COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0253

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

COUNTY OF LAFAYETTE,

PLAINTIFF-RESPONDENT,

V.

BRADLEY G. HEINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Reversed and cause remanded with directions.*

EICH, J.[1] Bradley Heins appeals from a judgment convicting him of operating a motor vehicle while under the influence of intoxicants and having a prohibited blood-alcohol concentration. He argues that the trial court erred when

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

it denied his motion to suppress evidence of his arrest on grounds that he was unlawfully stopped and detained by the arresting officer. Assuming, without deciding, that the arresting officer's initial contact with Heins was permissible, we conclude that he lacked the requisite reasonable suspicion to expand the stop and detain Heins after the initial contact. We therefore reverse the judgment and remand to the trial court with directions to grant Heins's suppression motion.

After an off-duty police officer observed a parked vehicle on the side of the road with its lights off at 2:30 a.m., and two occupants, one apparently slumped over the driver's seat, Deputy Sheriff Richard Nichols was dispatched to the scene. Approaching the vehicle, Nichols saw that the occupants—one of whom was Heins—were nude and engaging in sexual intercourse. Nichols testified that he was concerned about possible drug use or sexual assault. After observing the occupants, he contacted them, telling them to put on their clothes and that he would return to question them in a few minutes. When Nichols returned, Heins was still partially undressed. He appeared to be confused, and Nichols detected an odor of intoxicants coming from the vehicle. When Heins was fully dressed, Nichols ordered him out of the car. After observing additional signs of intoxication, Nichols administered a series of field sobriety tests, which Heins failed. Nichols then arrested Heins for driving while intoxicated.

Prior to trial, Heins moved to suppress the results of the sobriety tests on grounds that Nichols lacked reasonable suspicion to believe that a crime had been or was being committed, and therefore, had no lawful reason to stop and detain him. The trial court denied the motion and, after a trial on stipulated facts, found him guilty of operating a motor vehicle while under the influence of an intoxicant and while having a prohibited alcohol concentration.

When reviewing the denial of a suppression motion, we defer to the trial court's factual findings, and will uphold them unless they are clearly erroneous. ***State v. Dull***, 211 Wis.2d 652, 655, 565 N.W.2d 575, 577 (Ct. App. 1997). However, whether an investigative stop satisfies the constitutional standards of reasonableness presents a question of law which we review *de novo*. ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

A police officer may temporarily stop and detain an individual to investigate possible criminal behavior even if there is no probable cause for an arrest. ***Terry v. Ohio***, 392 U.S. 1, 22, (1968); § 968.24, STATS. To be valid, however, the stop must be based on the officer's reasonable suspicion that some criminal activity has taken or is taking place. ***State v. Jackson***, 147 Wis.2d 824, 833-34, 424 N.W.2d 386, 390 (1989). "Reasonableness" is a common sense test: whether, under the totality of the facts and circumstances, it was reasonable for the officer, in light of his or her training and experience, to believe that the defendant had committed, was committing, or was about to commit an offense. ***Id.*** at 834, 424 N.W.2d at 390.

A stop which is lawful at its inception, however, may develop into an unlawful seizure if an officer detains an individual after the purpose of the stop is completed.

> In addition to being justified at its inception … a traffic stop also must be reasonably related in scope to the circumstances which justified the interference in the first place. … [T]he detention caused by the traffic stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Thus, even a lawful traffic stop could develop into an unreasonable seizure if [police] detained [the suspect] … after the purpose of the stop was completed, so long as nothing occurred in the course of the stop to give the officers the reasonable suspicion needed to support a further detention.

Valance v. Wisel, 110 F.3d 1269, 1276-77 (7th Cir. 1997) (quotation marks and quoted sources omitted).

Assuming that Nichols's initial contact with Heins—approaching the parked car after receiving the off-duty officer's report—was proper, all he observed at that time was a man and woman engaging in sexual intercourse. There were no signs of any struggle or other indicia of forced or nonconsensual conduct—Nichols said he saw Heins lying on the car seat with a woman straddling him—nor did he detect any signs of intoxication or drug use at that time. He observed only factors consistent with consensual sexual activity, and the State does not suggest in its brief that that activity constituted criminal conduct.

The State argues that Nichols possessed reasonable suspicion to investigate further after the initial contact because, according to his testimony, he was "concerned" about "acquaintance rape" or sexual assault. And he said his concern was grounded on his belief, based on twenty-seven years' experience in law enforcement, that it is "unusual ... for people apparently in their 30's and 40's to be engaged in sexual activity in a car because, unlike teenagers, they usually had an apartment or home where they would engage in these activities." Nichols said he also was "concerned" that the driver or the occupant "would attempt to drive away and be intoxicated."

Based on the circumstances outlined in his own testimony, however, Nichols had had no *facts* before him that would reasonably justify a suspicion of criminal activity on the part of either Heins or his companion at the time he initially approached the car and observed them. There was no sign of drug use or

intoxication, and no indication of rape. Indeed, Nichols stated that the couple appeared to be "quite preoccupied with what they were doing."

The State also attempts to justify Nichols's actions as part of a police officer's "community caretaker function." It is true that police officers are allowed to make contact with vehicles in order to render necessary assistance to the occupants. *See* ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973). However, community caretaking functions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***State v. Anderson***, 142 Wis.2d 162, 166, 417 N.W.2d 411, 413 (Ct. App. 1987) (quoted source omitted). And Nichols testified in this case that he initiated contact with Heins not to check on the general welfare of the occupants, but because he suspected criminal activity—drug use or assault. And, by his own testimony, he fulfilled that purpose on his initial contact with Heins and his companion.

As indicated, we do not question Nichols's act of initially approaching Heins's car. We are satisfied, however, that he lacked reasonable suspicion, under ***Terry*** and its progeny, to detain the couple, require them to dress and get out of the car, and begin an investigation into possible illegal activities. We therefore remand the case with instructions that the trial court grant Heins's motion to suppress evidence.

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

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