COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2163-CR **Cir. Ct. No. 2011CF46**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN C. BAKER,

DEFENDANT-APPELLANT.

APPEAL from an judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. John Baker appeals a judgment of conviction for operating with a prohibited blood alcohol concentration (PAC), as a 7th, 8th, or

9th offense, in violation of WIS. STAT. § 346.63(1)(b) (2011-12).[1] He contends that the traffic stop by the arresting officer was not supported by reasonable suspicion and the circuit court therefore erred in denying his motion to suppress. For the reasons explained below, we affirm.

BACKGROUND

¶2 A City of Waupun police officer stopped Baker in a minivan at approximately 2:00 a.m. after Baker drove from the lot of a closed gas station in Waupun. The officer subsequently arrested him for operating under the influence and with a PAC. Baker moved to suppress evidence on the ground that the officer did not have reasonable suspicion to stop him.

¶3 At the hearing on Baker's motion, there was one witness, the officer who made the challenged stop. It is clear from the circuit court's findings of fact that the court largely credited the officer's testimony. In any event, Baker does not argue that any court finding was clearly erroneous.[2]

---

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] We remind counsel for Baker that WIS. STAT. RULE 809.19(1)(d) requires an appellant to include in a principal brief a statement of the case, "which must include: … *a statement of facts relevant to the issues presented for review, with appropriate references to the record*." (Emphasis added.) The statement of the case in Baker's principal brief is inadequate, lacking *any* of the facts that are material to the issue presented for review. That said, we do not believe that Baker suffers any disadvantage from this shortcoming in briefing, given the relative simplicity of this appeal. Still, counsel should bear in mind that shortcomings of this type to at least some extent always add unnecessarily to the work of this court and, in a more complicated appeal, might result in a decision declining to address the merits of one or more issues. *See, e.g.*, ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals "cannot serve as both advocate and judge" and may decline to address issues when litigants fail to follow appellate rules of procedure).

¶4 The officer testified in pertinent part as follows. At approximately 1:54 a.m., the officer was on routine patrol in a marked squad car when he observed a minivan parked "in front of the entryway" of a closed gas station.[3] There were no other vehicles in the station lot. The officer pulled into the station lot and "observed that the vehicle was positioned in an odd manner." The minivan was not in one of the parking stalls that ran perpendicular to the station building, but was instead parked at an angle to the doorway of the station building, about seven feet from the entry to the station building, and about twenty feet from the adjoining street. The driver's side door of the minivan was facing the building, as though the driver was stopping to get something from the building. The minivan was running and its headlights were on, but the interior overhead light was not on. All of the doors on the minivan appeared to be closed.

¶5 The officer pulled in behind the minivan, stopping about twenty feet behind it. The minivan had rear windows starting at the tops of the backseats. The officer shined at the minivan both the "stoplight" on top of his squad car and the "high beam spotlight" on the side of the squad car. These two lights added to the illumination provided by the headlights of his squad car. The officer looked around the immediate area, but did not get out of his police vehicle throughout the time he was at the station. The officer did not observe any person in the minivan at first.

[3] The circuit court found, based on the officer's testimony, that the gas station was "closed," but that "the [gas] pumps were open and could be used with a credit card." As we discuss below, however, the fact that the pumps were usable is not a significant factor weighing in Baker's favor under the totality of the circumstances in this case, including in particular the location and positioning of Baker's vehicle.

¶6 The officer shined his spotlights on the minivan from behind the minivan "for a little while," so that, in the officer's opinion, "the driver would have clearly observed that my spotlights were on the vehicle." In addition, the officer testified that the area where the minivan was parked was sufficiently "well lit," putting aside his use of spotlights, so that the officer "would have seen somebody in the vehicle if they were normally sitting." The officer also testified that, when he has been in a vehicle that has been lit up at night from behind with spotlights in the same manner, "it lights up the entire vehicle" and gets the attention of occupants even if they are looking down.

¶7 The officer considered whether the minivan might belong to a newspaper delivery person, but the officer apparently dismissed this possibility after he saw no sign of a delivery person or any newspapers in front of the station doorway.

¶8 The officer notified dispatch that he was with the vehicle. He further testified as follows:

> At that time, given the circumstances of many break-ins in the area, I assumed that it was possibly a smash and grab[4] or a burglary or some type of criminal activity. I started looking inside the business. I didn't observe anybody moving around inside the business….
>
> Shortly after that, I then observed somebody sit up in the driver's seat.

As to the number of break-ins, the officer more specifically testified that he was aware from daily police briefings of three recent "break-ins," each of which had

[4] "Smash and grab" is a phrase commonly used to describe the following criminal conduct: without permission from the property owner, smashing a pane of glass or other barrier at a store or on a showcase, reaching in for valuables, and then trying to make a quick getaway.

occurred at night and on the same side of Waupun where the gas station was located.

¶9 The person who sat up, "suddenly," was Baker. Approximately thirty to forty-five seconds passed from the time the officer pulled in behind the minivan to the time Baker sat up in the minivan. From his vantage point, the officer concluded that, before Baker sat up, he must have been "slouched very low" or in some other position so that his head and shoulders were below the top of the headrest.

¶10 Within seconds after sitting up, Baker started to drive away very slowly. The officer "moved [his] spotlight around trying to get the attention of the driver." Baker turned onto the street adjoining the station and turned right. The officer followed. Within forty-five seconds of the time Baker began to drive away, the officer activated his emergency lights and stopped the minivan.[5]

¶11 The circuit court concluded, based on the totality of the circumstances, that the officer had a reasonable suspicion that the driver of the minivan was committing or about to commit a crime at the time of the stop.

DISCUSSION

¶12 Whether a traffic stop is reasonable is a question of "constitutional fact." ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. A question of constitutional fact is a mixed question of law and fact to which we apply a two-part standard of review. ***Id.*** We review the circuit court's findings of historical

[5] Baker does not argue that a ***Terry*** stop had commenced before this point in time. *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

fact under the clearly erroneous standard, but we review de novo the application of constitutional principles to those facts. ***Id.*** Here, there is no dispute regarding relevant facts. Therefore we review de novo the question of whether the undisputed facts represent a constitutional violation. *See* ***id.***

¶13 An investigative stop is constitutional if the investigating officer is "'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***Id.***, ¶10 (quoting ***Terry v. Ohio***, 392 U.S. 1, 21 (1968)). The intrusion is warranted if the officer reasonably believes the person is committing, is about to commit, or has committed a crime. WIS. STAT. § 968.24; ***Post***, 301 Wis. 2d 1, ¶13. The reasonableness of the stop is determined by considering the totality of the circumstances. ***Post***, 301 Wis. 2d 1, ¶13.

¶14 As this court has further summarized the analysis:

> The question whether the officer's suspicion was reasonable is a common sense test: was the suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual was committing a crime. An inchoate and unparticularized suspicion or hunch will not suffice. However, the officer is not required to rule out the possibility of innocent behavior.

State v. Fields, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279 (citations omitted).

¶15 Also potentially relevant to the ultimate question of whether a stop is constitutionally reasonable are the following factors: (1) whether alternative means of further investigation are available, short of an investigative stop; (2) whether the opportunity for further investigation would be lost if the officer does not act immediately; and (3) what actions following the stop would be

necessary for the officer to determine whether to arrest or release the suspected individual. *See* ***State v. Guzy***, 139 Wis. 2d 663, 678, 407 N.W.2d 548 (1987).[6]

¶16 Here, the totality of the circumstances supports a conclusion that the officer could reasonably suspect that a break-in had occurred or was about to occur at the time the officer temporarily detained Baker for the purpose of investigating that reasonable suspicion. While pulling one's vehicle into a closed business during the middle of the night, in itself, may not ordinarily provide the basis for reasonable suspicion of criminal activity, here there were a number of additional incriminating circumstances. *See* 4 LAFAVE, SEARCH AND SEIZURE § 9.5(e), at 687-91 (5th ed. 2012) (discussing reasonable suspicion as it relates to certain premises and times of day). Those circumstances, all of which are referenced as part of the background section above, include in particular the following.

¶17 The officer saw a running vehicle with its headlights on that was parked oddly, not in any marked stall, near the entrance of a closed gas station

[6] Baker cites a list of six other factors from ***State v. Guzy***, 139 Wis. 2d 663, 407 N.W.2d 548 (1987):

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Id. at 677. It is apparent, however, that not all of these factors are material in every case involving an issue as to reasonable suspicion. Here, for example, it is clear that at least the first, second, and fourth factors are not material. To the extent other factors could be material, we consider them as part of our analysis in the text.

store. The time was approximately 2:00 a.m. in an area that had three recent night-time break-ins. Although the gas pumps were operable, the vehicle plainly was not parked in a way suggesting the vehicle was getting gas. Indeed, the circuit court specifically found that the particular positioning of the vehicle made this highly unlikely, reasoning that it might be "a different story" if the van was parked "under the lights by a pump." In addition, no person initially appeared to be visible in or around the vehicle, even after the officer shined bright lights on the vehicle, sufficient to flood the inside of the vehicle with light. In the officer's experience, shining such bright lights in a vehicle would normally get the attention of any occupants. However, it was not until about thirty to forty-five seconds after the officer pulled in behind the vehicle that the driver "suddenly" sat up. The officer "moved [his] spotlight around trying to get the attention of the driver," and instead of responding to the officer's attempt to get his attention, the driver proceeded to drive away.

¶18 Moreover, the ***Guzy*** factors on balance add weight to the circuit court's conclusion that the stop of Baker was reasonable. In testimony credited by the circuit court, the officer related that he could not safely make a visual inspection of the building to check for signs of criminal activity while also keeping his attention on Baker, who the officer reasonably decided was a criminal suspect and needed to be watched and then followed as soon as he drove away. In other words, it was reasonable, given the totality of the circumstances, for the officer to forego inspection of the building that might have helped confirm or reduce his suspicions in order to keep his attention focused on Baker and effectuate an immediate stop of Baker. It is true, as Baker suggests, that the officer could have taken note of Baker's license plate and vehicle description and inspected the building as an alternative mode of investigation. However, this

would appear to have been an approach considerably less likely to get to the bottom of the situation the officer faced.

¶19 Baker argues that the officer "did not witness any meaningful activity by Mr. Baker." The officer "simply saw Mr. Baker sit up within his vehicle … and slowly drive away." This argument ignores the legal test, which requires consideration of the totality of the circumstances. By focusing exclusively on what the officer saw him do, Baker fails to address the full picture, which we have summarized above. This effectively concedes that the full picture supports a conclusion that the officer had reasonable suspicion.

¶20 Similarly, Baker points to theoretical incriminating facts that the officer did *not* possess at the time of the stop, such as shattered windows or confederate burglars at the station. Such evidence, Baker argues, would have "len[t] [itself] to a high likelihood that a smash and grab burglary was about to or had been committed." However, the standard is not proof to a "high likelihood" of crime. The standard is a reasonable suspicion, a common sense test grounded in specific, articulable facts and reasonable inferences from those facts, and that test is met here.

CONCLUSION

¶21 For these reasons, we conclude that the circuit court did not err in denying the suppression motion. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.