COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP75-CR

Cir. Ct. Nos. 2008CT3488
2008CT3491

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT WENDT,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: RUSSELL W. STAMPER, SR., Reserve Judge.[1] *Affirmed*.

[1] The Honorable Ellen R. Bostrom presided over the suppression and plea hearings. The Honorable Russell W. Stamper, Sr., presided over the sentencing hearing and entry of judgment.

¶1 BRENNAN, J.[2] Robert Wendt appeals the judgments of conviction entered after he pled guilty to one count of operating a motor vehicle while under the influence of an intoxicant, as a second offense, and one count of operating a motor vehicle while under the influence of an intoxicant, as a third offense.[3] Wendt argues that the circuit court erred in denying his motion to suppress because the traffic stop upon which both charges are founded was not based on reasonable suspicion. We disagree and affirm.

BACKGROUND

¶2 The pertinent facts are supplied by the testimony of the initial arresting officer, Greendale Police Sergeant Bridgette Paul, who was the sole witness at the suppression hearing before the circuit court. Other facts, included only to provide background information, are set forth in the complaints and were admitted to by Wendt during his plea hearing.

¶3 On February 16, 2008, at approximately 1:30 a.m., Sergeant Paul was conducting a routine security check at Peter's Booze, a business located at 5090 West College Avenue in Greendale. While Sergeant Paul was conducting the security check, she observed a gray Ford pickup truck with a plow attachment, idling approximately ten feet behind the business. The driver of the truck was later identified as Wendt.

[2] This appeal is decided by one judge, pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] Wendt was charged in Milwaukee County Case Nos. 2008CT3491 and 2008CT3488. Pursuant to WIS. STAT. § 809.10(3), the cases were consolidated on appeal.

¶4 Sergeant Paul watched the truck for roughly ten seconds and did not observe it move at all during that time. In addition, Sergeant Paul noted that although it had snowed the previous night, the truck had the plow attachment in the "up" position and Wendt was not plowing snow at the time. After Sergeant Paul made these observations, she approached Wendt's vehicle on foot to investigate.

¶5 After making contact with Wendt to ask him why he was in the parking lot, she noted that his eyes were glassy and his speech was slurred. Sergeant Paul asked Wendt if he had been drinking, and he responded that he had consumed three beers at a nearby tavern. Sergeant Paul then asked Wendt to step out of his truck in order to conduct a field sobriety test. Wendt did so. Sergeant Paul then asked Wendt if he had any weapons or other sharp objects on his person. Wendt told Sergeant Paul that he had a pocket knife and a set of brass knuckles in his pockets. Sergeant Paul retrieved the items and then placed Wendt under arrest for carrying a concealed weapon.[4]

¶6 Officers then transported Wendt to the Greendale Police Department and conducted several field sobriety tests. Wendt's performance of the tests led officers to believe he was intoxicated. Wendt also submitted to a breath test, which showed .11 grams of alcohol in 210 liters of breath. Based on the results of those tests, he was charged with operating a motor vehicle while under the influence of an intoxicant.

[4] Wendt does not assert that arrest on those grounds was improper; he was not charged with carrying a concealed weapon.

¶7 After processing, around 3:30 a.m., Wendt was released into the custody of a responsible party, who agreed not to allow Wendt to drive for twelve hours. Minutes later, Greendale police observed Wendt driving a red pickup truck and stopped the vehicle.[5] The officer performing the stop observed a moderate odor of alcohol and noted that Wendt's eyes were glassy. A preliminary breath test performed on site indicated that Wendt's blood alcohol count was over the legal limit to drive. Accordingly, he was charged with another count of operating a motor vehicle while under the influence of an intoxicant.

¶8 On January 20, 2009, Wendt filed a motion to suppress "any and all statements made by [Wendt], the chemical test of [Wendt]'s breath, and any other observations made by the arresting officer" following Sergeant Paul's stop of Wendt behind Peter's Booze because the stop was not based upon reasonable suspicion. A motion hearing was held on July 27, 2009, at which Sergeant Paul testified. Following, Sergeant Paul's testimony, the circuit court denied the motion, concluding that Sergeant Paul had reasonable suspicion of criminal activity to permit her to approach the vehicle "for a very brief detention to ask the defendant why he was there," based upon "the time of day, the fact that the plow gate was not engaged, the fact that the defendant didn't move for a brief period of time, [and] the fact that he had driven into the parking lot without engaging the plow."

¶9 Subsequently, on October 19, 2009, Wendt pled guilty to both charges. He now appeals the circuit court's denial of his motion to suppress.

[5] Wendt does not challenge the validity of this stop.

STANDARD OF REVIEW

¶10 Ordinarily, a guilty plea waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). A narrowly crafted exception to this rule exists in WIS. STAT. § 971.31(10), which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. ***Id.*** We review the denial of a motion to suppress under a two-part standard of review, upholding the circuit court's factual findings unless clearly erroneous but reviewing *de novo* whether those facts warrant suppression. *See* ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404.

DISCUSSION

¶11 Wendt argues that when Sergeant Paul approached his truck in the parking lot of Peter's Booze she seized him without reasonable suspicion that he had committed, was committing, or was going to commit a crime, in violation of the Fourth Amendment. More specifically, Wendt contends that "there is nothing suspicious about a vehicle with a plow attachment idling in the parking lot for ten seconds when it had been snowing and there was plowing activity occurring throughout the city." We disagree.

¶12 The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." In ***Terry v. Ohio***, the United States Supreme Court allowed that, although investigative stops are seizures within the meaning of the Fourth Amendment, in some circumstances police officers may conduct such stops even where there is no probable cause to make an arrest. ***Id.***, 392 U.S. 1, 22 (1968).

However, such a stop must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" ***Id.*** at 27. Rather, 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. ***Id.*** at 21.

¶13 Investigative traffic stops are subject to the constitutional reasonableness requirement. ***Whren v. United States***, 517 U.S. 806, 809-10 (1996); ***State v. Rutzinski***, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. The burden of establishing that an investigative stop is reasonable falls on the State. ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

¶14 The determination of reasonableness is a common sense test. ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). The crucial question is whether the facts of the case would warrant a reasonable police 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.*** The reasonableness of a stop is determined based on the totality of the facts and circumstances. ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106.

¶15 Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). "[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." ***Id.*** at 60.

¶16 Here, there were "specific and articulable facts," as set forth by Sergeant Paul during her testimony, which could have led a reasonable police officer to believe that crime was afoot when Sergeant Paul first approached Wendt's truck. *See* ***Terry***, 392 U.S. at 21. Given that it was 1:30 a.m., the business at which the truck was idling had long since closed, and the truck was not plowing snow—in other words, there was no immediately discernable reason for the truck to be there—it was not unreasonable for Sergeant Paul to conclude that Wendt may be preparing to burglarize the business. Consequently, Wendt's Fourth Amendment rights were not violated when Sergeant Paul approached his truck to ask him why he was there.

¶17 Wendt asks us to conclude that because there is a potentially innocent explanation for his actions—that he was in the parking lot to plow snow—that Sergeant Paul lacked reasonable suspicion to approach his vehicle. That is not the law. The Wisconsin Supreme Court has held that "reasonable inferences of criminal activity can be drawn from [seemingly innocent] behavior." ***Waldner***, 206 Wis. 2d at 59. "Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity." ***Id.*** at 60. That is exactly what Sergeant Paul did here.

By the Court.—Judgments affirmed.

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