

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2018

Sheila T. Reiff
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. 2017AP1397-CR

Cir. Ct. No. 2016CF1796

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LINDSEY DAWAYNE NEAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Kessler, Brash and Dugan, JJ.

¶1 KESSLER, J. Lindsey Dawayne Neal appeals a judgment of conviction, following a guilty plea, of one count of possession with intent to deliver cocaine (between one and five grams) and one count of obstructing an

officer. Neal argues that the circuit court erroneously denied his motions to suppress evidence obtained as a result of a stop and frisk. We affirm.

BACKGROUND

¶2 On April 25, 2016, Neal was charged with one count of possession of cocaine, with intent to deliver, and one count of obstructing an officer. According to the criminal complaint, Milwaukee Police Officers Sean Mahnke, Mark Dillman, and Ismar Kulenovic were on patrol on the night of April 21, 2016, in the City of Milwaukee when they saw a silver Toyota parked in the middle of an alley, blocking traffic. The officers activated their squad lights and approached the vehicle. The officers asked the occupants to exit the vehicle. When the driver and the passenger (Neal) exited the vehicle, Dillman and Kulenovic conducted a pat-down of Neal and uncovered nothing. Mahnke stated he observed a firearm under Neal's seat. Mahnke then attempted to detain Neal, however, Neal fled. Two officers caught Neal and arrested him. Upon his arrest, Neal told Kulenovic that he had crack cocaine in his pants pocket. Kulenovic found a clear plastic corner-cut baggie containing a white substance in Neal's pocket, along with \$1518.00. Mahnke returned to the vehicle and recovered the firearm. The entire stop was recorded by the squad car's dashboard camera ("dashcam").

¶3 Neal filed a motion to suppress "anything obtained as a result of the stop, frisk and arrest of the defendant and his vehicle," arguing that: the arresting officers did not have reasonable suspicion that he violated any traffic laws justifying the traffic stop; the officers acted inappropriately by asking Neal and the driver if they were armed instead of inquiring about why they were parked in the alley; and, at the time of the stop, the officers had no reason to believe that Neal or the driver were armed and dangerous.

¶4 At a hearing on the motion, the circuit court viewed the dashcam video and found, based on the language of MILWAUKEE, WIS. TRAFFIC CODE 101-24.2, that the Toyota was illegally parked in a manner that obstructed traffic and the officers had reasonable suspicion to stop the vehicle. The dashcam video clearly shows that it was dark and that the original observation by the officers appears to be from a significant distance from the vehicle in question. The court noted that the entire stop lasted approximately one minute before Neal fled. The court stated that the next legal issue it had to address was “whether the officers should have seized the defendant prior to ... at least patting him down and seized [him] prior to him running.” Defense counsel requested that the officers testify about the details of the stop. The circuit court denied the request, stating the dashcam video provided all of the necessary details, but gave counsel an opportunity to brief the issue of whether Neal was unlawfully detained prior to his attempt to flee officers. The court also allowed the State to call Mahnke to testify as to the accuracy of the dashcam video. The video does not show the gun referred to in the complaint, nor was there any testimony during the suppression hearing about the observation of a gun.

¶5 Following the hearing, Neal filed a supplemental suppression motion, arguing that “the subsequent police action after the [initial stop] transformed the seizure into an unreasonable one.” Neal argued that following the initial traffic stop, the officers acted in an intrusive manner by frisking Neal without having reason to believe that he was armed and dangerous. Because the officers uncovered nothing during the frisk, Neal argued, he was unlawfully detained.

¶6 The circuit court denied the motion, finding that the duration of the stop “was not ... very long” before Neal “decided to leave the scene,” creating probable cause for his arrest. Neal subsequently pled guilty. This appeal follows.

DISCUSSION

¶7 On appeal, Neal argues that the circuit court erred in denying his suppression motions because: (1) there was no reasonable suspicion for the initial seizure; (2) there was no basis for the frisk and protective search of the vehicle; and (3) there was no basis for the extension of the seizure.

¶8 When reviewing a motion to suppress, we apply a two-step analysis. *See State v. Dubose*, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. First, we review the circuit court’s findings of fact under the clearly erroneous standard, *see State v. Smiter*, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010), with the circuit court acting as the ultimate arbiter of witness credibility, *see Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). We search the record for evidence supporting the circuit court’s findings. *See State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989).¹ Second, “we must review independently the application of relevant constitutional principles to those facts.” *See Dubose*, 285 Wis. 2d 143, ¶16.

¹ Although it would be inadmissible at trial, at this stage in the proceedings, a circuit court may consider the allegations in the criminal complaint. *See State v. Zamzow*, 2016 WI App 7, ¶13, 366 Wis. 2d 562, 874 N.W.2d 328, *aff’d*, 2017 WI 29, 374 Wis. 2d 220, 892 N.W.2d 637 (Generally, a circuit court’s reliance on hearsay evidence at a suppression hearing does not offend a defendant’s right to due process.).

The officers had reasonable suspicion to justify the stop

¶9 An officer must have reasonable suspicion that a traffic law has been or is being violated to justify a traffic stop. *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. Reasonable suspicion depends on an officer’s ability “to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). An officer may conduct an investigatory stop of a vehicle based on a noncriminal traffic violation. *State v. Colstad*, 2003 WI App 25, ¶¶11, 13, 260 Wis. 2d 406, 659 N.W.2d 394.

¶10 What constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable officer reasonably suspect in light of his or her training and experience. *Id.*, ¶8. Courts must look to the totality of the circumstances when determining whether reasonable suspicion existed. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Reasonable suspicion is evaluated under an objective test. *Id.* at 55-56. Although an inchoate, unparticularized suspicion or hunch will not suffice, *id.* at 56, when an officer observes lawful but suspicious conduct, he or she has the right to temporarily detain the individual for the purpose of inquiry if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn. *Id.* at 60.

¶11 Here, the State called none of the arresting officers to testify about the stop,² and when the defense requested to do so, its request was denied based on

² Although Mahnke testified at the suppression hearing, he only testified as to the accuracy of the dashcam video.

the circuit court’s conclusion that the dashcam provided a credible depiction of events. While we note that the better practice is to allow an arresting officer to testify at a suppression hearing, we conclude that the facts in the record, although extremely thin, support reasonable suspicion for the stop. The complaint alleges, with no testimony to the contrary, that the vehicle Neal was in was obstructing traffic in an alleyway—a violation of a local traffic ordinance. *See Colstad*, 260 Wis. 2d 406, ¶¶8-9 (When there is reasonable suspicion to believe a person is violating a law or a traffic ordinance, a police officer may, consistent with the Fourth Amendment’s protection against unreasonable seizures, detain the person for an investigative stop.). The ordinance, titled “Blocking Traffic” states: “It shall be unlawful for any vehicle to be parked or left standing on a highway in such a manner as to obstruct traffic.” *See MILWAUKEE, WIS. TRAFFIC CODE 101-24.2*. The dashcam clearly shows the vehicle parked towards the middle of the alley, blocking traffic in at least one direction. Accordingly, the stop was reasonable.

Search and seizure

¶12 The Fourth Amendment of the United States Constitution protects the right of individuals against unreasonable searches and seizures. U.S. CONST., amend. IV. Wisconsin courts “consistently follow[] the United States Supreme Court’s interpretation of the search and seizure provision of the [F]ourth [A]mendment in construing the same provision of the state constitution.” *State v. Kiper*, 193 Wis. 2d 69, 80, 532 N.W.2d 698 (1995) (citation omitted). We judge police officers’ actions against a standard of reasonableness, which “depends ‘on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’” *See State v. Malone*, 2004 WI

108, ¶21, 274 Wis. 2d 540, 683 N.W.2d 1 (citation and one set of quotation marks omitted).

¶13 A traffic stop's acceptable duration is determined by the "mission" of the seizure. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005). If an officer becomes aware of additional suspicious factors during a valid traffic stop, and those factors are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the stop, the stop may be extended and a new investigation may begin. *Colstad*, 260 Wis. 2d 406, ¶19. The validity of the extension is evaluated under the same criteria as the initial stop. *Id.*

¶14 The issue therefore is whether there were articulable facts which would cause a reasonable police officer to suspect that criminal activity was afoot. *See Waldner*, 206 Wis. 2d at 55-56. When determining whether reasonable suspicion exists, we consider the totality of the circumstances. *See State v. Williams*, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. This inquiry must necessarily take into account both the quantity and the quality of the suspicious factors. *Id.*

¶15 Without testimony by an arresting officer at the suppression hearing, we can only rely on the other facts in the record, which come from the notarized complaint and the dashcam video. We conclude that the facts in the record support the minimal detention which occurred before Neal attempted to flee the officers. The officers initially stopped the vehicle because they believed that a traffic violation was in progress. The complaint reports that the officers asked the occupants to exit. The dashcam video shows that after Neal was patted-down, Mahnke looked in the vehicle and observed a firearm under Neal's seat.

See Maryland v. Wilson, 519 U.S. 408, 415 (1997) (On a lawful traffic stop, an officer may order the driver and the passengers to exit the vehicle without violating the Fourth Amendment’s prohibition against unreasonable seizures.). The pat-down occurred before Mahnke saw a gun in the vehicle. The time between the pat-down and Neal’s attempt to flee was less than one minute. Hence, we conclude that the officers did not unconstitutionally prolong the traffic stop. Because Neal resisted and attempted to flee, the officers had probable cause to arrest. After obtaining probable cause to arrest, the officers discovered the items Neal disclosed to them, which Neal later sought to suppress.

¶16 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgment affirmed.

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