COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0753-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK S. KAWA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] Mark S. Kawa was found guilty by a jury of operating a vehicle while intoxicated, his second such conviction within five years. He raises two issues on appeal. First, he claims that the trial court erred in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

denying his motion to suppress all evidence obtained on grounds that the officer lacked reasonable suspicion to make the stop. Second, he contends that the trial court erred in refusing to strike one of the prospective jurors for cause on grounds of subjective and objective bias. We hold that there was reasonable suspicion to stop Kawa and that the trial court did not misuse its discretion by refusing to strike a prospective juror for cause. We affirm.

¶2 The facts relating to the motion to suppress are as follows: On Friday, October 30, 1998, at about 3:44 a.m., a Village of Pleasant Prairie police officer responded to an anonymous call reporting certain activity at the Tourist Information Center located at Highways 165 and I-94 in the Village of Pleasant Prairie. The officer's information was that the caller said he was parked there when a man in a light blue Pontiac parked next to his car and commenced making "some sort of eyes at him or some sort of sexual gestures." The officer had thirteen years of experience with the village police and knew, therefore, of the information center's reputation. According to the officer, the center had a reputation of being a place where "men meet other men there for sexual purposes in the washroom and in their cars." The officer had personally observed solicitation and contact at the center.

¶3 When the officer arrived at the center, he saw a light blue Pontiac Bonneville vehicle. It was the only such light blue Pontiac there. A Firebird vehicle was next to it. The officer pulled up behind the Firebird. The officer's squad completely blocked the Firebird and a foot and one-half of the Bonneville. The squad's emergency lights were activated. The officer described what happened next, as follows:

> [T]he passenger, who later was identified as the defendant, jumped out of the passenger side of the Firebird into his

> light blue Pontiac Bonneville; and I saw the lights, back-up lights, of his car come on; and I parked behind him, honking my horn signaling for him to stop before he hit my car; and I got out of my car and walked up to the defendant.…

¶4 When the officer came closer to the defendant, he detected a strong odor of intoxicants and slurred speech. The officer informed Kawa about the dispatch he had received. When Kawa protested that he was doing nothing wrong and was merely at the center to use the washroom, the officer inquired about what he was doing in the Firebird next to Kawa's car. Kawa responded that he had just come out of the bathroom and was going to get in his car, but forgot which car was his. So, he opened up the passenger side door of the Firebird and got in it. When the officer pulled up, that was when Kawa realized that he was in the wrong car.

¶5 The officer then spoke to the driver of the Firebird. That person said he was in the washroom when Kawa came in and "made some advance toward him or said something to him." The Firebird driver went out to his car, got into the driver's seat, and was just sitting there when Kawa walked out and sat in the passenger side of his Firebird. When the driver said "what's up," Kawa responded, "I am" and motioned to his penis which was erect. Kawa then asked the driver to touch him and that is when the officer pulled up.

¶6 The officer then directed Kawa to perform field sobriety tests which Kawa performed poorly. The officer arrested Kawa for driving while intoxicated. Kawa was brought to the station house and a breathalyzer test was performed. Kawa blew a .10%. Kawa moved to suppress any evidence relating to the officer's detection of alcohol on Kawa's breath, evidence of slurred speech, evidence of the sobriety tests and the breathalyzer test on the grounds that the stop and seizure occurred the moment the officer pulled up behind Kawa's car and that

there was no reasonable suspicion to make the stop at that time. The trial court heard evidence on the motion and denied it. On appeal, Kawa renews his claim.

¶7 Kawa sees the moment of the stop and seizure as being when the officer first pulled behind the two vehicles. He contends that, at this point in time, the officer had no reasonable suspicion to stop him. As his counsel told the trial court at the conclusion of the motion to suppress hearing: "What I think it comes down to here is actually a very simple question, and that simple question is can a police officer stop and detain someone for making eyes at someone else[?] I think the answer to that question has to be no." Kawa contends that while the officer certainly can go to the center in response to the call and "see what [is] going on," the officer may not "stop" a person just because that person is "making eyes" at another. Kawa maintains that this is not criminal activity justifying a stop anymore than a construction worker making eyes at a passing woman is criminal activity. Kawa also maintains that while it may be that the officer did obtain information suggesting criminal activity *after* the stop, it must be held to be irrelevant here.

¶8 The first question we must decide is when the stop occurred. From the briefs, it appears that Kawa says the exact moment of the stop occurred when the officer first pulled up and parked behind the Firebird and partially behind the Bonneville. We disagree. A ***Terry***[2] stop occurs when an officer in some way restrains the liberty of a citizen by means of physical force or a show of authority. *See* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). Here, when the officer first pulled up behind the vehicle, Kawa's automobile was not completely blocked. In

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

fact, the officer observed that the automobile was empty. Kawa had to feel he was free to leave. In fact, his actions confirm it. He jumped out of the Firebird and into his car. He tried to back up from the stall and leave. It was at that point that the officer moved the squad and thereby completely blocked the Bonneville. And it is at this point that Kawa knew for the first time that he was not free to leave.

¶9 The next question is whether the officer had reasonable suspicion to stop Kawa simply on the basis of the information he had gained at the time he completely blocked the Bonneville. To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, 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. *See* ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Reasonable suspicion must be based on specific and articulable facts, which taken together with rational inferences from those facts reasonably warrant the intrusion. *See* ***id.*** Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. Reasonableness is measured against an objective standard taking into consideration the totality of the circumstances. *See* ***id***. The question of what constitutes reasonable suspicion is a commonsense test: under all the facts and circumstances present, we ask what a reasonable police officer reasonably suspects in light of his or her training and experience. *See* ***State v. Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989).

¶10 The aforementioned test seeks to balance the individual's protection against unwarranted government intrusion with the societal interest in enabling police officers to solve crimes. *See* ***State v. Guzy***, 139 Wis. 2d 663, 675-76, 407 N.W.2d 548 (1987). "Nevertheless, the law must be sufficiently flexible to allow law enforcement officers … the opportunity to temporarily freeze a situation,

particularly where failure to act will result in the disappearance of a potential suspect." ***Id***. at 676.

¶11 Now, using the law which we have just set forth, this is what we know. The officer has been on the force for thirteen years. Based on this experience, he was aware that the Tourist Information Center was a place where men solicited other men to engage in sexual acts. We infer from this fact that criminal sexual activity has taken place when unwanted contact has occurred. We know that the officer had information from the caller that another man sitting in his car was "making eyes at him." Under the law, a police officer has the right to make reasonable inferences based on this call and the reasonable inference is that the offending person's actions were sexual in demeanor and were unwelcome. Based on this information, the officer drove to the scene.

¶12 If this were all the information that the officer had when he exercised the stop, we might agree with Kawa that the stop was without reasonable suspicion that the criminal law had either been broken or was about to be broken. But there is more. The officer arrives at the scene and sees the Pontiac. He knows that no one is in it. It is right next to a Firebird. At this point in time, the officer does not know that the owner of the Firebird is a different person than the person who called. For all the officer knows, the person in the Firebird may now be subject to the very unwelcome conduct that the caller was worried about. So, the officer is warranted in investigating further. Suddenly, the officer sees a man jump out of the Firebird, get into the Bonneville and attempt to leave. The officer stops him. Now, it is true that the officer could not know whether unwanted and therefore unlawful contact was actually occurring. But he did know that the caller was concerned and he knows now that the person who has hurriedly tried to depart the scene has fled to a car matching the description given by the caller. Perhaps

there is an innocent explanation. But, just as easily, perhaps criminal conduct has occurred. Based on the information that the officer has, he is justified in freezing the situation to resolve the question of whether criminal conduct has occurred. As stated in ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989):

> Doubtless, many innocent explanations for [a person's] conduct could be hypothesized, but suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal. In this regard, La Fave points out that the suspects in ***Terry*** "might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store." 3 La Fave, *Search and Seizure*, sec. 9.2(c), at 357-58. We conclude that if any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation ... to investigate further.

We conclude that the officer had the right to stop Kawa. The officer knew of the caller's concern, knew that solicitation had occurred at that location in the past, knew that the driver of the Bonneville was not in the car, did not know that the Firebird owner was not the caller, saw a man leap out of the Firebird immediately upon his arrival and jump into the Bonneville and saw the operator of the Bonneville try to flee. With all this information at his command, the officer could reasonably suspect, in light of his experience, that some kind of criminal activity might have taken place. He had the right to make inquiries which would either confirm or dispel the suspicions that justified the stop. We reject Kawa's argument.

¶13 Kawa's second argument relates to the trial court's refusal to dismiss a prospective juror for cause. Kawa claims that prospective juror Smuda was objectively biased under the standard announced in ***State v. Faucher***, 227 Wis. 2d

700, 596 N.W.2d 770 (1999). Smuda described the arresting officer in this case as "a fine human being." Smuda said: "I would be lying if I would say that my past experience with him would not enter into whatever he would say. He's always been truthful with me …." But Smuda later said that he "would like to think that I could look at the evidence presented and come up with a conclusion independent of my feelings toward Mr. Hunter …. If I couldn't do that, I would tell you, okay?" Kawa moved to strike Smuda for cause. But the trial court ruled that because Smuda said he could put aside his friendship and feelings about the officer and judge the case on the facts and because the trial court believed Smuda, it refused to strike Smuda for cause. Kawa claims that he was therefore forced to use a peremptory challenge to remove Smuda and makes this an issue on appeal.

¶14 We hold that Kawa's reliance on ***Faucher*** is misplaced. This court is very familiar with the facts in ***Faucher*** and can easily tell the difference between that case and this one. ***Faucher*** was about a juror who knew the State's main witness. *See* ***Faucher***, 227 Wis. 2d at 705. The case was a credibility battle. *See* ***id.*** If the jury believed the witness, the State would make its case. If the jury disbelieved the witness, the case would fail. The juror was the next door neighbor of the complaining witness. *See* ***id***. At voir dire, he did not apprise the court of this because the witness had undergone a name change and the juror was not aware that the neighbor was a witness. *See* ***id.*** at 707. When the neighbor took the stand, the juror voluntarily alerted the court. *See* ***id***. Under voir dire, the juror told the court that he could set aside his friendship with the neighbor and judge the case objectively. *See* ***id.*** at 709-10. On that basis, the trial court refused to strike and declare the case a mistrial. *See* ***id.*** at 710. But the supreme court disagreed. The reason is that the juror had already decided the witness's credibility. The juror said numerous times that the witness "would never lie." *See* ***id***. at 708-09.

The supreme court disagreed precisely because, despite the juror's statement that he could view the case objectively, he had already decided future credibility based upon his past knowledge of the witness. *See* ***id.*** at 730, 733.

¶15 We do not have that here. What we have is a man who knows the officer and believes the officer to be a fine fellow who has always been truthful with him in the past. But he did not say that, based on past experience, he had concluded that the officer "would never lie." Smuda did not imply that he had already resolved the officer's credibility ahead of time, unlike the juror in ***Faucher***. That is why this is not a ***Faucher*** case.

¶16 Nor does Smuda's voir dire show that he was subjectively biased. Kawa must remember that subjective bias is a call made by the trial court. Only if the trial court's determination is clearly erroneous will we reverse. *See* ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999). We cannot say that here. The trial court believed Smuda. The trial court had the opportunity to observe Smuda's demeanor and how he answered the questions. All we have is the cold, black-and-white record. That is why we give deference to the trial court on this question. We reject Kawa's contention.

¶17 Kawa also complains that Smuda was biased because of his friendship with the prosecuting attorney on the case, Richard Ginkowski. Smuda was a welfare fraud investigator who worked with the prosecutor several days a week preparing cases for trial. When Ginkowski made this known to the court and counsel, the court asked Smuda if he would have difficulty being fair and impartial. Smuda replied, "I would like to think not." Kawa claims that, nonetheless, Smuda's long-time working relationship with Ginkowski made him objectively biased. We fail to see how that is so. We reject the idea that

"allegiances" and "friendships" automatically mean that the juror's neutrality is "impossible." There is no case law to support this proposition. Certainly, ***Faucher*** nowhere says that. In fact, it says the opposite. *See* ***Faucher***, 227 Wis. 2d at 722. We reject the claim. We also reject the claim that Smuda's relationship with Ginkowski shows that Smuda was subjectively biased. The trial court said he was not. That is the trial court's call.

By the Court.—Judgment and order affirmed.

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