COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2303-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BILLY D. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

VERGERONT, J.[1] Billy Evans appeals the judgment convicting him of carrying a concealed weapon in violation of § 941.23, STATS., obstructing an officer in violation of § 946.41(1), STATS., and disorderly conduct in violation

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

of § 947.01, STATS., all as a repeater under § 939.62, STATS. He contends that his seizure by a police officer violated the Fourth Amendment and therefore the evidence discovered during a pat-down search for weapons pursuant to that seizure must be suppressed, and all convictions must be reversed. We conclude that the officer's detention and pat down of Evans were constitutionally permissible. We therefore affirm.

BACKGROUND

The charges arose out of an incident that occurred at approximately 12:19 a.m. on April 19, 1996. City of Beloit police officer Kurt Wald testified as follows at the hearing on Evans' motion to suppress evidence. He was patrolling in his squad car at that time on Keeler Avenue in the City of Beloit when he observed an unoccupied vehicle that appeared to be stalled in the lane of traffic. The tire closest to the curb was more than three feet from the curb and a majority of the vehicle was blocking the east bound lane of traffic. The vehicle appeared to be disabled and was a traffic hazard. Wald observed an Illinois license plate on the vehicle. Wald testified that the legal distance a vehicle is to be parked from a curb is no more than twelve inches.

Wald activated the red and blue emergency lights on his squad car and pulled up behind the vehicle. He got out of the squad car and approached the vehicle to make sure that no one was lying down on the seat and to get the VIN (Vehicle Identification Number) from the vehicle. As he did so, a man approached him in an excited state, stating that the vehicle was his. In response to Wald's request, the man identified himself with a Wisconsin photo I.D. card as Billy Evans. Evans was talking fast, was excited, was watching all around him

and did not seem completely rational. It appeared to Wald that Evans did not want him near the vehicle for some reason.

Evans told Wald that he was not driving the vehicle. Wald asked Evans to have a seat in the vehicle while he ran information on Evans on the mobile data computer in his squad car.[2] When Wald asked Evans to sit in his car, he had no reason to believe there was any outstanding warrant on him. He had not seen him do anything of a criminal nature and had not seen him drive the vehicle.

Evans sat in the driver's seat of his vehicle, with the door open and his feet sticking outward on the roadway. As Wald was beginning to run the information, Evans got up and came walking back toward the squad car Wald was in. When Evans approached the car, Wald feared for his safety. Evans walked toward him quickly and it appeared to Wald that this was against what Wald asked Evans to do. Wald did not know if Evans was carrying a weapon or if he was going to assault him or what he was going to do. Wald ordered Evans to stop and he did stop. At that time, Wald had run the license plate information through dispatch over his radio but had not yet had the results.[3] Wald ordered Evans to put his hands on the vehicle. He wanted to pat him down to make sure he was not carrying a weapon. Evans did not comply with Wald's request that he put his hands on the vehicle, instead he moved back towards the car in such a way that it appeared to Wald that he was going to get into the car. It occurred to Wald that

[2] The mobile data computer runs driver's license plate information, driver's license information and warrant information.

[3] Wald testified that the Illinois license plate on the vehicle did not match the make and mode of the vehicle. However, it is unclear from the record when Wald learned this, and the court did not make findings on this. We will assume Wald did not know this until after he conducted the pat down.

there might have been a weapon inside the vehicle. While Evans was still outside the vehicle, Wald held him against the vehicle and patted him down.

Wald felt a hard object, which felt like a knife, in a right rear pocket of Evans' pants. Evans was beginning to pull away from him. At this time, another officer, Officer Reynolds, arrived and assisted Wald. Reynolds handcuffed Evans and Wald removed a three-inch steak knife with a handle two to two-and-one-half inches long from Evans' right rear pocket. Wald arrested Evans for carrying a concealed weapon and put Evans in the back of his squad car. The charges of resisting a police officer and disorderly conduct arose from Evans' behavior after he was put in the squad car.

The trial court found that the police officer's testimony was credible and made findings of fact that closely followed the officer's testimony. The trial court denied the motion to suppress the knife. The court concluded that the officer's initial pulling up behind the vehicle and telling Evans to stay in the vehicle while he ran a record search was not a seizure within the meaning of the Fourth Amendment. In the alternative, the trial court concluded, if that were a seizure, there were articulable facts that provided a reasonable ground for Wald to believe that Evans was violating a traffic law. The court concluded that the fact that Evans said that he had not been driving the car did not preclude the officer from having a reasonable suspicion that he had been driving it and had parked it illegally: it was late at night, Evans was the only person around, and he said it was his vehicle. The trial court also concluded that when Evans approached Wald quickly from his car, after the officer had asked him to stay in his car while Wald ran the information through his mobile computer, Wald at that point had a

reasonable suspicion to believe that his personal safety was in jeopardy and a pat-down search for weapons was justified.[4]

DISCUSSION

On appeal, Evans argues that a seizure took place when Wald ordered Evans to go sit in his vehicle and, because there was no reasonable suspicion that Evans had engaged in or was about to engage in criminal activity, the seizure was unconstitutional. It follows, Evans argues, that the pat down was unconstitutional and therefore the evidence discovered—the knife—must be suppressed. We disagree and conclude that both the stop and the pat down were consistent with the Fourth Amendment.

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. Gaulrapp***, 207 Wis.2d 600, 605, 558 N.W.2d 696, 698. An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. ***Id.*** A traffic stop is generally reasonable if the officers … have grounds to reasonably suspect a traffic violation has been or will be committed. ***Id.***

When determining whether a seizure occurred, courts apply a reasonable person test: if a reasonable person would have believed he was not free to leave, then a seizure has occurred. *See* ***State v. Kramar***, 149 Wis.2d 767, 781,

[4] There were other motions before the court that the court ruled on at the same time but those are not pertinent to our appeal.

440 N.W.2d 317, 322 (1989). Courts consider the circumstances as a whole when making this determination. *See* ***id.***

In assessing whether there exists reasonable suspicion for a particular stop, we must consider all the specific and articulable facts, taken together with the rational inferences from those facts. ***State v. Dunn***, 158 Wis.2d 138, 146, 462 N.W.2d 538, 541 (Ct. App. App. 1990). 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. ***State v. Anderson***, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990). 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. ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

In deciding the issue of reasonable suspicion, the court considers all matters known to the officer at the time of the stop, not only the reasons that were articulated by the officer during his or her testimony. *See* ***Anderson***, 155 Wis.2d at 83-84, 454 N.W.2d at 766. It is not the subjective state of mind of the officer that controls the right to make a stop but whether a reasonable person would have a basis for making the stop based upon all the information then known to the officer. *See* ***State v. Baudhuin***, 141 Wis.2d 642, 650-52, 416 N.W.2d 60, 62 (1987). Thus, even if the officer did not intend to issue a traffic citation when he detained an individual, if there are articulable facts fitting the traffic law violation, and objective facts supporting a correct legal theory, the stop is permissible. ***Id.*** If there is a legally permissible justification for a stop, the officer's subjective reason

does not create or contribute to a Fourth Amendment violation. ***Gaulrapp***, 207 Wis.2d at 610, 558 N.W.2d at 700.

A pat down, or "frisk," is a search within the meaning of the Fourth Amendment. ***State v. Morgan***, 197 Wis.2d 200, 208-09, 539 N.W.2d 887 (1995). Pat-down searches are justified when an officer has a reasonable suspicion that a suspect may be armed. ***Id.*** at 209, 539 N.W.2d at 891. The scope of such a search must be limited to a pat down reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer. ***Terry v. Ohio***, 392 U.S. 1, 29 (1968).

The constitutionality of searches and seizures is an issue that this court determines independently. *See* ***State v. Guzman***, 166 Wis.2d 577, 586, 480 N.W.2d 446, 448 (1992). The trial court's findings of fact in the matter are upheld unless they are clearly erroneous. *See* ***State v. Mitchel***, 167 Wis.2d 672, 682, 428 N.W.2d 364, 368 (1992); § 805.17(2), STATS.

We agree with Evans that a seizure did take place when Officer Wald directed him to sit in his vehicle. On this point, then, we disagree with the trial court's conclusion. It is true that Officer Wald did not stop the vehicle and did not cause Evans to come over to speak to him. However, when he directed Evans to sit in his vehicle, a detention within the meaning of ***Terry*** did occur at that point. A reasonable person would not believe he or she was free to disregard Wald's direction and walk away.

The issue then becomes, first, whether there was reasonable suspicion to justify the detention and, second, whether there was a reasonable suspicion that Evans might be armed such that the pat down was constitutionally permissible. We conclude, like the trial court, that both the seizure and the pat

down were supported by the necessary reasonable suspicion and were therefore constitutional.

There were objective articulable facts from which a reasonable police officer would believe that Evans was violating a traffic statute. The right wheels of a parked vehicle must be within twelve inches of the curb of the street. Section 346.54(1)(d), STATS. Wald testified that the wheel closest to the curb on Evans' vehicle was at least three feet from the curb and that it was presenting a safety hazard. Although Evans told Wald that he was not driving, it was not necessary for Wald to believe Evans' statement. Given the late hour, the fact that Evans told him it was his car, and the fact that there was no one else around and no other apparent explanation of how the car came to be sitting there and of Evans' presence on the scene, it was reasonable for Wald to suspect that Evans had been driving the car and had parked it illegally. It is not necessary, as Evans seems to suggest, that there be reasonable suspicion to believe that the person detained has been engaged in criminal activity; it is sufficient if there are reasonable grounds to believe that the person has violated a traffic statute. *See* ***Gaulrapp***; 207 Wis.2d at 605, 558 N.W.2d at 698.

The totality of the circumstances also provided a reasonable suspicion that Evans might be armed. Evans had initially approached Wald in an agitated manner, looking around him and not seeming to Wald to be completely rational. Although Wald asked him to sit in his vehicle, he did not go inside his vehicle and close the door but instead left the car open and his feet on the ground. Instead of continuing to sit there, as Wald instructed, Evans got out of his car and came back toward Wald in a rapid manner. When Wald then instructed Evans to put his hands on his vehicle, he did not do that but, according to Wald's observation, he appeared to head for the door of his car as if to enter it. Wald was

alone at the time and it was around midnight. We conclude that these facts, taken together with the rational inferences from those facts, give rise to a reasonable suspicion that Evans might be armed, justifying a pat-down search for weapons for Wald's safety.

In summary, we conclude that the trial court correctly denied Evans' motion to suppress the evidence discovered in the pat down, and we affirm the convictions.[5]

By the Court.—Judgment affirmed.

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

[5] Because we have concluded that Wald had a reasonable suspicion under ***Terry*** to detain Evans, we do not decide whether detention was constitutionally permissible under ***State v. Ellenbecker***, 159 Wis.2d 91, 95, 464 N.W.2d 427, 429 (Ct. App. 1990), and the officer's community caretaker function.