

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0142-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02-CM-001591

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

DARRICK WRIGHT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Reversed.*

¶1 HOOVER, P.J.¹ The State appeals a circuit court order suppressing evidence obtained following what the court concluded was an illegal stop. We

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

conclude that the stop was grounded in reasonable suspicion and the suppression order is therefore reversed.

¶2 On March 16, 2002, sergeants Todd Peters and Ron Connolly of the Appleton Police Department were on patrol in an unmarked car. Around 12:43 a.m., they observed a car with four occupants parked behind a liquor store that was closed for the evening. The car had no lights on at any time during the officers' observation.

¶3 The officers watched the vehicle for a few moments. When the right rear passenger looked through the rear window and noticed the officers' car, he began making movements that appeared to Peters as consistent with concealing items. The vehicle then immediately began to leave the parking lot, and as it pulled away from its location the officers noticed a small plastic bag lying to the left of the car. They stopped to retrieve it and concluded that it contained traces of cocaine. They followed the car, eventually stopping it. After they patted down the occupants, Darrick Wright was charged with possession of marijuana and cocaine and carrying a concealed weapon.

¶4 Wright filed a motion to suppress, claiming the officers lacked reasonable suspicion to stop his vehicle.² The trial court agreed and granted the motion. The State appeals.

¶5 In order to justify an investigative stop, the "police must have a reasonable suspicion, grounded in specific and articulable facts and reasonable

² The motion also claimed there was no probable cause for the arrest, but the motion was decided solely on the reasonable suspicion ground and only that is addressed here.

inferences from those facts, that an individual is violating the law.” *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. “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.” *Id.* Before initiating a stop, an officer need not rule out innocent explanations for a suspect’s behavior. *Id.* A trial court’s determination whether undisputed facts establish reasonable suspicion justifying an investigative stop is a question of constitutional fact, subject to de novo review.³ *Id.*

¶6 The trial court concluded:

That movement [by the passenger] is not clearly furtive. ... No conclusion can be drawn from the observations of the movement that this officer saw. ... There is no link of that Baggie to this vehicle on the observations that were made by the officer. ... There is no violation[] of the law whatsoever, and the Court concludes from this evidence that there is not a reasonable suspicion to believe that crime was afoot in the minds of this officer in order to stop this vehicle.

The trial court discounted testimony that there were no nearby businesses open because there were bars open a few blocks away and because some of the businesses had apartments above them. The trial court also discounted the

³ Wright contends the State ignores the trial court’s findings of historical and evidentiary facts, which we leave undisturbed when reviewing constitutional questions. *State v. Phillips*, 218 Wis. 2d 180, 190, 577 N.W.2d 794 (1998). However, the State takes issue with the trial court’s interpretation of the facts, not the facts themselves.

Wright also argues that we should conclude the State waived its arguments by failing to include record citations in its argument section of its brief. Waiver is a rule of judicial administration. The State’s missing citations are for facts cited in its fact section of the brief, although it is reminded that the rules of appellate procedure require citations in the argument section of the brief. *See* WIS. STAT. RULE § 809.19(1)(e).

vehicle's location in a parking lot because a "Parking lot is a customary place where vehicles park."

¶7 The trial court apparently reasoned that because the officers observed no actual infraction of the law and because there was a possible innocent explanation for the vehicle's presence behind the liquor store, the stop was unjustified. However, this does not comport with the test for reasonable suspicion.

¶8 Peters and Connolly belong to a community intervention team dealing with gang crimes, and they assist with drug investigations. Peters is also trained in observing occupants of vehicles even before they exit the car, and in fact is a "vehicle contact instructor" for the State. The prosecutor asked Peters what the basis of the stop was, and Peters replied that there was "Suspicious activity, possible sale of drug[s], possession of drug paraphernalia, et cetera." Thus, Peters and Connolly suspected some drug-related crime was afoot.

¶9 This suspicion was grounded in a plethora of "specific and articulable facts." The vehicle was parked behind a closed store at 12:43 in the morning with no lights, either headlights or interior lights, on at any time. Wright argues that the main street was under construction, making parking on the road impossible, and the trial court concluded that parking lots are where cars normally park. However, Peters testified that the car was parked in an unusual way and not in a regular stall, and cars do not normally park in lots of closed businesses in the early morning hours. Wright again tries to explain this by pointing out that nearby bars were open and that some of the nearby businesses had apartments above them. However, no businesses in the immediate vicinity were open, and the testimony is ambiguous as to the location of open businesses relative to Wright. More importantly, the officers were not required to consider that innocent

possibility. *Id.*; see also *State v. Griffin*, 183 Wis. 2d 327, 333, 515 N.W.2d 535 (Ct. App. 1994) (citing *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)). They were entitled to infer that there was no legitimate purpose for the vehicle's presence behind the liquor store.

¶10 The right rear passenger began squirming when he noticed the police officers watching the vehicle.⁴ Peters explained that he has been trained to watch for “furtive movements,” which often suggest someone is trying to hide drugs or weapons to prevent their detection when officers approach the car. The trial court concluded that the movement was “not clearly furtive,” but this would mean that it was also not clearly innocuous and may be used in forming reasonable suspicion. Moreover, Peters has specific training interpreting movements that might seem ordinary or “not clearly furtive” to the lay observer.

¶11 Almost immediately after the passenger noticed the officers, the car left the parking lot, suggesting the occupants were not preparing to visit any open establishment or any apartment. Then the officers recovered the plastic bag containing traces of what they suspected was cocaine. Although the trial court suggested there was no link because the officers did not observe anyone in the car dispose of the bag,⁵ this does not mean there was no logical link. The bag could have been dropped before the officers arrived, or in a split second when that side of the car was not being observed. The bag was adjacent to the car's position, not

⁴ Wright contends this movement was not observed until after the stop. However, the trial court concluded that there was movement before the stop. Because that finding is not clearly erroneous and is a historical fact, this court is bound by the finding. *Phillips*, 218 Wis. 2d at 190.

⁵ Wright argues that this is a factual finding we must not disturb. However, the conclusion that there was no link between the car and the bag is a legal conclusion based on the fact that there was a bag near the car. We are not bound by the trial court's legal conclusions.

on the opposite side of the lot. Peters testified that there were no trash cans near the parking lot, reducing the likelihood that the bag was simply trash that had blown over to the vehicle.

¶12 The situation Peters and Connolly observed contained enough actions that, taken as a whole, give rise to reasonable suspicion that a crime had been, was being, or would be committed. The investigative stop was valid.

By the Court.—Order reversed.

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

