

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2005AP2762-CR

Cir. Ct. No. 2005CF147

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ENRIQUE VIZCAINO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
TIMOTHY M. VAN AKKEREN, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Enrique Vizcaino was a passenger in a car stopped for a traffic violation. Vizcaino was searched and found to be in possession of marijuana. The vehicle was searched and a large stash of cocaine was found taped inside the engine compartment. The State appeals an order suppressing evidence

obtained from Vizcaino and the vehicle.¹ We conclude that the officer's reasonable suspicion that criminal activity was afoot allowed him to expand the traffic stop to a valid *Terry*² stop. We reverse the order and remand so the case may proceed to sentencing on Vizcaino's guilty plea to one count of the complaint.

¶2 There is no dispute that the vehicle in which Vizcaino was a passenger was subject to a valid traffic stop based on the officer's observation that the vehicle was speeding, potentially had an expired temporary license plate, and had an excessive number of items hanging from the rearview mirror. The dispositive issue on appeal is whether the traffic stop was unreasonably extended beyond its original purpose.³ See *State v. Malone*, 2004 WI 108, ¶¶26-27, 274 Wis. 2d 540, 683 N.W.2d 1 (recognizing that a passenger may challenge the

¹ The circuit court originally denied Enrique Vizcaino's motion to suppress the evidence. Vizcaino entered a guilty plea to possession of cocaine with intent to deliver, as a party to the crime. Before sentencing, the circuit court reconsidered the suppression motion and granted it as well as Vizcaino's motion to withdraw his plea and to dismiss the complaint charging Vizcaino as a party to the crime of possession of marijuana and possession of cocaine with intent to deliver. The order appealed from also withdraws Vizcaino's guilty plea and dismisses the criminal complaint.

² *Terry v. Ohio*, 392 U.S. 1, 22, 27, 30 (1968) (police officers may temporarily stop and detain a person on reasonable suspicion that the person is committing, is about to commit, or has committed a crime).

³ With the issue so defined, it is not necessary to address the State's argument that Vizcaino had no reasonable expectation of privacy in the driver's consent for a vehicle search. We note that the circuit court reconsidered its suppression decision because after denying the motion, the court became aware of the decision in *State v. Jones*, 2005 WI App 26, 278 Wis. 2d 774, 693 N.W.2d 104, *review denied*, 2005 WI 134, 282 Wis. 2d 720, 700 N.W.2d (Nos. 2003AP3216 and 2003AP3217). Although the facts of *Jones* are similar in that the driver was asked to consent to a vehicle search after the issuance of a traffic citation, the legal issue in *Jones* was whether the driver was seized within the meaning of the Fourth Amendment when he consented to the search. *Id.*, ¶7. That is not the issue here and *Jones* has no application in this case.

reasonableness of the continued seizure as beyond that necessary to fulfill the original purpose of the traffic stop).

¶3 “[I]f during a valid traffic stop, an officer becomes aware of suspicious factors or additional information that would give rise to an objective, articulable suspicion that criminal activity is afoot, that officer need not terminate the encounter simply because further investigation is beyond the scope of the initial stop.” *Id.*, ¶24. On review of the circuit court’s ruling on a motion to suppress evidence, we will uphold the circuit court’s findings of fact unless they are clearly erroneous and independently determine whether the investigative detention was constitutionally reasonable. *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). The question of what constitutes reasonable suspicion is a commonsense test. The test is an objective one, and the suspicion must be grounded in specific, articulable facts along with reasonable inferences from those facts. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (No. 2001AP2988), *cert. denied*, 540 U.S. 877 (Oct. 6, 2003) (No. 03-110).

¶4 After stopping the vehicle, the officer approached on the passenger side. The officer observed that the windows of the car were down and the vent fan was on high. It was March 24, 2005, at approximately 11:30 a.m. Several air fresheners were among the items hanging from the rearview mirror. The occupants of the vehicle were two young men. The officer obtained the identification of the driver, Phillip Ventura, and the passenger, Vizcaino. Ventura handed the officer a traffic citation from Illinois when handing over his Illinois identification card. When the officer asked about the registration of the car, Vizcaino responded that the car was registered to his stepfather and handed the officer an insurance card in the name of Sergio Maya. The officer asked Ventura

where they were headed and Vizcaino answered that they were going to Sheboygan to see family and staying for the weekend. The officer thought Ventura and Vizcaino seemed extraordinarily nervous during the initial contact and gave evasive answers. They did not maintain eye contact with the officer. The officer saw no luggage in the car but observed a roll of duct tape in the back seat and maps in the pouch behind the passenger seat.

¶5 The officer returned to his vehicle to check on the identifications. He learned that Ventura's driving status in Wisconsin was suspended and that Vizcaino's driving status in Wisconsin was revoked. He also learned that despite the temporary Illinois license plate on the vehicle, the vehicle was registered to someone in Waukesha, Wisconsin. He observed that Ventura was nervously watching him by the rearview mirror.

¶6 At that point the officer formed a suspicion that criminal activity was afoot and so informed the arriving back-up officer. Then each officer took one occupant outside of the car. Ultimately the officer obtained Ventura's consent for a pat-down search and to search Ventura's pocket. Marijuana was found in Ventura's pocket and he was arrested.

¶7 When the second officer asked Vizcaino to step out of the car, he asked if he could pat down Vizcaino for weapons. Vizcaino was wearing a large, baggy winter jacket. No weapons were found. But when the officer learned that Ventura had been arrested, he obtained Vizcaino's consent to search Vizcaino's pockets and person. The officer found marijuana in Vizcaino's jacket pocket.

¶8 We agree with the circuit court's assessment that the absence of luggage and the presence of a roll of duct tape and maps inside the vehicle do not reasonably suggest criminal activity.⁴ However, the totality of the circumstances includes the observation that the windows of the car were open and the vent fan was on high, Vizcaino was wearing a bulky winter coat on a March day when the officer did not need a coat, Vizcaino answered questions posed to the driver, and the vehicle had a temporary Illinois license plate but was registered to a person in Waukesha. Also, the officer characterized the young men as unusually nervous as demonstrated by their lack of eye contact and short, evasive answers.

¶9 When determining whether reasonable suspicion exists, we examine the cumulative effect of the facts in their totality. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Conduct which has innocent explanations may also give rise to a reasonable suspicion of criminal activity, and in assessing the officer's actions, we should give weight to his or her training and experience, and the knowledge acquired on the job. *Betow*, 226 Wis. 2d at 98. We conclude that the totality of the circumstances created a reasonable suspicion that justified the extension of the traffic stop to an inquiry about illegal items and a request to conduct a search.⁵ Thus, because the inquiry and search of Ventura was justified,

⁴ The officer testified that his suspicion was based on the absence of luggage and the presence of a roll of duct tape and maps inside the vehicle. We do not read the officer's determination as based on only those facts. The officer also referenced the disparity between the registration and license plate and the occupants' overt nervousness. In any event, the officer's subjective motivation is irrelevant under the *Terry* analysis. See *State v. Baudhuin*, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987).

⁵ The existence of objective, articulable suspicion that criminal activity was afoot also distinguishes this case from *Jones*, 278 Wis. 2d 774, ¶¶2-4, where nothing unusual developed during the traffic stop for speeding.

the continued detention of Vizcaino was also justified. The evidence was not subject to suppression.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

