**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

October 25, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

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

**No. 95-1089-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**MARK KELNHOFER,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

NETTESHEIM, J. Mark Kelnhofer appeals from a judgment of conviction for possession of cocaine pursuant to § 161.41(3m), STATS. The appellate issue is whether Kelnhofer's initial temporary detention by the police was valid pursuant to ***Terry v. Ohio***, 392 U.S. 1 (1968), as codified in § 968.24, STATS. We agree with the trial court's ruling that Kelnhofer was properly detained. We therefore affirm the judgment of conviction.

On September 11, 1993, at approximately 11:50 p.m., Officer Paul DeJarlais was on foot patrol in a City of Waukesha municipal parking lot. The lot is located near a tavern. At that time and place, DeJarlais noticed an automobile parked in the lot with its motor running. The officer continued to watch the vehicle for a minute or two. He believed the vehicle to be unoccupied, although he could not be certain because some of the windows were tinted.

As he continued to watch the vehicle, DeJarlais became suspicious. Based on his nine years of experience as a police officer, including one year as a member of a drug unit, DeJarlais knew that patrons of nearby taverns would sometimes adjourn to their vehicles to use controlled substances. Moreover, he also testified that the City of Waukesha has an ordinance prohibiting a person from leaving an unattended motor vehicle with the motor running.

Based on these suspicions, DeJarlais approached the vehicle from the driver's side. Because the dark tint of the windows prevented easy viewing, the officer walked around to the passenger side of the vehicle. The window on this side of the vehicle was rolled down. As the officer approached this side of the vehicle from the rear, he observed a white powdery substance on the outside of the passenger door. Based on his training and experience, the officer suspected that the substance was cocaine.

DeJarlais then continued to the passenger window and shined his flashlight into the interior. He observed a person, later identified as Kelnhofer, in the driver's seat and another person in the passenger seat. The officer's

presence appeared to startle the occupants. DeJarlais observed Kelnhofer brush a white powdery substance off a cassette tape case and place the case on the floorboard of the vehicle, and he observed the passenger crumple up a dollar bill and throw it on the floor. The officer also observed a white powdery substance on the floorboard underneath the steering wheel. The officer further observed the occupants attempt to reach between and underneath the seats and into their clothing pockets.

DeJarlais then ordered the occupants to put their hands on the dashboard of the vehicle. The occupants failed to follow this instruction and, instead, continued to grope into various areas of the vehicle. The passenger also attempted to leave the vehicle. DeJarlais then called for backup assistance and drew his weapon for his own protection. With this show of force, he maintained the scene until the police assistance arrived.

When the backup assistance arrived, Kelnhofer and his passenger were arrested. They were searched, as was the vehicle. These searches produced the evidence which formed the basis for Kelnhofer's prosecution. Kelnhofer brought a motion to suppress the evidence based on his claim that DeJarlais's detention of him was contrary to § 968.24, STATS., and ***Terry***. The trial court denied the motion. Kelnhofer then pled no contest to the charge and he was convicted. This appeal followed.

We first define the perimeters of our inquiry. At certain portions of his argument, Kelnhofer appears to take issue with DeJarlais's right to detain the vehicle and its occupants *after* he had observed the suspected cocaine on the

passenger door and observed the passengers' conduct inside the vehicle. If Kelnhofer truly challenges these actions, we reject the argument out of hand. The officer observed a substance which he suspected to be cocaine based on his training and experience. He then observed the occupants inside the vehicle engaging in furtive conduct suggesting an attempt to hide objects or material. In addition, the officer observed further traces of material which he believed to be cocaine. We hold that such observations clearly satisfied not only ***Terry***, but also the higher standard of probable cause to arrest.

We next address Kelnhofer's challenge to DeJarlais's authority to approach the vehicle in the first instance. We address this argument in greater detail.

In ***Terry***, the United States Supreme Court held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." ***Terry***, 392 U.S. at 22. However, in such a setting, the officer must still have "specific and articulable facts which, taken together with rational inferences … reasonably warrant [an] intrusion." ***Id***. at 21. A brief investigatory stop under ***Terry***, including an automobile stop, is a seizure and is therefore subject to the reasonableness requirement of the Fourth Amendment. ***State v. Goebel***, 103 Wis.2d 203, 208, 307 N.W.2d 915, 918 (1981). A police officer is not required to rule out the possibility of innocent behavior before initiating a ***Terry*** stop. ***State v. Anderson***, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990). Wisconsin's

temporary detention statute, § 968.24, STATS., is a codification of the ***Terry*** standards. ***Goebel***, 103 Wis.2d at 209, 307 N.W.2d at 918.

Here, DeJarlais was confronted with activity which, based on his training and experience, reasonably suggested suspicious activity related to controlled substances. Under those circumstances, the officer had a right to approach the vehicle and inquire further. Separate and apart from that legitimate suspicion, DeJarlais also had a right to approach the vehicle because he was witnessing a possible violation of the city ordinance making it illegal to leave an unattended motor vehicle with the motor running. Here again, the officer was entitled to at least approach the vehicle and inquire further.

We acknowledge that the circumstances confronting DeJarlais also suggested the possibility of totally innocent behavior. But, as we have noted, the officer is not required to rule out the possibility of innocent behavior before initiating a ***Terry*** inquiry. ***Anderson***, 155 Wis.2d at 84, 454 N.W.2d at 766. To the contrary, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for purposes of inquiry. ***Id***.

Suspicious conduct is by its very nature ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. ***Id***. Faced with such ambiguity, the police officer is not required to look the other way and to lose the opportunity for further investigation. *See* ***State v. King***, 175 Wis.2d 146, 154, 499 N.W.2d 190, 193 (Ct. App. 1993). Instead, the

officer may temporarily detain the individual in order to maintain the status quo while obtaining more information to resolve the situation. *See* ***Goebel***, 103 Wis.2d at 211, 307 N.W.2d at 919.

We also approve of DeJarlais's initial approach to Kelnhofer's vehicle on a more fundamental basis—the community caretaker function of the police. This activity addresses those police actions which are divorced from the detection, investigation or acquisition of evidence relating to the possible violation of a criminal statute.[1] ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973); ***Bies v. State***, 76 Wis.2d 457, 471, 251 N.W.2d 461, 468 (1977).

Apart from any suspicions related to possible violations of the law, we conclude that a reasonable police officer would be prompted to inquire further to resolve any ambiguities or concerns about the situation. If someone in the vehicle was in distress, the officer could render aid. If the vehicle was unoccupied, the officer could turn the motor off if the vehicle was unlocked. These are classic community caretaker functions which the police provide on a

---

[1] We note that we are not governed by the particular police officer's subjective reasons in the particular case for engaging in certain police action. Rather, we are to view the circumstances objectively from the standpoint of a reasonable person confronting the situation. *See* ***State v. Goebel***, 103 Wis.2d 203, 209, 307 N.W.2d 915, 918 (1981).

daily basis and which constitute "an important and essential part of the police role." ***Bies***, 76 Wis.2d at 471, 251 N.W.2d at 468.

The threshold inquiry under a community caretaker inquiry is whether the police had the right to be where they were when they made their observations and took their responsive action. *See* ***id***. at 464, 251 N.W.2d at 465. DeJarlais was on foot patrol in a public parking lot at a late evening hour. He was not directly involved in the detection or investigation of a specific crime at the time he observed the vehicle. The officer had a right to be where he was when he made his observations. He also had a right to walk where he chose in this public area whether or not he harbored suspicions or concerns regarding the vehicle. We are unaware of any law which holds that a public parking lot is within the protected curtilage of a vehicle parked therein.

*By the Court.*—Judgment affirmed.

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