COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0083-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

PENNY P. SKAIFE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed and cause remanded.*

DEININGER, J.[1] The State appeals an order suppressing evidence in its prosecution of Penny Skaife for operating a motor vehicle while under the influence of an intoxicant (OMVWI). The State claims the trial court erred in granting Skaife's motion to suppress evidence because the deputy who arrested Skaife had a reasonable suspicion that she had committed, was committing, or was

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

about to commit a crime before he stopped her. We disagree and affirm the suppression order.

BACKGROUND

A temporary investigative stop is a seizure under the Fourth Amendment. *See* ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968). Under ***Terry***, the police must possess sufficient information to form a reasonable suspicion of illegal activity to justify an investigative stop. *See* ***id.***[2] Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990) (quoting ***Terry***, 392 U.S. at 21). The issue before us is whether the deputy who arrested Skaife for OMVWI possessed the requisite reasonable suspicion of illegal activity to subject Skaife to a ***Terry*** stop, based on the following facts, which are undisputed.

At approximately 10:53 p.m., an Iowa County Sheriff's Deputy was patrolling the Village of Avoca in his squad car, which had reflective striping on its side saying "Iowa County Sheriff" but had no rooftop lights. As he traveled westbound away from an intersection at which he had just stopped, he noticed a car approaching the intersection from the south. The deputy testified that he had

[2] The holding of ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968), has been codified in Wisconsin as § 968.24, STATS.:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

seen the vehicle earlier that evening when it had pulled into the parking lot of a closed convenience store, paused "for a short time and then left." As the deputy stopped at the upcoming intersection, he observed the car stop at the intersection one block behind him. The deputy paused at the next intersection in order to determine what direction the other car was heading.

The deputy testified that from his position a block away, he could not see how many people were in the other vehicle, or if either of its turn signals were activated. He testified that the vehicle was at the stop sign for a period of thirty seconds to one minute, even though there was not any traffic. The officer stated that as he made a left turn at his intersection to go south, the other vehicle "quite quickly" made a right turn and went east. The deputy then turned his patrol car around and followed the vehicle, which turned into the parking lot of an elderly housing complex. After entering the parking lot, the deputy pulled his squad car behind the other car "to prevent it from leaving." The deputy noticed that the driver of the vehicle, later identified as Skaife, was seated in the driver's seat, leaning to the right side "as far as possible."

As he exited his squad car to make contact with Skaife, she got out of her car, a "red Camaro-Firebird-type vehicle," and approached him. The deputy began to question Skaife but she was uncooperative in her answers. The deputy testified that he observed an odor of intoxicants on Skaife's breath and that her eyes were bloodshot. In addition, the deputy testified that Skaife would not stand still or make eye contact. At some point during the questioning, Skaife turned and walked away from the deputy. He attempted to grab Skaife's jacket to stop her and told her to stop. Skaife continued to walk or run away from the deputy, and he followed her until he was able to arrest her for OMVWI.

Skaife moved to suppress all evidence gathered by the deputy after he stopped her on the grounds that the deputy "did not have any reason" to stop her, and thus, the seizure violated the Fourth Amendment under the holding of ***Terry***. At the hearing on Skaife's motion, the deputy summarized his reasons for stopping Skaife as follows:

> [T]he combination of activity that was going on, the person waiting for me to leave … my location at the stop sign, the fact that the vehicle moved quite quickly when I started moving, and the fact that it was a sports car type vehicle that would be usually driven by younger people pulling into an elderly complex, all those factors were put together.

The trial court granted Skaife's motion and entered an order suppressing evidence, which the State appeals. *See* § 974.05(1)(d), STATS.

ANALYSIS

When reviewing a trial court's decision to grant or deny a motion to suppress evidence, we will uphold the trial court's findings of historical 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 the facts as found by the trial court constitute reasonable suspicion to justify an investigative stop 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 Fourth Amendment to the U.S. Constitution and Article I, § 11 of the Wisconsin Constitution provide, in relevant part, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." In order to justify an investigative stop, which constitutes a seizure under the Fourth Amendment, a law

enforcement officer must possess sufficient information to form a reasonable suspicion of illegal activity. *See* ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968).[3]

Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] 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* ***id.*** at 139-40, 456 N.W.2d at 834. It is "a common sense question, [one] which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions." ***State v. Jackson***, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989).

The State's principal claim in this appeal is that the deputy had reasonable suspicion to stop Skaife because her actions at the intersection observed by the deputy constituted "flight." Flight from a police officer is considered behavior sufficient in itself to justify a temporary investigative stop. *See* ***State v. Anderson***, 155 Wis.2d 77, 79, 454 N.W.2d 763, 764 (1990). The facts reviewed in ***Anderson***, however, are distinguishable from those before us in this case.

First, in ***Anderson*** the supreme court noted that the trial court found that the defendant had engaged in flight, and concluded that this finding was not clearly erroneous. *See* ***id.*** at 85, 454 N.W.2d at 766. Here, the trial court made no such finding, and in fact, the court noted in its written decision that Skaife

[3] "[We] follow[] the United States Supreme Court's interpretation of the search and seizure provision of the Fourth Amendment in construing the same provision of the Wisconsin Constitution." ***State v. Roberts***, 196 Wis.2d 445, 452-53, 538 N.W.2d 825, 828 (Ct. App. 1995).

"display[ed] little more than delay in entering traffic" when she paused at the intersection and turned in a direction opposite from the deputy.

Second, most of the factors which contributed to a determination of "flight" in ***Anderson*** are not present in this case. The defendant in ***Anderson*** approached and closely encountered a squad car in a narrow alley, saw the police and turned away. *See* ***id***. at 79-80, 454 N.W.2d at 764. Anderson drove "right by the officer's vehicle" and then sped away from the area. *See* ***id***. at 85, 454 N.W.2d at 767. By contrast, Skaife never approached the deputy's vehicle; she was at least one block distant at all relevant times, and simply proceeded in a direction other than the one the deputy had taken away from the intersection.

The deputy's view of Skaife's activity at the intersection was very limited. The deputy testified that with his line of sight to Skaife's car, situated behind him and a block away, he could not tell how many people were in the car or whether Skaife was utilizing a turn signal. This is because the two vehicles were facing perpendicular directions—the squad car was westbound, Skaife northbound before her turn. By the same token, Skaife's longitudinal view of the squad car from a block away would not necessarily have revealed its identity to her because its law enforcement markings were on its sides but not atop the vehicle. The deputy did not testify, because he could not, that Skaife had seen him before she turned her car to the east. Rather, his testimony was simply that, due to Skaife's delay at the intersection, "it appeared as though the vehicle was watching me as much as I was watching it …."

We conclude that Skaife's pause at the intersection, followed by her travel in a direction other than the direction of the deputy a block away, does not constitute flight sufficient in itself to establish reasonable suspicion for an

investigative stop. The ***Anderson*** facts bring to mind a scene from a cartoon or slapstick comedy where the protagonist runs unknowingly toward some menace, recognizes "the enemy" with a gasp and raised eyebrows, and quickly "high-tails" a retreat. The testimony in the present case, by contrast, suggests that the officer and Skaife were but two ships passing in the night.

The State argues next that even if Skaife's actions did not amount to "flight," the totality of the circumstances observed by the deputy gave him a reasonable suspicion of criminal activity sufficient to justify the officer's investigative stop of Skaife. The State summarizes those circumstances as follows: The deputy saw Skaife's car in the parking lot of a closed convenience store earlier in the evening; Skaife delayed in leaving an intersection a block away from the deputy; Skaife traveled quickly in a direction other than towards the deputy; Skaife's "Camaro-Firebird" entered and parked in the parking lot of an elderly housing complex; and Skaife leaned far over in her seat after parking.

We conclude, however, that these observations by the deputy spawned at most an "inchoate and unparticularized suspicion or 'hunch,'" which is not sufficient to justify an investigative stop. *See* ***State v. Waldner***, 206 Wis.2d 51, 56, 556 N.W.2d 681, 684 (1996). The deputy's observation of Skaife's car at the convenience store occurred some time before his 10:53 p.m. sighting of her car at the intersection. Many convenience stores are open at that hour, making a would-be customer's entry, pause and exit of the parking lot an entirely innocent activity, as opposed to a suspicious one. The deputy testified that Skaife's delay at the intersection gave him "a feeling that there was something that was strange about the whole situation," which is more in the nature of a hunch than the articulation of grounds for suspected criminal activity. And, a conclusion that the driver of a "Camaro-Firebird" had less business turning into an elderly apartment

complex parking lot than would, say, the driver of an Oldsmobile sedan, appears to be more of a generalized conclusion based on stereotypes than it is a particularized suspicion that this driver was up to no good.

We have acknowledged that "a series of acts, each of which are innocent in themselves may, taken together, give rise to a reasonable suspicion of criminal conduct." ***State v. Young***, 212 Wis.2d 417, 430, 569 N.W.2d 84, 91 (Ct. App. 1997). But, as we did in ***Young***, we conclude here that the deputy's account of Skaife's activities before he stopped her vehicle could have described the conduct of any number of innocent persons in the Village of Avoca on the evening in question. As the trial court properly concluded, those activities were not sufficient to give rise to "the reasonable, articulable suspicion of criminal activity that justifies the intrusion of an investigative stop." *See* ***id***. at 433, 569 N.W.2d at 92.

Finally, the State asserts in the alternative that "the actual stop" did not occur until the deputy "attempted to grab [Skaife]'s jacket and told her to stop" following his initial questioning of her. The State points to the facts that the deputy had not activated the squad car's lights and that Skaife had already parked her car before the deputy had any contact with her. It also notes that Skaife "voluntarily" got out of her car and approached the deputy as he was getting out of the squad car.

We reject the State's alternative argument for two reasons. First, it was not presented to the trial court. Although the prosecutor's argument regarding the deputy's reasonable suspicion for stopping Skaife overlapped somewhat with his argument regarding probable cause for her arrest, the State never claimed in the trial court that Skaife was not "stopped" until after the deputy became aware of

Skaife's bloodshot eyes, the odor of alcohol and her uncooperative behavior during his initial questioning of her. The trial court's written decision makes clear that it considered the deputy to have "stopped" Skaife upon his initial contact with her in the apartment complex parking lot. "We will not … blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis.2d 817, 827, 539 N.W.2d 897, 901 (Ct. App. 1995).

Second, even if we were to address the State's argument that the stop occurred later in the encounter, we would reject it. The deputy's testimony that he parked his squad car behind Skaife's in such a manner as to prevent her from leaving would lead us to conclude that he had shown his authority and communicated to Skaife that she was not free to leave before she got out of her car. *See* ***State v. Reichl***, 114 Wis.2d 511, 515, 339 N.W.2d 127, 128 (Ct. App. 1983) (noting that a seizure occurs "when, by means of physical force or a show of authority, [a person's] freedom of movement is restrained," citing ***United States v. Mendenhall***, 446 U.S. 544, 553 (1980)).

CONCLUSION

For the reasons discussed above, we affirm the order suppressing all evidence gathered after Skaife parked her vehicle in the apartment complex parking lot. We remand for further proceedings in light of our disposition.

By the Court.—Order affirmed and cause remanded.

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