COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2563-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COLLEEN LEMMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Colleen Lemmer appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1997-98). All further references to the Wisconsin Statutes are to the 1997-98 version.

STAT. § 346.63(1)(a).[2] The issue on appeal is whether the arresting officer had reasonable suspicion to stop Lemmer's vehicle under ***Terry v. Ohio***, 392 U.S. 1 (1968), and WIS. STAT. § 968.24. We uphold the trial court's determination that the stop was proper. We therefore affirm the judgment of conviction.

¶2 We take the relevant facts, which are undisputed, from the trial court's written decision and from the evidence presented at the hearing on Lemmer's motion to suppress.[3] The trial court wrote:

> Briefly stated, the stop of the defendant's vehicle occurred in the near dawn hours of April 5, 1998, in the City of Cedarburg. Although the defendant did not exhibit any driving pattern consistent with a person under the influence of an intoxicant, the officer stated that he stopped her vehicle because it had made at least one journey into a cul de sac and then had to turn around and head in another direction, apparently having entered the cul de sac without a destination at that location.
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> The officer further stated that he had received a memo some time up to a week before indicating that he should be on the lookout for vandals shooting paint projectiles in the general neighborhood. He further testified that he did not believe the vehicle driven by the defendant was from "the area." He also stated that there was no evidence or no reports to him from any paintball damage occurring during the evening and morning hours of the date in question.

¶3 City of Cedarburg Police Officer Joseph Biliskov, the arresting officer, testified at the hearing on Lemmer's motion to suppress that Lemmer's vehicle was traveling in front of him at approximately 4:23 a.m. Two persons

[2] Lemmer was convicted as a repeat offender. A companion charge of operating a motor vehicle with a prohibited alcohol concentration pursuant to WIS. STAT. § 346.63(1)(b) was dismissed.

[3] Although the State's response brief refers to certain evidence presented at the suppression hearing, we note that the appellate record does not include the actual transcript. However, Lemmer's reply brief does not complain that the transcript is not included in the appellate record. In addition, Lemmer does not dispute the evidentiary material presented by the State. We therefore will refer to the relevant portions of this evidence.

were in the vehicle. The officer did not recognize the vehicle and he tried to run a registration check. The vehicle turned into a cul de sac located in the Cedar Pointe subdivision and then "made a quick turn into the first driveway on Greenway Terrace or Gateway Terrace." The residence at the location was unlit. Neither person exited the vehicle. A few moments later, the vehicle pulled out of the cul de sac and drove away. The officer then stopped the vehicle. Lemmer proved to be the driver. Further investigation resulted in Lemmer's arrest for OWI. As noted, Lemmer brought a motion to suppress evidence obtained as a result of the stop of her vehicle.

¶4 In its written decision, the trial court ruled, "It is clear under the facts of this case that none of the three factors standing alone would even come close to providing reasonable suspicion." Instead, the court saw the issue as whether the cumulative facts sufficed to establish reasonable suspicion under ***Terry***. The court ruled that they did. Following the trial court's ruling, Lemmer pled guilty to OWI. She now appeals the trial court's ruling denying her motion to suppress.

¶5 The rule of ***Terry*** is codified in WIS. STAT. § 968.24, which authorizes a law enforcement officer to "stop a person in a public place for a reasonable period of time when the officer *reasonably suspects* that such person is committing, is about to commit or has committed a crime." (Emphasis added.) The question of what constitutes reasonableness is a commonsense test. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). We inquire: "What would a reasonable police officer reasonably suspect in light of his or her training and experience[?]" ***Id***. "This commonsense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility." ***Id***. In order to perform a legal stop, the officer must have a reasonable suspicion grounded in specific, articulable

facts and reasonable inferences from those facts that the individual has committed, is committing, or is about to commit an offense. *See* ***Terry***, 392 U.S. at 27. An inchoate and unparticularized suspicion or hunch will not suffice. *See* ***id***.

¶6 In ***Waldner***, the defendant had engaged in a series of lawful acts which, considered separately, did not provide reasonable suspicion under ***Terry***. *See* ***Waldner***, 206 Wis. 2d at 58. However, the supreme court cautioned, "[T]hat is not the test we apply." ***Id***. Instead, the court looked to "the totality of the facts taken together." ***Id.*** Likening the defendant's separate, discrete acts to a series of "building blocks," the court concluded that the conduct of the defendant provided a reasonable basis for the temporary detention. *See* ***id.***

¶7 The trial court employed the ***Waldner*** analysis in this case. So do we. Viewed separately, the individual components of Lemmer's conduct would not provide a reasonable basis for a ***Terry*** stop. Lemmer's operation of a motor vehicle without committing any observable violations of the law was certainly lawful. The same is true of her subsequent acts of turning into the cul de sac area, entering the driveway of one of the residences in the area, remaining in the vehicle and then departing the area. *See* ***Waldner***, 206 Wis. 2d at 60-61.

¶8 But, as ***Waldner*** teaches, we look at the entire picture from the standpoint of a reasonable officer. Here, sometime during the preceding week Biliskov had received information that residences in the area had been vandalized and that he should be on the lookout for the vandals. At 4:30 a.m., Biliskov observed a vehicle that he did not recognize pull into a driveway of an unlit residence. Neither the driver nor the occupant exited. Instead, after a few moments, the vehicle left the cul de sac area and went on its way. From these observations, coupled with his previous knowledge of vandalism in the area and

his directive to be on the lookout for vandals, we conclude that Biliskov had an understandable suspicion that the occupants of the vehicle might be associated with the vandalism episodes.

¶9 "Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity…. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." ***Id.*** at 60. Here, notwithstanding that the facts presented Biliskov with a reasonable inference of lawful conduct, they also presented a reasonable inference of unlawful conduct. *See* ***id***. Vandalism is not ordinarily committed in open view or in the light of day. Moreover, when a vehicle pulls into a driveway, common sense and human experience lead to the reasonable expectation that the driver or an occupant will exit the vehicle. But that did not occur here. Instead the vehicle departed, allowing Biliskov to reasonably conclude that the occupants of the vehicle had no business in the area or, in the words of the trial court, were "without a destination at that location."

¶10 Biliskov's suspicion was not made out of whole cloth. Nor was it a mere hunch. He had solid evidence of recent criminal activity in the area. He was on watch for the persons who might have committed such acts. Lemmer's driving conduct, while lawful, was suspicious measured from the background information that Biliskov possessed. We hold that Biliskov had a reasonable suspicion under ***Terry*** and WIS. STAT. § 968.24 to stop Lemmer's vehicle. We uphold the trial

court's ruling rejecting Lemmer's motion to suppress the evidence obtained as a result of the stop. We therefore affirm the judgment of conviction.[4]

By the Court.—Judgment affirmed.

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

[4] Lemmer refers us to ***City of Minot v. Johnson***, 603 N.W.2d 485 (N.D. 1999), where a divided North Dakota Supreme Court held that a temporary detention was unlawful under what Lemmer contends were similar facts to those presented here. The crux of the court's holding was that the defendant's presence in a "high crime area" cannot solely justify a temporary detention. *See* ***id***. at 487; *see also* ***Brown v. Texas***, 443 U.S. 47, 52 (1979). We first note that we are not bound by the appellate decisions of a sister state. More importantly, we disagree that the facts in this case parallel those in ***Johnson*** because here Lemmer's suspicious driving conduct—*not her mere presence*—contributed to the reasonable suspicion. *See* ***United States v. Rickus***, 737 F.2d 360, 366 (3d Cir. 1984).