COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0817-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TODD J. GERRITS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded.*

CANE, C.J. Todd Gerrits appeals from a final judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, third offense, contrary to § 346.63(1)(b), STATS. Gerrits argues that the State failed to prove that Gerrits was lawfully stopped; therefore, the trial court erred by failing to suppress all evidence gained as a result of the stop. This court agrees.

Therefore, the judgment is reversed and remanded for proceedings consistent with this opinion.

On July 4, 1998, Gerrits was stopped by Appleton Police Officer Adam Konkle because Konkle felt Gerrits' car stereo was excessively loud. Specifically, Konkle believed Gerrits was in violation of a city ordinance prohibiting extremely loud noise in residential areas.[1] As a result of stopping Gerrits, the officer made various observations that led him to believe Gerrits was intoxicated. Following a series of field sobriety tests, Gerrits was arrested for operating a motor vehicle while intoxicated.

Gerrits subsequently filed a motion to suppress all evidence obtained as a result of the stop, asserting that he was stopped without reasonable cause in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution and art. I, §§ 7 and 11, of the Wisconsin Constitution. At the suppression motion hearing, the State's sole argument for Gerrits' stop was based upon Gerrits' violation of Appleton's noise ordinance. Gerrits argued, however, that the State had failed to prove that there was a violation of the noise ordinance or that it occurred in a residential area and thus, the officer had no "articulable reason to stop" Gerrits' vehicle. The trial court found that the officer had reasonable cause to make the stop and denied Gerrits' motion to suppress. Gerrits subsequently pled no contest to the charge, was convicted and sentenced. This appeal followed.

[1] APPLETON, WIS., CODE § 12-82 prohibits a person from creating "a noise disturbance in a residential area."

It has long been recognized that "stopping an automobile and detaining its occupants constitutes a seizure under the Fourth Amendment." ***State v. Baudhuin***, 141 Wis.2d 642, 648, 416 N.W.2d 60, 62 (1987). Further, "[t]he validity of such a search and seizure depends initially upon whether the defendant … was lawfully stopped." ***Id***. An officer has authority to stop a vehicle where "the officer has reasonable grounds to believe [a] violation has occurred." ***Id***. The legality of an initial stop is a question of law. *See* ***id***. at 648, 416 N.W.2d at 62. This court is not bound by a trial court's conclusion of law and decides the matter de novo. *See* ***Green Scapular Crusade, Inc. v. Town of Palmyra***, 118 Wis.2d 135, 138, 345 N.W.2d 523, 525 (Ct. App. 1984).

Gerrits, in his brief to this court, argued that the stop was unlawful because the State failed to establish that the ordinance giving rise to the stop had been violated. Gerrits asserted that Appleton's noise violation ordinance required the following two elements: (1) that there be a noise disturbance as defined by the ordinance; (2) in a residential area, limited by ordinance to specific zones within the city.[2] Gerrits argued that Konkle misunderstood the ordinance, citing Konkle's belief that the ordinance made no distinction between residential and nonresidential settings. Gerrits further argued that the State had produced no evidence of a noise disturbance as it failed to establish how loud the noise was or that anyone was annoyed therefrom.

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[2] The Appleton Code defines "noise disturbance" as "any sound which: (1) Endangers or injures the safety or health of humans or animals; (2) Annoys or disturbs a reasonable person of normal sensitivities; or (3) Endangers or injures personal or real property." APPLETON, WIS., CODE § 12-76.

"*Residential area*" is defined as "any area of the City designated on the official zoning map as R-1A, R-1B, R-2, R-3, R-4, R-5, C-H, R-6 or R-7." ***Id***.

In its brief, the State abandoned its claim that Gerrits' stop was based on the noise ordinance violation, asserting in the alternative, for the first time on appeal, that the stop was based on disorderly conduct, prohibited under § 947.01, STATS. Relying on ***Baudhuin***, the State argues that this court may find a different and lawful justification for the stop if supported by the record, despite the officer's subjective motivation. In ***Baudhuin***, the record established that the officer had before him articulable facts to establish reasonable grounds for his belief that Baudhuin was violating a traffic law. *See* ***id***. at 650-51, 416 N.W.2d at 63. Despite these facts, the officer's subjective motivation in stopping Baudhuin was not to issue a citation, but rather to see if Baudhuin needed assistance. *See* ***id***. The ***Baudhuin*** court held:

> As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal. The officer's subjective intent does not alone render a search or seizure of an automobile or its occupants illegal, as long as there were objective facts that would have supported a correct legal theory to be applied and as long as there existed articulable facts fitting the traffic law violation.

Id. at 651, 416 N.W.2d at 63.

This court hesitates to address the State's disorderly conduct argument because it was never raised before the trial court.[3] In general, an issue

[3] Gerrits argues that the State is judicially estopped from asserting disorderly conduct as a basis for the stop. Judicial estoppel, however, "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." ***Riccitelli v. Broekhuizen***, 227 Wis.2d 100, 595 N.W.2d 392, 397 (1999). "Inconsistent" is defined as "mutually repugnant or … contrary." BLACK'S LAW DICTIONARY 907 (Rev. 4th ed. 1968). Although the State's positions regarding the basis for Gerrits' stop are different, they cannot be categorized as inconsistent, mutually repugnant or contrary. Because the State's positions are not inconsistent, as contemplated under the equitable doctrine of judicial estoppel, it is not prevented from asserting disorderly conduct as a basis for Gerrits' stop.

may not be raised for the first time on appeal. *See* ***Anderson v. Nelson***, 38 Wis.2d 509, 514, 157 N.W.2d 655, 658 (1968). Under ***Baudhuin***, however, we may look to the record to determine if there were objective facts to support the stop based on the application of a correct legal theory, regardless of Konkle's subjective intent. The State asserts there was reasonable cause to stop Gerrits as the record supports a "reasonable belief ... that [Gerrits] was engaged in disorderly conduct at the time of the stop."

Disorderly conduct is described as follows: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." Section 947.01, STATS. In essence, "there are two distinct elements to disorderly conduct—conduct must be of the type enumerated in the statute *or similar thereto* AND such conduct must be engaged in under circumstances which tended to cause or provoke a disturbance." ***State v. Zwicker***, 41 Wis.2d 497, 515, 164 N.W.2d 512, 521 (1969) (emphasis in original). It is this "combination of conduct and circumstances that is crucial in applying the statute to a particular situation." ***State v. Maker***, 48 Wis.2d 612, 616, 180 N.W.2d 707, 709 (1970). The ***Maker*** court recognized that "the relatedness of conduct and circumstances in the [disorderly conduct] statute is no more than a recognition of the fact that what would constitute disorderly conduct in one set of circumstances, might not under some other." ***Id***. In general, the statute "does not protect the hypersensitive from conduct which generally is tolerated by the community at large." ***State v. Givens***, 28 Wis.2d 109, 116-17, 135 N.W.2d 780, 784 (1965).

Looking at the conduct at issue here, the State asserts that the music from Gerrits' truck was unreasonably loud. Although Konkle characterized the

music as "very loud," this court must look not only to the alleged conduct, but also to the circumstances surrounding that conduct. Konkle heard "very loud music," from a distance of 250 feet, coming from Gerrits' truck. It was this loud music that motivated the stop as Konkle did not notice any irregular driving on Gerrits' part. The stop occurred at 8:20 p.m. on July 4, 1998, and Konkle testified that at the time of the stop, he heard fireworks coming from "multiple directions." In fact, Konkle noted that the noise from both the fireworks and from Gerrits' truck was "fairly equal." Given the celebratory nature of Independence Day coupled with the fact that the stereo was no louder than fireworks coming from multiple directions, this court cannot conclude, as a matter of law without other evidence, that there was probable cause to believe this was conduct that tended to cause or provoke a disturbance.

Moreover, in comparing this case to ***Baudhuin***, the objective facts in ***Baudhuin*** supported the officer's reasonable belief that there was a traffic law violation. Here, Konkle's motivation in stopping Gerrits was based solely on his belief that Gerrits was violating Appleton's noise violation ordinance. Although an officer's subjective intent is immaterial where there is an otherwise proper legal basis to justify a stop, it is important to note that officer Konkle, unlike the officer in ***Baudhuin***, never even contemplated the legal basis now asserted by the State—specifically, disorderly conduct. Given this fact and upon review of the record, this court holds that these facts are insufficient to support a reasonable belief that Gerrits was engaged in disorderly conduct at the time of the stop. As such, there was no reasonable cause to stop Gerrits, and any evidence obtained as a result of the illegal stop should have been suppressed.

By the Court.—Judgment reversed and cause remanded.

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