COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0834-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LYNWOOD E. HUNTOON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Lynwood E. Huntoon appeals from a judgment of conviction for three misdemeanors: escape pursuant to WIS. STAT. § 946.42(2)(a), resisting an officer pursuant to WIS. STAT. § 946.41(1) and

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

obstructing an officer also pursuant to § 946.41(1).[2] Huntoon entered pleas of guilty to the charges after the trial court rejected his motion to suppress evidence based on a claimed ***Terry***[3] violation. Following the convictions, Huntoon renewed the ***Terry*** issue in a postconviction motion. The trial court confirmed its earlier ruling and denied the motion.

¶2 Huntoon further renews the ***Terry*** issue on appeal. We affirm the judgment and the postconviction order.

Facts

¶3 The facts are not in dispute. On May 15, 1999, an anonymous telephone caller reported to the City of Sheboygan Police Department "two suspicious male subjects in the seven hundred block alley of Center Avenue." The caller reported that the two men were staggering and stumbling and appeared "quite intoxicated." Officer Brian Krueger was dispatched to the area where he observed two men walking with a staggering gait. After a few minutes, one of the men entered into an alley that services a restaurant business and some apartments. The other man, who proved to be Huntoon, remained at the alley entrance.

¶4 Krueger thought this suspicious and was concerned that Huntoon might be serving as a lookout for the other man. As Krueger approached the alley entrance, Huntoon looked at him and then said to his companion, "You're busted." Krueger told Huntoon, "I need to talk to you. I need to see some information," but Huntoon started to walk away. At that time, Krueger observed the other man in

[2] The resisting and obstructing charges were based on different acts by Huntoon during the events on May 15, 1999.

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

the alley urinating between two dumpsters. Twice more Krueger told Huntoon that he needed to talk to him and asked for identification. Both times Huntoon ignored the request and continued to walk away. Krueger then called for other officers to apprehend Huntoon while he arrested the other man for disorderly conduct. During the ensuing arrest, Huntoon physically resisted the arresting officers.

Discussion

¶5 Huntoon does not dispute Krueger's right to follow up on the anonymous telephone call. However, he contends that Krueger's observations in response to the tip did not establish reasonable suspicion that he was engaged in any illegal activity within the meaning of ***Terry***, as codified in WIS. STAT. § 968.24. Alternatively, Huntoon contends that even if Krueger initially had such reasonable suspicion when he first told Huntoon that he needed to talk to him in order to get some information, such suspicion was dispelled once he saw the other man urinating in the alley. In a nutshell, Huntoon argues that he was free to ignore Krueger's requests for information and identification.

¶6 The State responds that the facts established a reasonable suspicion that Huntoon was serving as a lookout while his companion was urinating in the alley. Noting that the companion's conduct constituted disorderly conduct, the State contends that Huntoon's statement, "You're busted," to his companion "clearly impl[ies] that Huntoon knew that his companion was engaged in illegal conduct …."

¶7 In ***State v. Anderson***, 155 Wis. 2d 77, 454 N.W.2d 763 (1990), our supreme court addressed the policy considerations at work in a ***Terry*** case. The court said that the focus of the Fourth Amendment and WIS. STAT. § 968.24 is

reasonableness. This contemplates a commonsense balancing between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibilities. The court noted that suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. As a result, the court held that police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. *See* ***Anderson***, 155 Wis. 2d at 83-87. However, the court has also said "an inchoate and unparticularized suspicion or 'hunch' will not suffice." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted).

¶8 When Krueger first observed the two men, he "just watched to make sure there was no illegal activity going on …." While he acknowledged that it was unusual to find intoxicated people staggering in the downtown area during the daylight morning hours, Krueger did not intercept the men at that point. However, when he observed Huntoon's companion enter into the alley while Huntoon remained at the entrance, Krueger's suspicion was heightened. The alley served a business and some apartments. A theft or burglary could well have been afoot. Krueger's suspicion was additionally justified by the fact that an intoxicated person may not be as inclined to comport with the law as a sober one. Krueger was not required "to simply shrug his … shoulders and thus possibly allow a crime to occur or a criminal to escape." ***Id***. at 59. We conclude, as did the trial court,

that these circumstances constituted a reasonable suspicion that Huntoon might be serving as a lookout while his companion was engaging in illegal activity.[4]

¶9 We also reject Huntoon's alternative argument that when Krueger observed the companion urinating in the alley, any reasonable suspicion that previously existed was dissipated. That "innocent" conduct did not dissipate Krueger's reasonable suspicion that Huntoon and his companion had committed or were committing a crime.

¶10 Huntoon also relies on ***State v. Hamilton***, 120 Wis. 2d 532, 356 N.W.2d 169 (1984), in support of his claim that he was entitled to ignore Krueger's attempts to detain and question him. But in ***Hamilton*** the defendant was merely a witness—not a suspect—to the criminal event. *See* ***id***. at 539-44. Thus, the supreme court held that the defendant's refusal to provide information to the police about the event was not "obstructing" under WIS. STAT. § 946.41(1). *See* ***Hamilton***, 120 Wis. 2d at 544. Here, Krueger reasonably suspected that Huntoon was engaged in illegal activity. This is not a ***Hamilton*** case.

[4] Our holding is broader than the approach taken by the State which contends that Huntoon was serving as a lookout only for his companion's act of urinating in the alley. While that may have been Huntoon's subjective purpose, we view the incident from the standpoint of the reasonable police officer. "What would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***State v. Anderson***, 155 Wis. 2d 77, 84-85, 454 N.W.2d 763 (1990). Here, we read the evidence to establish reasonable suspicion of conduct far more serious than urinating in an alley. We read the trial court's bench decision to agree with our approach.

Conclusion

¶11 We hold that Krueger had reasonable suspicion under ***Terry*** and WIS. STAT. § 968.24 to temporarily detain Huntoon and to request the information and identification that he sought.[5]

By the Court.—Judgment and order affirmed.

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

[5] Since we hold that Huntoon was properly detained under ***Terry***, we need not answer the State's further argument under ***State v. Hobson***, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), that Huntoon had no right to resist what he believed to be an illegal arrest. Under ***Hobson***, a defendant who believes that he or she has been unlawfully arrested may not use force to resist arrest. Rather, the question of the legality of the arrest is reserved for the courtroom. *See* ***id***. at 380.