COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP749-CR **Cir. Ct. No. 2012CM1197**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN P. LIND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Reversed and cause remanded for further proceedings.*

¶1 HOOVER, P.J.[1] Benjamin Lind appeals from a judgment convicting him of operating while intoxicated (OWI), second offense, and from

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the denial of his motion to suppress. Lind contends the circuit court erred by finding there was reasonable suspicion to conduct an investigatory stop of his vehicle pursuant to WIS. STAT. § 968.24.[2] We agree and reverse.

BACKGROUND

¶2 On June 23, 2012, Lind was cited and subsequently charged for second offense OWI. At Lind's suppression hearing, officer Jason Rasmussen of the Village of Kronenwetter Police Department testified. Rasmussen stated that he was working the midnight shift patrol when he observed an unfamiliar vehicle, later identified as Lind's, enter a driveway at the corner of Highway X and Kowalski Road at 1:36 a.m. Rasmussen testified that Lind's entrance into the driveway struck him as odd because he knew a Wausau police officer lived at that address.

¶3 Rasmussen testified there was nothing unusual about the vehicle other than its presence in the driveway of that particular home: he did not observe erratic driving, anything suspicious about the operation of the vehicle, or anything otherwise "obviously out of character." He testified that the driveway was the first

[2] WISCONSIN STAT. § 968.24 provides:

> **Temporary questioning without arrest.** 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.

available to turn into after entering a large intersection. Rasmussen described the vehicle's location as approximately ten feet into the "fairly long" driveway.

¶4 Rasmussen further testified to his familiarity with the cars that come and go from that particular residence, and stated he had never seen a vehicle come there at that time of the morning. Rasmussen therefore contacted the officer-homeowner through the police instant messaging system. The homeowner responded that there should not be anyone pulling into his driveway, and asked Rasmussen to "check on that." Rasmussen testified, "I turned around before [the homeowner] replied because my intention was to check on it anyway because it is not a vehicle that I have ever seen there before. And then he asked me to check on it so I did stop there." Rasmussen estimated "about a minute or two" passed between the time the vehicle turned into the driveway and the time he began his investigatory stop.

¶5 At the conclusion of the suppression hearing, the circuit court first stated, "Well, I agree that if the car in question had pulled in, immediately pulled out, and had taken off, that there wouldn't be reasonable suspicion to stop and contact." The court further found bad driving had not been observed and was not the reason for the stop. Nevertheless, the court concluded the stop was justified because of the homeowner's request that the officer investigate.

¶6 After the circuit court denied Lind's motion to suppress and subsequent motion for reconsideration,[3] Lind pleaded no contest. He now appeals.

DISCUSSION

¶7 The issue in this case is whether Lind's temporary detention was properly based on reasonable suspicion. Whether reasonable suspicion exists is a question of constitutional fact on appeal. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We will uphold the circuit court's findings of fact unless they are clearly erroneous, but we independently apply those facts to the constitutional principles. ***Id.***

¶8 Constitutionally permissible investigatory stops require the support of reasonable, articulable suspicion of criminal activity. ***State v. Pugh***, 2013 WI App 12, ¶9, 345 Wis. 2d 832, 826 N.W.2d 418. The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. "'The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.'" ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (quoted source omitted). Therefore, investigatory stops "must not be unreasonable under the circumstances." ***Id.***

[3] In response to a question from the court at the original motion hearing, Rasmussen testified that Lind's vehicle was approximately fifteen feet from the residence. Lind filed a motion for reconsideration offering documentary evidence to establish that the officer was mistaken in this testimony; that the distance between Lind's vehicle and the residence was at least fifty to seventy-five feet. Denying the motion for reconsideration, the circuit court discussed the totality of the circumstances test and explained that, "notwithstanding if the defendant's car is 15 or 50 feet away from the citizen's house, that the officer who stopped the defendant to make inquiry was allowed to do so pursuant to [WIS. STAT. §] 968.24."

¶9 We examine the totality of the circumstances to determine whether the facts amount to reasonable suspicion. The totality of the circumstances test asks whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that an individual is committing, is about to commit or has committed a crime. ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). The test is "naturally highly fact specific and [each case] must 'be decided on its own facts.'" ***State v. Miller***, 2012 WI 61, ¶35, 341 Wis. 2d 307, 815 N.W.2d 349 (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). An officer must be able to identify specific and articulable facts that warrant the intrusion of a stop; inchoate and unparticularized suspicion or hunches will not suffice. ***Post***, 301 Wis. 2d 1, ¶10.

¶10 Suspicious behavior is inherently ambiguous. ***Anderson***, 155 Wis. 2d at 84. Officers are not required to rule out innocent explanations before initiating a stop; however, they must first have an articulable and reasonable inference of criminal activity. ***Id.***; *see also* ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987) ("Law enforcement officers *may only* infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime.") (Emphasis added.)

¶11 Lind argues that Rasmussen lacked reasonable suspicion to initiate an investigatory stop because he did not observe any bad driving or suspicious behavior that indicated a potential crime. He asserts that unusual behavior does not automatically equate to reasonable suspicion. Lind contends Rasmussen acted in haste—he may have had the right to observe Lind further, but he did not have any evidence of criminal wrongdoing to justify the investigatory stop.

¶12 In response, the State argues that reasonable suspicion for an investigatory stop need not include observations of erratic driving. We agree: reasonable suspicion depends on the totality of the circumstances; specific indicia are not required to satisfy this test. The State directs us to ***State v. Waldner***, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996), where this court recognized that "[t]he law allows a police officer to make an investigatory stop based on observations of lawful conduct *so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot*." (Emphasis added.) However, the State's argument falls short when examining the totality of these particular circumstances for reasonable inferences of criminal activity. Notably, there are hardly any observations, of lawful conduct or otherwise, available to consider.

¶13 The law is clear that an officer must suspect someone is committing, is about to commit, or has committed a crime. We strain to see the specific, articulable facts that created such an inference here. Pulling partway into a driveway and temporarily stopping is not a crime.[4] Rasmussen initiated the investigatory stop very shortly after observing Lind's vehicle turn into his colleague's driveway. There was no observation of erratic driving, which we agree is not required, but strikingly, there was little observation of Lind's behavior or driving at all. Rasmussen testified that the location of Lind's temporary stop was the only fact that garnered his attention as "odd." While the early morning timing is something to consider, Rasmussen's lack of familiarity with this vehicle

[4] In addition, Lind's motion for reconsideration presented undisputed evidence that Rasmussen was mistaken in his initial testimony that Lind's vehicle was approximately fifteen feet from the residence. Rather, Lind's vehicle was between fifty to seventy-five feet from the residence. We believe this distinction impacts the totality of the circumstances test, further eroding the argument that Rasmussen had reasonable suspicion to stop Lind.

does not contribute to our analysis, as that fact does not enhance an articulable suspicion of wrongdoing.

¶14 The circuit court's conclusion relied upon the homeowner's desire that Rasmussen investigate the situation.[5] This pinpoints the inherent tension in Fourth Amendment cases: effective law enforcement requires flexibility for police performing their job duties; yet, the public must have a robust right against unreasonable intrusion. *See* ***Terry***, 392 U.S. at 9-11. Lind argues Rasmussen could have continued to watch for further developments, but initiating the stop "a minute or two" after Lind's turn into the driveway did not give rise to a reasonable suspicion that a crime was afoot. We agree. The request for Rasmussen to "check on it" could have been satisfied, as Lind argues, by a continued observation of the unfamiliar vehicle until the situation resolved itself or further developed. As it was, this investigatory stop was an unwarranted intrusion upon Lind's constitutional right to be free from unreasonable seizures because the truly limited observation of Lind resulted in insufficient suspicion to justify the stop.

¶15 Using ***Waldner***'s "building blocks" approach to ascertaining reasonable suspicion, without greater indicia of suspicious or even ambiguous behavior, the minimal existing facts weigh against a finding of reasonable suspicion. *See* ***Waldner***, 206 Wis. 2d at 58. The available facts, even when taken together, are simply insufficient to support a reasonable suspicion of criminal activity.

[5] We note Rasmussen's testimony that he had turned his vehicle around and intended to "check on" Lind even *before* receiving the homeowner's response.

¶16 There is no reason to believe Rasmussen did not act in good faith here. Nonetheless, the situation and the facts were too undeveloped to amount to reasonable suspicion of criminal activity. The United States Supreme Court, emphasizing the need for specificity in search and seizure cases, has long held that "'good faith on the part of the arresting officers is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate." ***Beck v. Ohio***, 379 U.S. 89, 96-97 (1964) (quoted source omitted).

¶17 We conclude Rasmussen did not have reasonable suspicion that criminal activity was afoot before he initiated an investigatory stop of Lind's vehicle. Accordingly, we reverse the judgment of conviction and the circuit court's denial of Lind's motion to suppress, and remand for further proceedings consistent with this decision.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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