COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP82-CR **Cir. Ct. No. 2003CF213**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT A. UNERTL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: RICHARD L. REHM, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Scott Unertl appeals a judgment convicting him of second-degree sexual assault of a child. The prosecution resulted from information police obtained after detaining and later arresting Unertl. He entered a plea to the charge after the circuit court denied his motion to suppress the

evidence gathered as a result of the stop and the arrest. The issue is whether the police lawfully detained Unertl, whether that detention became a defacto arrest requiring ***Miranda*** warnings to validate the consent to search Unertl gave police, and whether police had probable cause to arrest Unertl based on evidence discovered during the subsequent search. We affirm.

¶2 Police officers in the City of Horicon encountered Unertl near his home as they responded to a fireworks complaint. With him was a female juvenile, who they subsequently identified as fourteen-year-old runaway from Iowa. The officers also learned from Iowa police sources that the runaway had been having sexually explicit computer communications with a person from Horicon named "Scott." The officers then attempted to obtain a warrant to search Unertl's computer. When that effort failed, an officer escorted Unertl to a police car parked 300 yards away and placed him in the backseat. The officer then moved the car nearer to Unertl's apartment.

¶3 Unertl was detained approximately twenty minutes in the police car until a more senior officer arrived to question him. Unertl subsequently consented to a search of his apartment, including his computer. On the computer officers discovered a picture of a young woman posing naked on a bed with her hand holding her breast, with a teddy bear lying nearby. Unertl was then arrested on the grounds that the picture provided probable cause to believe that Unertl possessed child pornography in violation of WIS. STAT. § 948.12 (2003-04).[1] Evidence

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

discovered subsequently, including the runaway's account of her relationship with Unertl, led to the sexual assault charge.

¶4 In a suppression motion Unertl contended that his initial detention was unlawful and eventually became an arrest due to its extended duration. Consequently, he contended that his consent to the search was invalid because the police officers should have, but did not, advise him of his ***Miranda*** rights before obtaining his consent. He also challenged the subsequent arrest because, he contended, the picture found on his computer did not establish probable cause that he possessed child pornography. The circuit court rejected those arguments, resulting in Unertl's plea and this appeal.

¶5 Police officers may temporarily stop and detain a person on reasonable suspicion that the person is committing, is about to commit, or has committed a crime. WIS. STAT. § 968.24; *see* ***Terry v. Ohio***, 392 U.S. 1, 22, 27, 30 (1968). The detention is limited to a reasonable period of time and must be conducted in the vicinity where the person was stopped. Section 968.24. A question of what constitutes reasonable suspicion is a common sense test. ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). Stated otherwise, the test is whether the detaining officer had specific and articulable facts, along with rational inferences from those facts, that would objectively allow a reasonable police officer to believe that the detained individual was engaged in, or about to engage in, criminal activity. ***Terry***, 392 U.S. at 21-22.

¶6 We will uphold the circuit court's findings of fact concerning the detention in question under the great weight and clear preponderance of the evidence test. ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App.

1991). However, whether the detention meets the statutory and constitutional standards is a question of law, which we review de novo. ***Id.***

¶7 The police officers reasonably detained Unertl. The officers knew that Unertl's companion was a fourteen-year-old runaway from another state, who had participated in sexually explicit communications with a man who was almost certainly Unertl. After the officers learned who the runaway was, how old she was, and that she was in fact a runaway, Unertl falsely told them she was sixteen years old and was with him in Horicon with parental permission. Under these circumstances, a reasonable police officer applying common sense would suspect that Unertl was involved in some criminal activity involving the runaway.

¶8 The officer did not detain Unertl for an unreasonable length of time such that the detention escalated into an arrest. A ***Terry*** stop becomes an arrest if it extends unreasonably long. ***United States v. Sharpe***, 470 U.S. 675, 685 (1985). However, there is no rigid or bright-line rule as to the outer limits of the length of a temporary detention. ***Id.*** at 685-86. To investigate possible criminal activity, which is the purpose of ***Terry*** stops, police may under certain circumstances detain the individual for longer than the brief time period involved in ***Terry***. ***Sharpe***, 470 U.S. at 685-86. The test remains one of reasonableness concerning the time needed to diligently perform the investigation justified by the circumstances. *See* ***id***. In this case officers reasonably detained Unertl until a more senior officer could arrive to investigate a fairly complex matter involving an out-of-state runaway juvenile and her potential sexual relationship with an adult. Furthermore, the officers had reliable information that incriminating material might be found on Unertl's computer, and could reasonably conclude that detention was appropriate to prevent Unertl from destroying potentially incriminating evidence before it could be investigated.

¶9 We conclude the detention did not continue unreasonably and, therefore, it did not become an arrest. Nor does the record show that the detention became an arrest for any other reason, such as the location of the detention or the degree of restraint placed on Unertl. A reasonable person in Unertl's position would have understood that he or she would be free to go if the investigation produced no evidence of criminal activity.

¶10 Furthermore, even if ***Miranda*** warnings had become necessary under the circumstances of the detention, the evidence obtained from Unertl's subsequent consent to search was not subject to suppression. Evidence derived from statements made without benefit of ***Miranda*** warnings will be suppressed only if the ***Miranda*** violation was intentional. *See* ***State v. Knapp***, 2005 WI 127, ¶¶1, 74-82, ___ Wis. 2d ___, 700 N.W.2d 899. Here, the record contains no evidence that the officers on the scene intentionally failed to give Unertl his ***Miranda*** warnings during his detention in order to gain advantage over him.

¶11 After discovering the suggestive photograph on Unertl's computer, the officers had probable cause to arrest him for possessing child pornography. It is a crime to possess a digital image of a child engaged in sexually explicit conduct if the person knows that he or she possesses the material, the person knows the character and content of the sexually explicit conduct in the material, and the person knows or reasonably should know that the child in the image is under eighteen years old. WIS. STAT. § 948.12. Sexually explicit conduct includes the "lewd exhibition of intimate parts." WIS. STAT. § 948.01(7)(e).

¶12 In this case Unertl contends the officers had no reasonable basis to conclude that the girl in the picture was under eighteen, that she was engaged in a lewd exhibition of intimate parts, or that Unertl knew or reasonably should have

known that the girl was less than eighteen. We disagree. Upon review of the photograph, we conclude that a reasonable police officer could easily believe that the girl in the picture was less than eighteen, both because of her very youthful appearance, and the fact that a teddy bear appears in the picture to underscore her young age. A reasonable police officer could also conclude that the young girl was lewdly exhibiting her breasts, which are emphasized in the picture by the fact that she is arching her back and thrusting them forward. She is also cupping and pinching her left breast, which is centered in the picture and is the closest object to the camera. Finally, from the picture itself, and the officers' knowledge of Unertl's interest in and contact with a fourteen-year-old, they could have reasonably concluded that Unertl knew or should have known that the image was that of a child.

By the Court.—Judgment affirmed.

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