COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0362-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JOSEPH L. EGERSON,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

SNYDER, P.J. The State of Wisconsin appeals from an order suppressing drug evidence collected from Joseph L. Egerson because the seizure violated Egerson's Fourth Amendment rights. We affirm the trial court's orders granting Egerson's motion to suppress the evidence and denying the State's motion to reconsider suppression.

The facts are undisputed. On September 20, 1997, City of Kenosha Police Officer Michael Wilkinson received a radio dispatch at 9:08 p.m. to investigate "a suspicious complaint" that "two subjects were sitting in a brown Cadillac in the 4300 block of 7th Avenue." Wilkinson was advised by dispatch "that the caller thought it was suspicious because [the two subjects] had been in the vehicle for a period of time," but the length of time was not reported to Wilkinson. Dispatch also advised Wilkinson that the caller stated that the Cadillac was a vehicle unfamiliar to the area.

Wilkinson went to the described area and observed a brown Cadillac with two occupants. The Cadillac was parked in a mixed residential and business area, and a pizza parlor was located on the corner of 44th Street and 7th Avenue.[1] Wilkinson activated his squad lights, put a spotlight on the Cadillac and approached the person in the driver's seat. Egerson, sitting in the driver's seat of the Cadillac, opened the door. When Egerson opened the car door, Wilkinson smelled what he believed to be the odor of burnt marijuana. Wilkinson ordered Egerson to exit the Cadillac and noticed a baggie of marijuana in his hand. Egerson was then taken into custody and charged with possession of marijuana contrary to §§ 961.41(3g)(e) and 939.62, STATS. Egerson filed a motion to suppress the evidence, which the trial court granted.

The court concluded that the Cadillac's occupants were seized when Wilkinson activated his squad's red lights and then found that "[f]or someone to be parked in an automobile for an unspecified period of time in a mixed

[1] Wilkinson testified that there was an empty pizza box in the Cadillac and he asked the Cadillac occupants what they were doing. They responded that they were eating pizza. The record does not establish, however, when the observation or conversation took place.

[residential and business] district is not sufficient to cause one to reasonably suspect that a crime had been committed." The State disagrees, arguing that Wilkinson's investigation of a credible anonymous tip that an occupied, suspicious and unfamiliar vehicle was parked on a city street for a period of time did not violate Egerson's Fourth Amendment rights.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches and seizures." *See* ***State v. Richardson***, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). Wisconsin courts rely on United States Supreme Court interpretations of the search and seizure provisions under both constitutions. *See* ***State v. Fry***, 131 Wis.2d 153, 171-72, 388 N.W.2d 565, 573 (1986). When reviewing a trial court's determination regarding the suppression of evidence, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***Richardson***, 156 Wis.2d at 137, 456 N.W.2d at 833. However, whether an investigatory stop meets statutory and constitutional standards is a question of law which we review de novo. *See* ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

The State contends that this was a proper investigatory stop under ***Terry v. Ohio***, 392 U.S. 1 (1968). The ***Terry*** Court held that the police must possess sufficient information to form a reasonable suspicion of illegal activity to justify an investigatory stop. Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834 (quoting ***Terry***, 392 U.S. at 21). Reasonableness is measured against an objective standard, taking into consideration the "totality of the circumstances."

See ***Richardson***, 156 Wis.2d at 139-40, 456 N.W.2d at 834-35. It is a common sense question which strikes a balance between the interests of society in solving crime and the right of society members to be free from unreasonable intrusions. *See* ***State v. Jackson***, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989).

Citing ***Krier***, the State maintains that because the anonymous tip about the car parked in the 4300 block of 7th Avenue was independently corroborated by Wilkinson as to "the type and color of vehicle involved, its exact location and number of occupants," an inference arose that the tipster was telling the truth, and, therefore, the investigatory stop was justified. *See* ***Krier***, 165 Wis.2d at 676, 478 N.W.2d at 65. The State misses the constitutional point. Accepting the anonymous tip as credible,[2] the issue is whether those facts, along with reasonable inferences from those facts, were sufficient to provide Wilkinson with a reasonable suspicion of illegal activity to justify an investigatory stop of the Cadillac.

The trial court's factual findings supporting the suppression of the drug evidence are fully supported by Wilkinson's suppression hearing testimony:

> Q Did you observe the car for any period of time prior to stopping it?
>
> A No. As soon as I got into the area, I mean the car was right there so I just stopped behind the vehicle.
>
> Q And then you activated your lights?
>
> A Yes.
>
> Q Did you smell anything before the door was opened?
>
> A No, I did not.
>
> Q Do you recall what dispatch said about what type of car? Were you looking for a brown Cadillac?

[2] The trial court's decision does not challenge the credibility of the information included in the anonymous tip or relayed to Wilkinson by dispatch.

> A [Dispatch] stated a brown Cadillac with two subjects in it.
>
> Q Is that what you ultimately found at [the provided] address?
>
> A Yes it is.

Wilkinson also testified as follows:

> Q Aside from two guys sitting in a car, that's not a crime, is it?
>
> A No.
>
> Q Did you observe any type of criminal activity or municipal ordinance activity or anything?
>
> A Yeah, after I made contact, I did.
>
> Q *Before you placed your squad lights on and put the flood light on the car, did you notice anything criminal before that?*
>
> A *Not at that point, no.*
>
> Q And the [anonymous tip] caller through dispatch only said that they thought the car was suspicious, correct?
>
> A That's what I believe they stated. Dispatcher advised me that the caller stated there are two subjects in a car for a period of time that was unfamiliar to the area. [Emphasis added.]

In view of the circumstances, we conclude that the trial court did not err in determining that Wilkinson did not have a reasonable suspicion, based on specific and articulable facts, that warranted an investigative seizure of Egerson's vehicle. Accordingly, we affirm the trial court order suppressing the evidence collected from Egerson after the seizure.

By the Court.—Orders affirmed.

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