COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2981

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL E. KIMMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

CANE, P.J. Paul Kimmes appeals from a judgment convicting him of one count of operating a motor vehicle while intoxicated, first offense. The primary issue on appeal is whether the trial court erred by concluding that the arresting officer had sufficient authority to stop Kimmes's car. The State contends that by pleading no contest to the OWI charge, Kimmes has waived his right to appeal and, in any event, the stop was legal. Because this court elects not to apply

the waiver rule and concludes the trial court correctly denied the suppression motion, the judgment is affirmed.

After the trial court denied the motion to suppress, Kimmes entered a no contest plea to the OWI charge with the understanding that the mandatory license suspension would be stayed pending the outcome of this appeal. After the record was filed with this court, this court ordered the parties to address in their briefs whether Kimmes waived his right to appeal by entering a no contest plea to the OWI charge.

The State relies on ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984), a case with identical facts, where we stated:

> The central issue in this appeal is whether by pleading no contest, Smith waived his right to appeal. It is well-established that a plea of guilty, knowingly and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Riekkoff***, 112 Wis.2d 119, 122-23, 332 N.W.2d 744, 746 (1983), citing ***Hawkins v. State***, 26 Wis.2d 443, 448, 132 N.W.2d 545, 547-48 (1965). Waiver also applies in the case of no contest pleas. ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis.2d 646, 651, 292 N.W.2d 807, 810 (1980). The waiver does not, however, deprive an appellate court of jurisdiction to review nonjurisdictional errors in the exercise of its discretion. ***Riekkoff*** at 123-24, 332 N.W.2d at 747.

In ***Smith***, we declined to exercise our discretion to review the trial court's order denying Smith's motion to suppress and, therefore, dismissed the appeal. Since ***Smith***, we reviewed a similar jurisdictional issue in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 275-76, 542 N.W.2d 196, 198 (Ct. App. 1995) where we

exercised our discretion to allow the defendant to appeal a denial of his motion to suppress notwithstanding a guilty plea. We reasoned:

> While the County acknowledges that an appellate court may review nonjurisdictional errors in the exercise of its discretion, id. at 434, 362 N.W.2d at 441, it nonetheless contends that we should apply ***Smith*** and dismiss Quelle's claim.
>
> We decide not to apply the waiver rule here for the following reasons. First, although a jury trial was scheduled, the no contest plea saved administrative costs and time. As we pointed out in ***Smith***, it often improves the administration of justice to avoid an unnecessary and protracted trial when the sole issue is a review of a suppression motion. *See* ***id***. at 437-38, 362 N.W.2d at 442. Second, since the issue raised on appeal was squarely presented before the trial court and testimony was taken regarding the issue, we have an adequate record. Third, this does not appear to be a case where the defendant took a chance on a more lenient sentence and then brought this appeal when the sentence was more severe than hoped. All indications are that this was a garden-variety first offender driving while intoxicated case and the penalty assessed was no greater or lesser than usual. *Cf.* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 686 (Ct. App. 1985) (recognizing that litigants may not use appellate rights simply to remedy an unfavorable trial verdict). Fourth, there are no published cases applying the pertinent language in [***Village of Oregon v.***] ***Bryant*** [188 Wis.2d 680, 524 N.W.2d 635 (1994)]. We are mindful of the rule favoring repose when a defendant has pled guilty or no contest to a charge. *See* ***Smith***, 122 Wis.2d at 437, 362 N.W.2d at 442 ("He cannot be heard to complain of an act to which he deliberately consents.") (quoting ***Agnew v. Baldwin***, 136 Wis. 263, 267, 116 N.W. 641, 643 (1908)). On balance, however, we will not apply the waiver rule here.

Id.

We agree with Kimmes that his no contest plea saved the court time and costs of proceeding with a trial when the only contested issue is whether the arresting officer had sufficient authority to stop Kimmes's car. Also, the record

contains a complete transcript of the hearing on the motion to suppress. Finally, there is no suggestion that the appeal is motivated by a severe sentence since the trial court imposed the standard penalty for first time OWI offenders. Therefore, in the interests of judicial economy, this court will not apply the waiver rule.

Next, Kimmes claims that the arresting officer did not have sufficient facts to justify stopping his car. In ***State v. Waldner***, 206 Wis.2d 51, 56, 556 N.W.2d 681, 684 (1996), the supreme court reiterated the test to be applied when determining whether an investigatory stop was reasonable:

> The test is an objective one, focusing on the reasonableness of the officer's intrusion into the defendant's freedom of movement: "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 [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or "hunch" … will not suffice.'"

The officer testified that in the early morning hours he first noticed Kimmes's car because it was "wandering" on the highway. The officer's initial impression after seeing the car was that either the driver was intoxicated or the car had mechanical problems. As he continued to follow the car, the officer observed that: "During the time that I was following behind the vehicle, it again was what I would call drifting in the lane of traffic two times. It was almost on the centerline. It was very close to the centerline and then back." As the officer was about to stop Kimmes's car, it moved over to the shoulder of the highway and at a very slow rate of speed crept for a short distance to a driveway. The officer's impression was that the driver didn't know where he was going until he finally turned into the driveway. The officer stopped Kimmes's car as it was slowly creeping up the

driveway. The State concedes that Kimmes stayed within his own lane of traffic during the "wandering" and there were no traffic violations.

Kimmes contends that the investigative stop was illegal because the officer failed to observe any conduct that would suggest some kind of criminal activity had occurred. Essentially, he contends that since the conduct observed by the officer was not unlawful, there was no basis for the stop.

A similar argument was rejected in ***Waldner*** where the court stated:

> Waldner contends that lawful acts cannot form the basis for a reasonable suspicion justifying a stop. We agree that these acts by themselves were lawful and that each could well have innocent explanations. But that is not determinative. Waldner's argument is contrary to well-settled law. When an officer observes unlawful conduct there is no need for an investigative stop: the observation of unlawful conduct gives the officer probable cause for a lawful seizure. If Waldner were correct in his assertion of the law, there could never be investigative stops unless there was simultaneously sufficient grounds to make an arrest. That is not the law. The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. The law of investigative stops allow[s] police officers to stop a person when they have less than probable cause. Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.

Id. at 58-59, 556 N.W.2d at 685.

In our case, the officer became suspicious because of the manner in which Kimmes was driving. Based on the officer's past experience and training, the repeated erratic driving, although lawful, gave rise to a reasonable inference that the driver was intoxicated. Essentially, Kimmes's conduct, though lawful, was suspicious. As stated in ***Waldner,*** suspicious conduct by its very nature is

ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. ***Id.*** at 60, 556 N.W.2d at 686. Thus, when an officer observes lawful but suspicious conduct, if a reasonable inference of unlawful 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 the purpose of inquiry. ***Id.***

Here, the officer observed Kimmes's car early in the morning repeatedly "drifting" or "wandering" within its own lane of traffic and almost touching the centerline. He observed the car then move over to the shoulder of the highway and continue to go very slowly for a short distance until finally turning into a driveway. The essential question is not whether this conduct was unlawful, but whether it gives rise to a reasonable suspicion that the driver was intoxicated, thereby warranting the officer's right to temporarily detain Kimmes for the purpose of inquiry. The trial court concluded that it was and this court agrees. Confronted with these facts, this court is satisfied that Kimmes's repeated erratic driving behavior, although lawful, formed a reasonable basis for the officer's suspicion that the driver was impaired and very well could have been intoxicated. Thus, he had a sufficient basis to temporarily stop Kimmes and investigate.

By the Court.—Judgment affirmed.

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