COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3018-FT

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

IN THE INTEREST OF CARL E.V.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL E.V.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Reversed and cause remanded with directions.*

BROWN, J. Carl E.V. appeals a finding of delinquency for possessing cocaine with intent to deliver. He was seated in the back of an automobile that was the subject of a ***Terry***[1] investigation. He argues that the

[1] ***Terry v. Ohio***, 392 U.S. 1 (1968).

evidence resulting from that investigation was illegally seized because the officer did not have reasonable suspicion to conduct the investigation. This court concludes that the facts of this case most closely resemble those in ***State v. Young***, 212 Wis.2d 417, 569 N.W.2d 84 (Ct. App. 1997), and compel reversal.

Young involved an officer who was involved in a surveillance operation designed to catch persons selling narcotics in a high-drug trafficking area. The officer was contacted by radio to look for and stop a "black male subject ... [w]ho had just made short-term contact with another subject in that area." ***Id.*** at 421, 569 N.W.2d at 87. The officer observed Young and concluded that Young was the person being sought. He stopped Young, informed him that he had been seen either selling or buying drugs and asked if he would consent to a search. Young complied and the search of his person yielded a small amount of marijuana and a pipe. *See* ***id.*** The trial court held that the officer had reasonable suspicion to make the stop based upon the officer's training and experience because the term "short-term contact" could mean an exchange of money for drugs and because Young was in a high-crime area. The court of appeals reversed. The appellate court noted that part of the law which holds that while Young's presence in an area known for drug trafficking is a permissible factor for an officer to take into account, it will not suffice "standing alone." *See* ***id.*** at 427, 569 N.W.2d at 90 (citing ***Brown v. Texas,*** 443 U.S. 47 (1979)). The court then noted that while an officer may be trained in the area of drug enforcement, the meaning a trained officer gives to certain conduct on the street is also only one factor to consider. *See* ***id.*** at 429, 569 N.W.2d at 90. The court then concluded that a "short-term contact" with another individual on a residential street is an "ordinary, everyday occurrence during daytime hours in a residential neighborhood." ***Id.*** The court observed that there was nothing in the record suggesting that this would not be the

case in a high-crime neighborhood. Based on the sparse record and no further elucidation of what was observed on the street between Young and another individual, the court felt compelled to reverse.

Comparing ***Young*** to the facts in the case here, an officer was on patrol in a "known drug area." That fact was also present in ***Young***. It was about 11:00 p.m. This fact is different than ***Young*** because in ***Young*** the stop occurred in the early afternoon. The officer in this case observed four people in a vehicle as he passed by. He saw another person walk up to the vehicle from the driver's side. The pedestrian remained there for fifteen to twenty seconds and then walked away. We identify this to be a "short-term contact" similar to but not identical to the short-term contact in ***Young.*** The officer in this case then stopped the car, searched it and found the contraband.

Thus, we identify two facts that are different from ***Young***. First, the stop and search took place at 11:00 p.m. Second, the short-term contact was of a pedestrian seen at the driver's side of a car for up to twenty seconds, as opposed to a meeting between two pedestrians on a sidewalk. The State argues that these two facts make for a different result than the result of the court in ***Young***. In the State's apparent view, the fact that the activity was observed at nighttime as opposed to daytime makes all the difference. Further, the State appears to argue that walking up to a car that is stopped at a curbside late at night in a high-drug area is suspicious and unusual activity.

But we agree with Carl that whether this was in midday or late evening and whether it was two pedestrians meeting on a street or a pedestrian stopping at the driver's side of a vehicle and then walking away after twenty seconds, the question remains whether it is "unusual" activity. The ***Young*** court

held that for two individuals to meet on a residential sidewalk in midday is not an unusual activity. This is so when there is no observation of something being passed from one person to another and there are no gestures, movements or anything else to suggest unusual activity. The same is true here. It is not unusual activity for a law-abiding pedestrian to walk to a parked automobile and talk to the driver in the pre-midnight hours. There must be something else—something that makes the conduct unusual. It is not present here, just as it was not present in ***Young***.

We are well aware, as the State points out, that the evidence collected must be seen and viewed not in terms of a library analysis by scholars, but as understood by those versed in the field of law enforcement. *See* ***United States v. Trullo***, 809 F.2d 108, 112 (1st Cir. 1987). But the law also provides that the behavior of the person being observed must somehow distinguish itself from the innocent behavior of law-abiding citizens. *See* ***Whitfield v. Board of County Comm'r***, 837 F. Supp. 338, 344 (D. Colo. 1993). That simply is not shown here under the facts of this case.

If there had been any factual showing of unusual activity, we would have a different result. For example, in ***Trullo***, it was certainly unusual for a person to enter a vehicle, for the driver of the vehicle to go a short distance, for the person to exit the vehicle and for the person to walk back to where he originally was picked up. That kind of activity is not usual. We do not see that happen everyday. Or when a person in a high-crime neighborhood is seen obtaining a small object in exchange for cash, that is very unusual activity for a law-abiding citizen. *See* ***United States v. Lender,*** 985 F.2d 151, 154 (4th Cir. 1993). Because there are no facts here showing any kind of activity that a law-abiding person

would not reasonably be expected to do, we reverse on the basis of ***Young.*** The case is remanded for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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