COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2273-CR **Cir. Ct. No. 2002CT152**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN L. PAULSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

¶1 DEININGER, P.J.[1] Kevin Paulson appeals a judgment that convicted him of a fourth offense of operating a motor vehicle while under the influence of an intoxicant (OMVWI). He claims the circuit court erred in denying

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

his motion to suppress all evidence obtained after an officer stopped his vehicle. Specifically, Paulson contends that police stopped him without reasonable suspicion, that the stop was unreasonably prolonged and that officers unlawfully entered upon the curtilage of his residence in order to effect his stop and arrest. We reject these contentions and affirm the appealed judgment.

BACKGROUND

¶2 The State charged Paulson with fourth-offense OMVWI.[2] He moved to suppress all evidence obtained after his traffic stop. At the suppression hearing, an investigator with the Clark County Sheriff's Department testified that he observed Paulson's vehicle cross the centerline several times, and on one occasion travel "completely" in the oncoming lane of traffic. The investigator was in plain clothes and driving an unmarked car. He radioed dispatch regarding his observations and asked that a marked squad car be sent. He followed Paulson's vehicle until it pulled into the driveway of a single-family residence and parked "a couple feet" from the garage door. The investigator parked behind Paulson's car and approached it on foot.

¶3 The investigator instructed Paulson to remain seated in his vehicle. After identifying himself as a law enforcement officer, the investigator asked Paulson for identification. Paulson replied that he did not have a driver's license and that he was watching the house where he had parked for its owner. The investigator detected "a slight odor of alcoholic beverage" and noted that Paulson's eyes were bloodshot. Paulson told him that he had consumed "about

[2] Paulson was also charged and convicted of operating after revocation, second offense.

three beers, two or three beers." The investigator pursued no further questioning but waited "until somebody from the county or the state got there to take over the situation." The investigator testified that a state trooper arrived in "maybe seven to ten minutes."

¶4 Before the trooper arrived, an officer from an area municipal police department responded to assist at the scene of the stop. This officer testified that Paulson was seated in his car when the officer arrived and that Paulson remained there until the trooper arrived. When the trooper arrived, he conferred with the investigator who had initially stopped Paulson. He then spoke with and observed Paulson, who told the trooper that he had consumed "about a six-pack." The trooper then had Paulson perform field sobriety tests and ultimately arrested him for OMVWI.

¶5 Paulson also testified at the hearing. He explained that he had resided at the house in question "all summer" and had his "personal possessions" there. He described an "eight-foot wooden fence" that went "along the front and along the north side of the house." The fence did not, however, cross the driveway, no gate "closes the driveway" and there was not "a no trespass sign up or anything like that." Paulson estimated that he sat in his car "about 15 minutes" after the investigator told him "to stay there" before another officer arrived.

¶6 The circuit court concluded that the investigator had properly effected a ***Terry***[3] stop, and that the stop was not unreasonably prolonged, finding that "the maximum potential time" that Paulson was detained until the trooper

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

arrived "was at most 15 to 20 minutes." As to Paulson's claim that officers had unlawfully entered upon the curtilage of Paulson's place of residence, the court concluded in a written decision that "the driveway falls outside the home's curtilage" and thus no Fourth Amendment violation had occurred premised on the location of the stop. After the court denied the suppression motion, Paulson entered a no contest plea. He appeals the judgment of conviction, challenging only the denial of his motion to suppress.[4] *See* WIS. STAT. § 971.31(10).

ANALYSIS

¶7 Paulson's motion and his arguments on appeal assert Fourth Amendment violations. We apply a two-step standard of review to circuit court decisions on questions of constitutional law: we will not disturb the circuit court's findings of historical fact unless they are clearly erroneous; but we independently apply constitutional standards to the facts as found, determining de novo whether a constitutional violation has occurred. *See* ***State v. Martwick***, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552.

¶8 Police may stop a vehicle for investigation if, under all of the facts and circumstances present, they have a reasonable suspicion of past, present or future criminal activity. *See* ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). A suspicion is reasonable if it is based on specific and articulable facts. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Reasonable suspicion is an objective standard, meaning that an officer's actual

[4] Paulson's motion challenged only the officers' actions "up until the time of the field sobriety tests." That is, he makes no claim that probable cause for his arrest did not exist at the point the trooper arrested him for OMVWI.

intent or purpose in effecting a stop does not determine whether an objectively reasonable suspicion of criminal activity existed at the time. ***Id.***

¶9 Paulson contends the Clark County investigator lacked a reasonable suspicion that Paulson had committed OMVWI when he stopped and detained Paulson in the driveway.[5] Paulson does not dispute, however, that the investigator observed Paulson's car cross over the centerline several times, once completely entering the oncoming traffic lane. The officer thus observed Paulson commit a traffic violation. *See* WIS. STAT. § 346.05(1) (providing that "the operator of a vehicle shall drive on the right half of the roadway" except in certain circumstances). "[A]n officer may make an investigative stop if the officer … reasonably suspects that a person is violating the non-criminal traffic laws." ***County of Jefferson v. Renz,*** 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (footnote and citations omitted). Regardless of whether the investigator reasonably suspected Paulson of committing OMVWI, he observed Paulson commit a traffic violation, thereby justifying an investigative stop.

¶10 Paulson next argues he was detained for an unreasonable amount of time while the investigator awaited the arrival of the state trooper. Although Paulson asserts in his brief that the wait was "thirty-four minutes," the circuit court found that it was "at most 15 to 20 minutes." We cannot conclude from the suppression hearing testimony that this finding was clearly erroneous. Paulson himself put the delay before the second officer's arrival at "about 15 minutes," and

[5] Paulson actually argues that the investigator lacked "sufficient probable cause to initiate a stop for [OMVWI]." An officer, however, need only have reasonable suspicion of unlawful activity in order to stop a motor vehicle. *See* ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). Reasonable suspicion is a lesser standard than probable cause. *See* ***State v. Eason***, 2001 WI 98, ¶19, 245 Wis. 2d 206, 629 N.W.2d 625.

the second officer testified that the trooper arrived "at the most, a couple minutes" later. We need not determine, however, whether twenty minutes constitutes an unreasonably prolonged investigative stop under the present facts and circumstances.

¶11 The investigator testified that, at the very inception of the traffic stop, Paulson admitted he had no driver's license. An officer may arrest a person when the officer has probable cause to believe the person committed a traffic offense in the officer's presence. *See* ***City of Milwaukee v. Nelson***, 149 Wis. 2d 434, 458, 439 N.W.2d 562 (1989). Driving without a valid license is a traffic offense. *See* WIS. STAT. § 343.05(3)(a). Given the investigator's observation of Paulson driving and Paulson's admission that he had no driver's license, the investigator had probable cause to place Paulson under arrest for the traffic violation.[6]

¶12 Because an objective basis on which to arrest Paulson arose within moments of Paulson's initial detention, it makes no difference that the investigator's primary intent may have been to detain Paulson for further investigation of a possible OMVWI. Paulson cannot complain that a twenty-minute delay in resuming the OMVWI investigation represented an unreasonable investigative detention when the investigator could have lawfully taken him into custody until he posted a proper deposit for driving without a license. *See* WIS. STAT. §§ 345.23 and .26. We thus conclude that neither the basis for the traffic stop nor the duration of Paulson's detention were constitutionally infirm. We next

[6] Paulson argued in the circuit court that officers violated Paulson's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), by questioning him while in custody without giving the required warnings. He does not renew the argument on appeal and we deem it abandoned.

consider whether the location of Paulson's stop and detention violated his Fourth Amendment rights.

¶13 Paulson claims that the officers in this case intruded upon the "curtilage" of the residence in which he was staying, without a warrant, his consent or exigent circumstances, thereby effecting an unreasonable seizure within the meaning of the Fourth Amendment. When a potential search or seizure occurs in an area adjacent to a residence, the concept of "curtilage" provides a useful analytical framework to determine the extent of the area surrounding the residence in which an individual has a reasonable expectation of privacy. *See* ***United States v. Dunn****,* 480 U.S. 294, 300-01 (1987); ***State v. Lange****,* 158 Wis. 2d 609, 618-21, 463 N.W.2d 390 (Ct. App. 1990) (adopting *Dunn* factors in Wisconsin). The concept is employed in Fourth Amendment analysis to delineate "the area [which] harbors the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'" ***Dunn****,* 480 U.S. at 300 (citations omitted).

¶14 Four factors are relevant to determining whether a given area is within a dwelling's curtilage: the proximity of the area claimed to be curtilage to the home; whether the area is included within an enclosure surrounding the home; the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observation by people passing by. ***Id****.* at 301. The circuit court, in a written decision, applied the ***Dunn*** factors to the present facts. We agree with the circuit court's conclusion that the driveway where officers stopped and detained Paulson was not within the curtilage of the residence in question.

¶15 The only factor that supports Paulson's curtilage claim is proximity—the record shows that he parked his car within a few feet of a garage at the interior end of a "20-yard" driveway. The remaining factors, however,

establish that Paulson cannot reasonably claim that the location in question was an area that harbored "intimate activity associated with the sanctity" of the residence. ***Id***. at 300. Although there was apparently a fence around portions of the front yard of the residence, it is undisputed that the fence did not cross the driveway and that no gate or other obstruction prevented ingress and egress from the driveway. Similarly, no signs were posted to deter people from accessing the driveway and no testimony described any portion of the driveway as being hidden from public view. Paulson admitted on cross-examination that postal carriers and delivery men were "free to use" the driveway.

¶16 In short, the officers in this case did not invade the curtilage of Paulson's residence. *See* ***U.S. v. French***, 291 F.3d 945, 951 (7th Cir. 2002) (explaining that "whether an area is within a house's curtilage depends not only on proximity to the house but also on the *use of the area and efforts to shield* it from public view and access as well as the nature for which it is used"). Like the defendant in ***French***, Paulson

> failed to produce any evidence that his driveway … [was] hidden from public view, inaccessible, or otherwise used for intimate activity. Nothing … alerted [officers] that [Paulson] had closed the [drive]way to the public in order to engage in private activities and that curious neighbors, members of the public, and government agents should keep out. Indeed quite the opposite appeared to be the case ….

Id. at 953-54. Accordingly, we need not inquire into the reasonableness of the officers' actions in entering the driveway. They did not intrude upon an area in which Paulson may claim Fourth Amendment protections.[7]

CONCLUSION

¶17 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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

[7] Paulson argues in his reply brief that, just because the driveway was open to the public and freely available for the use of guests and deliverymen, this does not mean that law enforcement officers could enter the driveway without a warrant. Not only do we generally decline to address arguments first made in a reply brief, *see* ***Swartout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981), Paulson is simply wrong that police are presumed excluded from areas otherwise open to the public. *See* ***U.S. v. French***, 291 F.3d 945, 954 (7th Cir. 2002) (noting that "it is not objectionable for an officer to come upon that part of private property opened for public common use and the officer may use the route which any visitor to a residence would use ... for the purpose of making a general inquiry or for some other legitimate reason").