COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2618

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

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. DUFFY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Timothy Duffy appeals from a judgment finding him guilty of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to a City of Madison ordinance adopting WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

STAT. § 346.63(1)(a), and to operating a motor vehicle with a prohibited alcohol concentration (OMVPAC), contrary to a City of Madison ordinance adopting § 346.63(1)(b). Duffy filed a suppression motion, challenging the underlying stop. He claims that the arresting officer did not have reasonable suspicion to stop him. Because we conclude there were sufficient facts within the officer's knowledge to permit the stop, we affirm the circuit court.

BACKGROUND

¶2 At approximately 1:30 a.m., Officer Timothy Harder, a police officer for the City of Madison, was parked in a marked squad car in a parking lot located between two businesses, the Happy Sleeper and the International House of Pancakes (IHOP). Harder observed Duffy drive his truck slowly down the frontage road and turn into the parking lot shared by the Happy Sleeper and Oak Express. Both businesses were closed at the time. The vehicle stopped in front of the stores and shined its headlights on the front door of the businesses, for approximately twenty seconds.

¶3 The vehicle then left this parking lot and entered the parking lot of IHOP, another business on the frontage road. IHOP was also closed at the time. Again, Duffy drove his truck up to the establishment and shined its headlights on the front door, for approximately ten seconds.

¶4 Harder testified that these businesses have alarm systems and that he had previously responded to them when their alarms have been activated. He also testified that many businesses place decals on their front doors to announce the presence of security systems; and by shining headlights on the front door, a driver could see any security decals. Harder stated that he believed the driver of the vehicle may have been "casing" the businesses for a potential burglary. Harder

decided to stop the vehicle to investigate. When he did so, he found evidence that the driver, Duffy, was intoxicated.

¶5 Duffy filed a motion to suppress the evidence, claiming that Harder did not have reasonable suspicion to stop his vehicle. The circuit court denied the motion. Subsequently, Duffy was found guilty of OMVWI and OMVPAC.[2] He appeals the denial of his suppression motion.

DISCUSSION

Standard of Review.

¶6 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law which we decide without deference to the circuit court's decision. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

Reasonable Suspicion.

¶7 The Fourth Amendment prohibits unreasonable searches and seizures. *See* U.S. CONST. amend. IV. The detention of a motorist by a law enforcement officer constitutes a "seizure" of the person within the meaning of the Fourth Amendment. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984).

[2] The record contains circuit court minutes which state that a plea of guilty was entered on behalf of Duffy and that he was found guilty based on that plea. However, the same document notes a "stipulated trial." Although we were not provided with a transcript of that trial, counsel for Duffy has advised the court that he did not plead guilty and the City does not contest that representation. Therefore, we accept it as an accurate statement of what occurred in the circuit court.

Statements given and items seized during a period of illegal detention are inadmissible. *See* ***Florida v. Royer***, 460 U.S. 491, 501 (1983). However, an investigative detention is not "unreasonable" if it is brief in nature, and justified by a reasonable suspicion that the motorist has committed, or is about to commit, a crime. *See* ***Berkemer***, 468 U.S. at 439; *see also* WIS. STAT. § 968.24. The same standards which have been established for a stop challenged under the Fourth Amendment apply to a stop challenged under art. I, § 11 of the Wisconsin Constitution. *See* WIS. CONST. art. I, § 11; ***State v. Harris***, 206 Wis. 2d 243, 259, 557 N.W.2d 245, 252 (1996).

¶8 According to ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be bottomed on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action is appropriate. *See* ***id.*** at 21-22. "The question of what constitutes reasonable suspicion is a common sense test. Under all the facts 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, 390 (1989). The test is designed to balance the personal intrusion into a suspect's privacy occasioned by the stop against the societal interests in solving crime and bringing offenders to justice. *See* ***State v. Guzy***, 139 Wis. 2d 663, 680, 407 N.W.2d 548, 556 (1987).

¶9 Duffy contends that none of his acts constituted illegal behavior. Further, he argues that a police officer is not permitted to make a stop simply because he can infer a "sinister connotation" to otherwise innocent acts. Duffy claims that his behavior fits the description of a person who is lost and looking for an address.

¶10 We agree that Duffy did not engage in illegal behavior and that each act identified by Harder could well have innocent explanations. However, whether an innocent explanation exists is not determinative of whether there is reasonable suspicion to justify a stop. When an officer observes unlawful conduct, there is no need for an investigative stop because the observation of unlawful conduct gives the officer probable cause for an arrest. However, "[t]he Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape." ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681, 685 (1996). The Fourth Amendment allows a police officer to stop a person when he has less than probable cause.

¶11 Our review of the record discloses that the facts in ***Terry*** are analogous to what occurred here. In ***Terry***, the Supreme Court upheld the legality of an investigative stop by a police officer who observed the defendants repeatedly walk back and forth in front of a store window at 2:30 in the afternoon, and then confer with each other. The officer suspected the two of contemplating a robbery and stopped them to investigate further.

¶12 Walking back and forth in front of a store on a public sidewalk is perfectly legal behavior. Nonetheless, reasonable inferences of criminal activity can be drawn from such behavior. As our supreme court noted in ***Jackson***, "the suspects in ***Terry*** 'might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store.'" ***Jackson***, 147 Wis. 2d at 835, 434 N.W.2d at 391 (citation omitted). Nonetheless, the Court concluded that the investigative stop of the ***Terry*** defendants was permissible because, based on the police officer's training and experience, their

lawful conduct gave rise to a reasonable inference that criminal activity was afoot. In short, the conduct of the ***Terry*** defendants, though lawful, was suspicious.

¶13 Additionally, the supreme court has noted that suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763, 766 (1990). Therefore, when a police officer observes lawful, but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively made, notwithstanding the existence of other innocent inferences that could be drawn, a police officer may temporarily detain the individual for the purpose of inquiry. *See* ***id.*** A police officer is not required to rule out the possibility of innocent behavior before initiating a brief stop. *See* ***Waldner***, 206 Wis. 2d at 59, 556 N.W.2d at 685 (citation omitted).

¶14 In this case, Harder was conducting a legitimate investigative stop. He had observed Duffy go through a series of acts, which taken together, warranted further investigation. Harder was not required to rule out possible innocent explanations for Duffy's behavior before stopping him to investigate. Reasonable inferences of criminal behavior can be drawn from Duffy's conduct.

CONCLUSION

¶15 Because we conclude that there were sufficient facts within the officer's knowledge to justify the stop, we affirm the circuit court.

By the Court.—Judgment affirmed.

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