COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1476 **Cir. Ct. No. 01-TR-4468 01, TR-4469**

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

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

PATRICK WOLF,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Walworth County: ROBERT J. KENNEDY,[1] Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[2] Patrick Wolf appeals from judgments of conviction for operating a motor vehicle while intoxicated (OWI), contrary to

[1] We note that while Judge Robert Kennedy entered the judgments of conviction, Judge Michael Gibbs issued the suppression ruling that we are reviewing.

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

WIS. STAT. § 346.63(1)(a) and operating a motor vehicle with a prohibited alcohol concentration (PAC), contrary to § 346.63(1)(b).[3] Wolf argues that the investigating officer lacked reasonable suspicion to conduct a ***Terry***[4] stop. We reject Wolf's argument and affirm the judgments.

¶2 The relevant facts are undisputed and are set forth in a Stipulation of Facts and Order approved by the trial court.[5] On July 29, 2001, at 12:07 a.m., Deputy Winger of the Walworth County Sheriff's Department was on routine patrol when he observed a "suspicious" vehicle parked in a gravel parking lot on private property with its headlamps illuminated.

¶3 The property, owned by Robert A. Pearce Farms, is used for the commercial sale of vegetables, fruit, and similar food items at seasonal times of the year. At the time of this encounter, the business was closed for the season.

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[3] Only the OWI judgment imposed penalties. *See* WIS. STAT. § 346.63(1)(c).

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

[5] We make a number of observations about the state of the record in this case. First, this case is submitted to us upon the parties' Stipulation of Facts and Order because the court reporter's notes from the October 31, 2001 motion hearing were incomplete due to technical problems. The stipulation states that "[t]he parties agree to the following stipulation of the relevant facts in this instant case, regarding the issue of whether there was reasonable suspicion to stop Defendant's motor vehicle."

Second, we note that this case eventually went to a jury trial. "When reviewing a suppression order, an appellate court is not limited to examination of the suppression hearing record. It may also examine the trial evidence." ***State v. Gaines***, 197 Wis. 2d 102, 107 n.1, 539 N.W.2d 723 (Ct. App. 1995). Here, however, the parties have not provided a transcript of the jury trial proceedings.

Third, Wolf's trial court brief in support of his motion to suppress includes references to the police report concerning the incident that are relevant to the ***Terry*** question before us. However, these references are not included in the parties' stipulation. Under ***Gaines***, we conclude that we are at liberty to consider this added information presented in the trial court.

However, despite the absence of seasonal products, a wagon filled with rocks for sale, and denoted as such, was present in the parking lot. There were no signs indicating that trespassing, parking, or driving was prohibited.

¶4 Winger believed the vehicle to be suspicious because it was parked on private property of a closed business during the early morning hours of darkness. Therefore, Winger drove into the parking lot, pulled behind the pickup, and shined his spotlight on the vehicle to indicate that it should remain parked. Winger saw two occupants in the pickup and also observed that it carried Illinois license plates. To this point, Winger had not observed any violations of state or local laws by the two persons in the vehicle.

¶5 When Winger illuminated the spotlight, the pickup rolled ten to fifteen feet forward and then stopped. At this time, Winger observed the person in the driver's seat fumbling around down by his legs.[6] Winger exited his squad car and approached the passenger's side of the vehicle. He observed a female in the passenger seat and a male, later identified as Wolf, in the driver's seat. Upon talking with Wolf, Winger noted an odor of intoxicants coming from within the vehicle. After further investigation, Wolf was arrested and charged with OWI and PAC.

¶6 Wolf filed a motion to dismiss and a motion to suppress, arguing that Winger did not have reasonable suspicion to conduct an investigatory stop of his

[6] This information comes from the police report that Wolf, himself, quoted in his trial court brief in support of his motions to dismiss and to suppress. As noted earlier, we conclude that we are entitled to consider this information. *See* ***Gaines***, 197 Wis. 2d at 107, n.1. However, even without this added information, we would still conclude that Winger had reasonable suspicion to conduct a ***Terry*** investigation.

vehicle. The trial court disagreed and denied the motions. Later, a jury found Wolf guilty of both OWI and PAC. Wolf appeals, challenging the trial court's ruling that Winger had reasonable suspicion to conduct a ***Terry*** investigation.

¶7 Since the facts in this case are presented to us via the parties' written stipulation, since those facts are undisputed, and since the only disputed question (reasonable suspicion under ***Terry***) presents a question of constitutional law, our review is de novo. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996).

¶8 In determining whether the facts support a finding of reasonable suspicion, we begin by examining WIS. STAT. § 968.24, a codification of ***Terry***, which provides:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may 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, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

¶9 Wolf argues that a vehicle stopped in a private parking lot, without more, does not constitute reasonable suspicion to conduct an investigative stop. We have no quarrel with this general statement, but we disagree with Wolf's implicit assertion that this is a "without more" case. To the contrary, there is "more." In reviewing a determination of reasonable suspicion, we must consider the totality of the circumstances. ***State v. Williams***, 2001 WI 21, ¶¶21-22, 241 Wis. 2d 631, 623 N.W.2d 106, *cert. denied*, ***Williams v. Wisconsin***, 122 S.Ct. 343 (U.S. Wis. Dec. 9, 2001). The determinative issue in considering the totality of

the circumstances is whether the officer's actions were reasonable under the circumstances. ***Id.*** at ¶22.

¶10 Winger observed a pickup truck with its headlamps illuminated parked on private property in a rural area during the early morning hours. The parking lot belonged to a seasonal business that was closed for the season at the time of the encounter. Despite the absence of seasonal goods, a wagon containing rocks for sale was located on the parking lot. Under these circumstances, we conclude that a prudent and reasonable police officer would see the need to investigate whether criminal or illegal activity might be afoot. Therefore, we see nothing improper in Winger's decision to enter the parking lot and illuminate the area with his spotlight.

¶11 Winger's subsequent observations served to heighten the suspicion. When Winger directed his spotlight on the pickup truck, the vehicle rolled forward ten to fifteen feet and stopped. As Winger approached the vehicle, Wolf then began to fumble around at his feet, a furtive act that could suggest the presence or concealment of a weapon or contraband. Given the totality of the circumstances observed and known by Winger, we conclude that he had reasonable suspicion to approach the vehicle and to temporarily freeze the situation in order to conduct a ***Terry*** investigation.

¶12 While there may have been an innocent explanation for Wolf's presence in the parking lot, an officer is not required to rule out the possibility of innocent behavior before conducting a ***Terry*** stop. *See* ***State v. Fields***, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. In ***Adams v. Williams***, 407 U.S. 143 (1972), the United States Supreme Court stated:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, ***Terry*** recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams, 407 U.S. at 145-46 (citations omitted).

¶13 Likewise, in ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989), our supreme court stated:

> Doubtless, many innocent explanations for [the defendant's] conduct could be hypothesized, but suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal.... We conclude that if any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.

¶14 Considering the totality of the circumstances, we hold that Winger had reasonable suspicion to conduct a ***Terry*** investigation.[7]

[7] As part of its argument, the State also asserts, without identifying it as such, a community caretaker argument. The State argues that the circumstances observed by Winger also signaled the possibility of a motorist in distress. Although we are sympathetic to this argument, the present state of community caretaker law does not permit us to apply that doctrine in this case because a community caretaker function must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***State v. Anderson***, 142 Wis. 2d 162, 166, 417 N.W.2d 411 (Ct. App. 1987). Since Winger also harbored a suspicion of possible illegal activity, the State cannot be heard to invoke the law of community caretaker.

(continued)

By the Court.—Judgments affirmed.

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

Although we are bound by this law, we think it is unwise, impractical and unrealistic. Police officers routinely encounter ambiguous situations that might simultaneously call for intervention based upon possible criminal activity and intervention based on the possible need for police assistance. The instant case may well be such a situation. However, under current law, if the officer makes the wrong "reasonable suspicion" decision, any evidence garnered thereby is lost, even though the same facts convincingly establish the need for police assistance.