

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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Appeal No. 2017AP1417

Cir. Ct. No. 2016FO817

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

FOND DU LAC COUNTY,

PLAINTIFF-APPELLANT,

V.

ISAAC ANTHONY DAHLKE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Fond du Lac County:
ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 HAGEDORN, J.¹ This case concerns whether an officer's search of a citizen's vehicle was supported by reasonable suspicion. Shortly after midnight on November 12, 2016, Deputy Lucas Olson stopped Isaac Dahlke in a wayside that was either next to or part of a park, depending on one's view of the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

evidence. Dahlke's vehicle was searched during the stop, leading to Dahlke's arrest and citation for possession of marijuana. Dahlke moved to suppress the results of the search on the grounds that the initial stop itself was unlawful. The circuit court agreed and granted the motion.

¶2 On appeal, the County argues that the stop was justified based on what Olson reasonably believed to be a violation of a Fond du Lac County ordinance restricting hours of access to the County's parks, or even without an ordinance violation, reasonable suspicion otherwise that Dahlke was involved in criminal activity. Because the County failed to prove the objective reasonableness of Olson's belief that Dahlke's entry into a wayside was in violation of the County ordinance, this belief did not justify the stop. Neither is the stop saved on the grounds that reasonable suspicion was present independent of the alleged ordinance violation. Accordingly, we affirm.

BACKGROUND

¶3 This case turns on whether the County met its burden to prove reasonable suspicion for the stop. The following facts are taken from statements and witness testimony and exhibits from the initial suppression hearing and the subsequent hearing following Dahlke's motion for reconsideration.

¶4 At 12:26 a.m. on November 12, 2016, Dahlke was driving south on U.S. Highway 45 with his friends when, according to Dahlke, he spotted a sign

that said “WAYSIDE.”² He then decided to enter the wayside area in order to turn around.

¶5 The wayside is located in Fond du Lac County between Lake Winnebago and U.S. Highway 45. It has two entrances off the highway; a sign proclaiming “WAYSIDE” with an arrow pointing to the entrance greets both northbound and southbound drivers. Both entrances lead into the same large parking lot. Near the south entrance is a separate drive leading to a boat ramp granting access to Lake Winnebago. Next to the parking area toward the Lake are a picnic shelter, restrooms, and grassy, tree-filled, park-like areas.

¶6 Somewhere “near” the north entrance and “by the shelter”—in what appears to be the park-like land adjacent to the parking area—is another, unlit sign. This sign proclaims: “PARK CLOSED 10PM-6AM” at the top. Below this, the sign gives other warnings: “NO DESTRUCTION OF PROPERTY, STOPPING, PARKING, LOITERING, LITTERING, DISTURBANCE, OR CAMPING IN PARK AREA,” followed by other instructions relating to intoxicating beverages. Though Olson

² A “wayside”—not common parlance in some quarters—generally refers to “the side of a road or path” or “land adjacent to a road or path.” *Wayside*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993). Our statutes also define wayside (although the County argues that this definition is inapplicable in case). WISCONSIN STAT. § 84.04(1)(e) states:

“Wayside” means an area of land adjacent or in close proximity to the highway, with facilities developed for the convenience, comfort, and enjoyment of the motoring public, these developments to include parking, sanitary, cooking, and picnicking facilities, together with any other facility or improvement which the department deems desirable or necessary to accommodate travelers and provide convenient and safe access thereto by pedestrians and vehicles. “Wayside” includes rest areas.

Id.

pointed out the general location of this sign in an aerial photograph, the photograph was not marked. Olson admitted that it would be difficult for a person to see this sign at night upon entering the parking area from either entrance if he or she was not “looking directly at it.” Additionally, two photographs of the entrances clearly show the two “WAYSIDE” signs visible from the road. However, the “Park Closed” sign is not visible in either photograph.

¶7 Olson—also driving south on U.S. Highway 45 at some distance behind Dahlke—observed Dahlke turn into the wayside. Although he observed nothing illegal about the vehicle’s maneuver, Olson testified that he became suspicious due to his personal knowledge that the “park is known for the use of illegal drugs, drinking, and suspicious activity,” especially during that time of night. Additionally, Olson testified that he was suspicious of Dahlke’s actions because he personally believed that the wayside was a part of the park, which he knew was closed.³ Although Olson admittedly did not “know of there being a definitive ... dividing marker for the park and wayside,” he testified that he believed this wayside was part of the park because “[t]he general location is owned [and maintained] by the County” and “the County website ... says a wayside is considered a park.”

³ Highway 45 Wayside Park is subject to FOND DU LAC COUNTY, WIS., CODE OF ORDINANCES § 42-35 (2017), which states:

The hours of use by the public for any park, trail or outdoor recreation area shall be from 6:00 a.m. to 10:00 p.m. It shall be unlawful for any person to be in any park, trail or outdoor recreation area except registered campers in designated campgrounds, outside the established hours.

¶8 Olson followed Dahlke into the wayside, turning into the north entrance. By this time, Dahlke’s vehicle was already on the other end of the parking area near the boat ramp entrance. Dahlke’s vehicle turned and proceeded toward Olson’s squad car. Olson then pulled behind Dahlke’s vehicle and activated the emergency lights. Testimony at the suppression hearings did not reflect much of what happened after that point. We do know, however, that Dahlke’s vehicle was searched after the stop, turning up evidence that ultimately led to his arrest and citation for possession of marijuana. Dahlke moved to suppress any evidence obtained as a result of the stop, and the circuit court held a hearing where Dahlke and Olson testified.

¶9 The County argued that Dahlke’s actions—entering the wayside at a late hour and turning around near the boat launch—constituted reasonable suspicion that illegal activity was afoot. The circuit court disagreed and concluded that Olson’s stop was not supported by reasonable suspicion. The County then moved for reconsideration, specifically arguing that FOND DU LAC COUNTY, WIS., CODE OF ORDINANCES § 42-35 (2017)—which provides that “[t]he hours of use by the public for any park ... shall be from 6:00 a.m. to 10:00 p.m.”—applied to the wayside Dahlke entered. Therefore, the County reasoned, Olson had reasonable suspicion that Dahlke was violating the ordinance. Even if the ordinance did not cover the wayside, the County maintained in the alternative that the stop was supported by reasonable suspicion because Olson’s belief that the wayside was closed was objectively reasonable. The circuit court disagreed. It affirmed its ruling, holding that it was “not convinced” that the ordinance applied to the “parking lot” or “cover[ed] the wayside” because there was no indication “that the parking lot is part of the park.” The County appeals.

DISCUSSION

¶10 The issue on appeal is whether Olson’s stop was justified based on either an objectively reasonable belief that Dahlke’s presence in the wayside violated the ordinance, or reasonable suspicion (absent the purported ordinance violation) that Dahlke was involved in criminal activity. We affirm because the County failed to carry its burden to prove either ground.⁴

¶11 A traffic stop is per se a “seizure within the meaning of our Constitutions.”⁵ *State v. Floyd*, 2017 WI 78, ¶20, 377 Wis. 2d 394, 898 N.W.2d 560. An officer may conduct a traffic stop when he or she has either probable cause to believe a traffic violation has occurred, or “when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed.” *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Because “reasonable suspicion” is an entirely appropriate basis for a warrantless stop, *State v. Houghton*, 2015 WI 79, ¶¶29-30, 364 Wis. 2d 234, 868 N.W.2d 143, and is the lower of the two required standards, we will analyze whether Olson had reasonable suspicion to justify the stop.

¶12 The reasonable suspicion standard is a holistic inquiry, requiring a totality of the circumstances analysis. *State v. Post*, 2007 WI 60, ¶18, 301 Wis. 2d

⁴ Dahlke asks that we treat the County’s argument regarding FOND DU LAC COUNTY, WIS., CODE OF ORDINANCES § 42-35 (2017) as forfeited. However, the County raised this argument in its motion to reconsider, and the court entertained and thoroughly considered this argument on its merits. We conclude the argument was not forfeited.

⁵ When speaking of “our Constitutions,” our courts have stated that the search and seizure protections granted by the Fourth Amendment are “coextensive” with those granted by the Wisconsin Constitution. *State v. Houghton*, 2015 WI 79, ¶49, 364 Wis. 2d 234, 868 N.W.2d 143.

1, 733 N.W.2d 634. “The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *Popke*, 317 Wis. 2d 118, ¶23 (citation omitted). Reasonable suspicion cannot be solely based on the “inchoate or unparticularized suspicion or hunch” of an officer, but rather focuses on the “the crucial question” of “whether the facts of the case would warrant a reasonable officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *Id.* Additionally, the reasonableness of a traffic stop is not diminished by the officer’s mistake of either law or fact so long as the mistake is objectively reasonable. *Houghton*, 364 Wis. 2d 234, ¶52 (“[A]n objectively reasonable mistake of law by a police officer can form the basis for reasonable suspicion to conduct a traffic stop.”); *see also Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014).

¶13 Whether reasonable suspicion supports a traffic stop and whether evidence should be suppressed are matters of constitutional fact. *State v. Iverson*, 2015 WI 101, ¶17, 365 Wis. 2d 302, 871 N.W.2d 661. We review the circuit court’s factual findings under the deferential clearly erroneous standard of review, and then independently apply constitutional principles to those facts. *Id.*, ¶18. Furthermore, where a “Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state”—here represented by the County. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

¶14 Assuming that a nontraffic forfeiture violation of the County ordinance can justify the stop,⁶ the stop was lawful if (1) it was true that the wayside was subject to the same closing hours as the adjacent park or (2) if Olson’s belief that the wayside was closed was otherwise objectively reasonable.

¶15 On the question of whether the wayside is *actually* subject to the park’s hours of operation, Dahlke argues that the ordinance limiting the County park’s hours cannot apply to the wayside because the wayside is along a federally funded highway—a “state trunk highway”—and is therefore controlled by federal regulations. The County, however, argues that the wayside is not along a state trunk highway. Rather, the County maintains that “the evidence in the appellate record” establishes that “the location is a county park” and therefore subject to the hours restrictions of FOND DU LAC COUNTY, WIS., CODE OF ORDINANCES § 42-35 (2017).

¶16 Whether the wayside parking area was subject to the general park closing hours would seem to be a question with a definitive legal answer. But the ordinances and arguments presented by the County—which again, bears the burden to prove its contention—fail to settle the issue. The ordinances proffered by the County—specifically FOND DU LAC COUNTY, WIS., CODE OF ORDINANCES §§ 42-31, 35 (2017)—simply state that the rules concerning the hours of use apply to “Highway 45 Wayside Park.” None of the ordinances describe the boundaries of Highway 45 Wayside Park or indicate whether the wayside parking lot is

⁶ The County argues that, under *State v. Iverson*, 2015 WI 101, 365 Wis. 2d 302, 871 N.W.2d 661, an officer’s authority to seize a person without a warrant extends to nontraffic forfeiture violations. Dahlke does not contest this, nor does it impact the outcome of this case. We therefore assume for our purposes that the County is correct.

covered by the limitation of the park hours. In short, the County has failed to make its case that Dahlke's presence in the wayside actually violated the County ordinance.

¶17 Even if the wayside parking area is not clearly subject to the County ordinance governing park hours, we must determine whether Olson's subjective belief in this regard was objectively reasonable nonetheless. In so doing, we take into account both our own lack of clarity, as well as the circuit court's factual findings during the hearing. Olson testified that he believed the wayside was part of the park based on his knowledge that the County owns and maintains the "general location" of the wayside and that "[o]n the County website, it says a wayside is considered a park." The circuit court, however, discredited this testimony and was "not [] convinced that anybody has an idea that [the wayside] is a county park."

¶18 Our review of the photographs showing the layout of the park and the signage yields no additional clarity. The signs along the highway merely indicate a "wayside"; they do not indicate whether this wayside is part of the park and subject to its closing hours. An ordinary driver accepting the highway sign's invitation to pull in to the wayside for an evening nap on a long journey would appear to have no idea they are breaking the law if the County is correct. One would think that if the wayside parking area itself was closed at night, the sign on the highway inviting drivers in would say so. It does not.

¶19 Even the sign by the shelter—potentially visible in the parking lot if looking straight at it—does not communicate to the ordinary person that the wayside parking area is off limits at night. In fact, a plain reading of the sign appears to indicate that its regulations apply to an area other than the parking lot.

The sign announcing “PARK CLOSED 10PM-6AM” also forbids “stopping” or “parking” among other things in the “park area.” These proscriptions applying to the “park area” cannot reasonably be read as referring to the wayside parking lot—which is expressly designed for stopping and parking. The natural reading of this language is that parking is forbidden in the park, but not the parking lot. This strongly indicates to the reader that the parking lot is separate from the park itself and therefore not subject to the same regulations—including the closing hours.

¶20 The standard, of course, is whether Olson’s belief was objectively reasonable, not what the average driver would think. But Olson’s stated reasons during the hearing, sparse as they were, do not evoke a different conclusion. Reviewing the record ourselves, while deferring to the circuit court’s critical assessment of Olson’s testimony, we determine that the County has not presented sufficient evidence by which we can conclude Olson’s belief that Dahlke violated the ordinance by turning around in the wayside parking area was objectively reasonable. Therefore, we hold that the County did not meet its burden to prove that Olson had reasonable suspicion to stop Dahlke for illegally entering the park.

¶21 Absent this ground, the County offers an additional, independent ground for the stop—namely, that Olson’s stop was still justified based on reasonable suspicion that Dahlke was involved in criminal activity. The only other rationale for the stop Olson offered was the park’s reputation of use for illicit activity, “especially during that timeframe.” Beyond this, Olson observed no illegal or otherwise suspicious activity.

¶22 Although Dahlke’s presence in an area that is known for illicit activity can be a factor that helps justify a search, “simply being about in a high-crime area should not of itself ever be viewed as sufficient basis to make an

investigative stop.” *State v. Morgan*, 197 Wis. 2d 200, 211-12, 539 N.W.2d 887 (1995) (quoting 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.3(c), at 456 (2d ed. 1987)). Similarly, while the time of day can also be a factor supporting an officer’s reasonable suspicion, *Morgan*, 197 Wis. 2d at 213-14, and properly may be “considered together with other suspicious circumstances,” this factor is also not enough to individually justify a stop. 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.5(g) (5th ed. 2012).

¶23 Absent Olson’s belief that Dahlke was in a closed park—a belief the County has failed to demonstrate was reasonable—Dahlke’s late night turn-about near a location Olson knew to be used for illicit criminal activity is not enough to constitute reasonable suspicion. To say it another way, the County has no constitutional authority to stop someone simply for driving when and where bad things often happen. While this may cause a reasonable law enforcement officer to have an inkling something is up, it does not rise to the level of providing a reason to suspect that the individual has committed, was committing, or is about to commit a crime. While it might be a reasonable hunch, without more, it is still just a hunch.

¶24 Because the County provided insufficient evidence indicating (1) that Olson’s belief the “wayside is considered a park” was either correct or, if mistaken, objectively reasonable or (2) that Olson’s stop was otherwise justified based on reasonable suspicion that Dahlke was involved in criminal activity, the County failed to carry its burden of proof at the suppression hearing. Therefore, we agree with the circuit court: the County failed to prove that the stop was lawful. The circuit court’s grant of the motion to suppress is affirmed.

By the Court.—Order affirmed.

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