

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1133-CR

Cir. Ct. No. 2013CF1854

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIANNA L. FLAHAVAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
JOSANN M. REYNOLDS, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Brianna Flahavan challenges the circuit court's order denying her suppression motion. According to Flahavan, evidence against

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2015-16 version. Although the appeal line indicates that this is an appeal from a judgment by Judge Josann Reynolds, her predecessor, Judge Maryann Sumi, issued the suppression ruling that Flahavan challenges.

her was obtained illegally because it was the result of a temporary investigative stop that was not supported by reasonable suspicion that she was engaged in criminal behavior. I conclude that the facts known to police at the time of the temporary seizure supplied the requisite reasonable suspicion. Accordingly, I affirm the circuit court.

¶2 As noted, Flahavan challenges a temporary investigative seizure. The law on this topic was summarized in *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997):

A brief investigatory stop is a seizure and is therefore subject to the requirement of the Fourth Amendment to the United States Constitution that all searches and seizures be reasonable. To execute a valid investigatory stop consistent with the Fourth Amendment, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. The standard is the same under Article I, Section 11 of the Wisconsin Constitution. The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.

Id. at 423-24 (citations omitted). In other words, when viewed objectively, the facts and reasonable inferences from those facts must be sufficient for an officer to reasonably conclude, in light of his or her experience, that criminal activity may be afoot. See *Terry v. Ohio*, 392 U.S. 1, 21-22, 30 (1968).

¶3 The reasonable suspicion requirement for limited-intrusion investigative stops is a meaningful protection, but it is not a high standard. Reasonable suspicion can exist even when innocent explanations are more likely than inculpatory ones. That is, the reasonable suspicion standard does not require

that the inculpatory inference be more likely than not. Indeed, even probable cause is not a more-likely-than-not standard. See *State v. Erickson*, 2003 WI App 43, ¶14, 260 Wis. 2d 279, 659 N.W.2d 407 (“Probable cause does not mean more likely than not.”).

¶4 I now turn to the arguments and facts here.

¶5 Flahavan was stopped by police while driving away from her residence shortly after the arrest of Jordan Lehr, a man with whom Flahavan lived. Lehr was arrested away from the residence at a business he owned. The arrest occurred minutes after Lehr sold a large quantity of marijuana to a confidential informant. About 40 minutes after the arrest, Flahavan was stopped.

¶6 According to Flahavan, police did not possess facts amounting to reasonable suspicion that she was involved in criminal conduct relating to Lehr’s drug dealing. Before addressing whether there was reasonable suspicion of criminal activity, I pause to address a related issue.

¶7 Flahavan argues that the circuit court erred by taking into consideration facts indicating that Flahavan might have *information* to give police about criminal activity. She argues that an investigatory stop must be based on a reasonable suspicion that the stopped person is engaged in criminal behavior, not a reasonable suspicion that the person has information about criminal behavior. I acknowledge that there was testimony and some discussion of the possibility that Flahavan might have information helpful to the police, particularly in terms of their anticipated search of the residence Flahavan shared with Lehr. However, my review is de novo, see *Young*, 212 Wis. 2d at 424, and I do not rely on the proposition that police may conduct a temporary investigative seizure based merely on reasonable suspicion that the stopped person has information about

criminal activity. I instead assume that the stop here was permissible only if the police had reasonable suspicion to believe Flahavan had been, was, or was about to engage in criminal behavior or that the vehicle she was driving contained evidence of a crime.

¶8 Flahavan spends considerable time discussing testimony regarding the subjective thoughts of the various police officers. I do not spend time on this testimony. The test focuses on what a reasonable police officer would think, not on the particular subjective thoughts of the particular officers involved.

¶9 Turning to the testimony, Flahavan's basic premise is that the police had substantial information about Lehr's involvement in crime, but no reason to believe that Flahavan was involved or was inclined to assist Lehr. In particular, Flahavan argues that there was no reason to think that Flahavan was aware that Lehr had been arrested following a drug deal and, therefore, no reason to think that Flahavan might be engaged in transporting drugs away from their shared residence. I agree that the facts known to police suggested only a possibility that Flahavan was aware of the drug bust of Lehr, but this possibility was more than a mere hunch given what police knew about the extent of Lehr's drug dealings, the camera monitoring system installed at Lehr's business, and Flahavan's connection to Lehr.

¶10 The facts supporting reasonable suspicion are as follows.

¶11 On February 28, 2013, police engaged in a controlled drug buy from Lehr. The collective information possessed by the police, including the primary case detective, included the following:

- Lehr resided at 809 Herndon Drive with Flahavan.

- Lehr operated a business called D Mobile Media at 4510 Femrite Drive.
- Lehr was “associated with” two vehicles, a black Chevrolet Avalanche and a white Chevrolet Trailblazer.
- The Trailblazer was registered to Flahavan. Lehr was known to have operated both vehicles.
- Lehr conducted drug deals at both the Herndon Drive residence and his business on Femrite Drive.
- The case detective received several anonymous tips, one that was “pretty detailed,” that Lehr was selling controlled substances from his Herndon Drive residence.
- Lehr had conducted drug deals “out of the Avalanche.”
- Lehr was currently on parole “for the distribution of ... cocaine.”
- An identified source, who was also a convicted drug dealer and who had met Lehr in prison, told police that the source conducted four “multiple pound” marijuana deals with Lehr at Lehr’s business on Femrite Drive.
- An anonymous source told the case detective that Lehr sold Oxycontin to the source’s son, and this source indicated that a white Trailblazer was involved.
- Two months before the challenged stop here, Lehr was involved in a weapons incident at a restaurant. The complaining witness identified Lehr’s vehicle “by license plate” and asserted that Lehr possessed a handgun. A separate anonymous tip asserted that Lehr was selling weapons.
- A confidential informant told the case detective that Lehr had video surveillance cameras at his business that were “active” video feeds. The cameras were “active and live [and] mounted on the outside of the building.” The case detective had personally observed the exterior-mounted cameras.

- Based on experience, the case detective knew that drug dealers “routinely” keep drugs at multiple locations, including their residences, and that “spouses, people who live in those houses, have knowledge of the drug activity that is taking place.”
- Police understood that the type of cameras mounted on the outside of Lehr’s business could be monitored from a remote location.
- The case detective knew that it was not uncommon for persons to monitor those kinds of cameras from remote locations and that, if such remote monitoring was happening, evidence at the remote location could be removed to avoid detection by the police.
- At approximately 5:00 p.m. on February 28, 2013, in a garage that was part of Lehr’s business, the confidential informant purchased approximately one pound of marijuana from Lehr for \$3,600. Lehr’s black Avalanche was in the garage. The informant observed Lehr obtain the marijuana from a “cargo box on that vehicle.”
- At approximately 5:10 p.m., Lehr was arrested while in his business’s parking lot.²
- At approximately 5:45 p.m., undercover officers surveilling the Herndon Drive residence reported observing the Trailblazer leaving the residence.
- An officer in a squad car stopped Flahavan in her Trailblazer at about 5:50 p.m.

¶12 Flahavan seeks suppression of evidence obtained as a result of this stop. Thus, the question is whether the information above provides reasonable

² Although the testimony could be more specific, it appears that it was apparent to the litigants that the exterior cameras were in a position to capture Lehr’s arrest. The arguments and questioning assume this fact, and it was never challenged by the defense.

suspicion that Flahavan knew about Lehr's criminal activities and was acting to remove evidence from their shared home.

¶13 In my view, this is not a close call. Even if it is significantly more likely that Flahavan was simply aware of some of Lehr's activities, but not involved in them, and even assuming it is far from certain that Flahavan had the ability to see, via remote monitoring, Lehr's arrest, reasonable suspicion exists.

¶14 The facts known to police suggested that Lehr was a significant and active drug dealer. It was reasonable for police to suppose that the exterior-mounted cameras were used by Lehr to protect both his legitimate business and his drug business and that Lehr would have the ability to monitor the cameras both at his business and from his home. Given Lehr's parole status and the extent of his drug activities, including selling from his home, it was reasonable to assume that anyone living with Lehr was aware of his activities. It was reasonable to suspect that Flahavan and Lehr were in a relationship and that Flahavan would act to protect Lehr if she could. Putting these and all of the other circumstances together, it was reasonable to suspect that Flahavan saw Lehr's arrest from the Herndon Drive residence and that she gathered up evidence from the residence and was driving away with it to hide it or dispose of it in a different location.

¶15 For the reasons above, I agree with the circuit court that reasonable suspicion supported the temporary investigative stop of Flahavan.

By the Court.—Judgment affirmed.

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

