the officer's observations of Kelly's driving, which had been relayed to Roth through the dispatcher, Roth's own observations of

[1] ***Terry v. Ohio,*** 392 U.S. 1 (1968).

[2] It was later determined that this was the driveway of the driver's residence.

[3] Although Roth's report indicates that the other officer exited his vehicle and engaged in conversation with the driver, there was no testimony at the suppression hearing or other evidence in the record that indicates what was said.

Kelly, and Kelly's affirmative answer to the question of whether he had been drinking that evening, Roth asked Kelly to perform several field sobriety tests.[4] Kelly was unable to perform the tests satisfactorily. Roth then arrested Kelly for operating while intoxicated and transported him to the Walworth County Sheriff's Department.

Kelly filed a motion to suppress and exclude the post-stop evidence on the basis that the stop was not founded on probable cause. This is premised on his claim that he was stopped illegally by the police officer who was outside of his jurisdiction and that the stop laid an illegal foundation for the arrest by Roth. After a hearing, the trial court denied the motion. Kelly was found guilty by a jury of operating while under the influence of an intoxicant and of the companion charge of operating a motor vehicle with a prohibited alcohol concentration. He now appeals, contending that the court erred when it failed to exclude the post-stop evidence.

Whether the police officer stopped Kelly is a question that requires us to apply constitutional doctrine to the facts in this case, thereby making it a question of law for the trial court. *See* ***State v. Reichl***, 114 Wis.2d 511, 516, 339 N.W.2d 127, 129 (Ct. App. 1983). Therefore, the appellate court is "not bound by the trial court's conclusions of law and decides these matters de novo." ***State v. Dunn***, 158 Wis.2d 138, 142, 462 N.W.2d 538, 540 (Ct. App. 1990) (quoted source omitted). However, "the trial court findings regarding the historical facts surrounding defendant's detention will not be overturned unless they are clearly erroneous." ***State v. Smith***, 119 Wis.2d 361, 366, 351 N.W.2d 752, 754-55 (Ct.

[4] The tests included recitation of the alphabet, the Horizontal Gaze Nystagmus (HGN), the one-leg stand, the heel-to-toe straight line walk, and a preliminary breath test.

App. 1984). In this case, the trial court found that Kelly was not stopped by the police officer as Kelly brought his vehicle to a stop himself.

Our analysis of this issue requires us to look at what may constitute a ***Terry*** stop and then determine at what point Kelly was stopped. The first officer was authorized to stop Kelly's vehicle under two separate rules. He was authorized under the law enforcement mutual assistance statute as he had been given permission by Roth to pull the car over. *See* § 66.305, STATS. The evidence is uncontroverted that Kelly was not pulled over; rather, he stopped his vehicle when he arrived at his destination—his own driveway. However, the officer was also authorized to make a citizen's arrest under the rule of ***State v. Slawek***, 114 Wis.2d 332, 335, 338 N.W.2d 120, 121 (Ct. App. 1983). The rule enunciated by ***Slawek*** authorizes out-of-jurisdiction police officers to make an arrest under any circumstances where an ordinary citizen would be authorized to do so. *See* ***id.*** at 337-38, 338 N.W.2d at 122.

In ***Slawek***, six Chicago police officers were following a van in their jurisdiction as they believed it was involved in several area burglaries. They followed the van into Wisconsin and witnessed a burglary taking place in Lake Windsor. The officers were unable to alert local authorities and therefore arrested the suspects themselves, using police procedures of frisking and handcuffing. The court upheld the officers' actions, finding that they were authorized to act in the same way any ordinary citizen could, that is, to effect a citizen's arrest using whatever techniques they had at their disposal. *See* ***id.*** at 338, 338 N.W.2d at 122.

This rule was further articulated in ***City of Waukesha v. Gorz***, 166 Wis.2d 243, 479 N.W.2d 221 (Ct. App. 1991). That case involved an out-of-jurisdiction police officer, in a marked police car and uniform, pulling over a

suspected drunk driver by activating his emergency lights and waiting with him until the local police arrived. *See* ***id.*** at 245, 479 N.W.2d at 222. The court ruled that the officer's actions were a citizen's arrest, despite the trappings of his squad car and uniform.[5] *See* ***id.*** at 246, 479 N.W.2d at 223. In the present case, however, there is nothing in the record to indicate that Kelly was compelled to pull his vehicle into his own driveway as a result of actions taken by the police officer. There is no testimony that the emergency lights and/or siren were activated when Kelly brought his vehicle to a stop. There is no testimony which suggests that Kelly was aware that he was being followed by a police officer.

Having concluded that the first officer did not stop Kelly, it is nonetheless instructive to examine conduct that has been held to constitute a stop as further support for our determination. Examples of when a person has been "seized" are provided in ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980), which elucidated "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." The standard for a ***Terry*** stop is codified in § 968.24, STATS., which states that a law enforcement officer "may demand the name and address of the person and an explanation of the person's conduct." Further, an officer is authorized to ask for a driver's license even when his motivation for stopping is that of a community caretaker. *See* ***State v.***

[5] Similar to ***City of Waukesha v. Gorz,*** 166 Wis.2d 243, 246, 479 N.W.2d 221, 223 (Ct. App. 1991), which rejected the argument that a uniformed officer cannot act as an ordinary citizen when "official police indicia are used," the question of when the stop occurred in the instant case is only an issue because the individual initially reporting the conduct was a police officer. However, there is nothing in the record which indicates that anything occurred between the officer and Kelly that could not have occurred between a citizen with a cellular phone and Kelly.

Ellenbecker, 159 Wis.2d 91, 97-98, 464 N.W.2d 427, 429 (Ct. App. 1990). In that case, the court held that the "community caretaker action is not an investigative ***Terry*** stop and thus does not have to be based on a reasonable suspicion of criminal activity." ***Ellenbecker***, 159 Wis.2d at 96, 464 N.W.2d at 429.

The record in the instant case is devoid of any testimony that the police officer took any action or even attempted to learn Kelly's identity by asking for his driver's license. We find no error in the trial court's determination that under the facts presented, the first officer did not effect a ***Terry*** stop, nor was there any evidence that his behavior led Kelly to believe that he was being detained. [6] "[A]ny subjective intention of the officer[s] to detain [the subject] is relevant only to the extent it was conveyed to him." ***Reichl***, 114 Wis.2d at 515, 339 N.W.2d at 129.

When Roth arrived, he spoke with the officer and then to Kelly. It was at this point that the ***Terry*** stop occurred. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). Roth had a reasonable suspicion that Kelly was violating the law and therefore his detention of Kelly for further investigation was warranted. His reasonable suspicion was based upon the officer's statements to the dispatcher, which were relayed to Roth. An officer may

[6] Defense counsel claims that the failure to recognize the first officer's actions as a stop could only stem from the unlikely inference that Kelly and the officer were "taken by the beauty of the evening" and "enjoying the same view" until Roth arrived. We note, however, that because the record fails to provide any evidence of what, if anything, transpired between Kelly and the first officer, the trial court's conclusion that there was no stop could reasonably be inferred from the facts in evidence. *See* ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989).

rely on the "collective knowledge" of his entire department. *See* ***State v. Cheers***, 102 Wis.2d 367, 388, 306 N.W.2d 676, 685 (1981).

After Roth spoke to Kelly himself, he asked Kelly to step from the vehicle and perform several field sobriety tests. After the tests, Roth's information rose to the level of probable cause to arrest Kelly for operating while under the influence of an intoxicant. The post-stop evidence was properly admitted.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.