

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 29, 2011

A. John Voelker
Acting 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. 2010AP2564-CR

Cir. Ct. No. 2008CT171

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LISA K. BECKMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Lisa K. Beckman appeals from a judgment of conviction for operating a motor vehicle while intoxicated, third offense.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Beckman contends that the circuit court erred in denying her motion to suppress evidence based on a lack of reasonable suspicion to initiate an investigatory traffic stop. We reject Beckman's argument. We affirm the judgment.

¶2 The facts underlying Beckman's conviction were testified to at the suppression hearing by the arresting officer, John Schubel. On Sunday, January 20, 2008, at approximately 11:40 p.m., Schubel was patrolling the Village of Mukwonago. Schubel testified that his attention was drawn to a vehicle stopped behind a closed business, Little Babe's, located on "Main Street and Flood." Schubel testified that "[a]ll the lights were out." The vehicle was parked in the southwest corner of the parking lot, near the back door of Kay's Academy of Dance, a business located in the same building. After Schubel noticed the vehicle, he observed it leave the parking lot. He followed the vehicle approximately "half a mile," during which "[i]t stopped at the lights on County Highway ES and State Highway 83 and then proceeded to make a left hand turn when the light turned green." He did not notice anything unusual about the driving. The vehicle then turned left into The Fork in the Road restaurant parking lot, which was also closed. Schubel testified that "[a]ll the lights were out and there were no parked cars in the front lot." Schubel pulled in behind the vehicle and activated his emergency lights.

¶3 When asked on what basis he had activated his emergency lights, Schubel testified: "As a community caretaker, because we've had burglaries in the small businesses so I was concerned that the vehicle was stopping at closed businesses and why." Schubel then made contact with the driver, later identified as Beckman.

¶4 Beckman argued that Schubel lacked a reasonable basis to stop her vehicle. She pointed to Schubel’s testimony that he had observed her for “[m]aybe a minute, two minutes” before activating his emergency lights and he could not describe what knowledge he had of business burglaries in the Village of Mukwonago in the month prior to Beckman’s arrest. The circuit court, Judge Lee Dreyfus, Jr., presiding,² determined that the question was “whether or not there was an appropriate basis for ... Officer Schubel to have had contact with Ms. Beckman.” The circuit court concluded that it was not a traffic stop as asserted by the State, but was “in the guise of [the] officer’s community caretaker function.”

¶5 Beckman moved for reconsideration before Judge James Kieffer. Based on his review of the transcript, Judge Kieffer again denied Beckman’s motion to suppress. However, Judge Kieffer disagreed with Judge Dreyfus as to the grounds for the stop. Judge Kieffer concluded that the officer was not engaged in bona fide community caretaker activity, but that the stop was a classic *Terry*³ stop justified by “the time of night and the curious behavior” observed by Schubel. Beckman appeals.

¶6 At the outset, the State clarifies on appeal that it does not contest that a *Terry* stop occurred and it does not allege that the officer relied upon a community caretaking function. Rather, the State contends that Schubel had reasonable suspicion to stop Beckman’s vehicle for further investigation. We

² While Judge James Kieffer entered the judgment of conviction in this case, Judge Lee Dreyfus, Jr.’s ruling on the motion to suppress is also a subject of Beckman’s challenge on appeal.

³ *Terry v. Ohio*, 392 U.S. 1 (1968).

therefore focus our discussion on whether Schubel had the requisite reasonable suspicion to justify a *Terry* stop of Beckman's vehicle.

¶7 Upon review of a motion to suppress, we will sustain the circuit court's historical findings of fact unless those findings are clearly erroneous. *State v. Amos*, 220 Wis. 2d 793, 797, 584 N.W.2d 170 (Ct. App. 1998). However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law that we review de novo. *See id.* at 797-98.

¶8 WISCONSIN STAT. § 968.24, which codifies *Terry*, permits a police officer to temporarily detain and question a person in a public place when the officer reasonably suspects that the person is committing or is about to commit an offense. "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Police officers are not required to rule out the possibility of innocent behavior before initiating a *Terry* stop. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Suspicious conduct, by its very nature, is ambiguous and therefore if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences, the police have a right to temporarily detain the suspect for purposes of inquiry. *Id.*

¶9 Here, on reconsideration, the circuit court agreed with the State's assertion "that this was a classic *Terry* type stop and there did exist a reasonable and articulable suspicion to stop Miss Beckman's vehicle." The court found:

Officer Schubel was on duty and he saw a vehicle stopped behind a closed business identified as Little Babe's Restaurant located in Mukwonago and the officer observed

the vehicle then leave this parking lot and then observed this vehicle then proceed to another area with another business. It's important to note these businesses were closed at this time and the time of all of this was at 11:40 p.m.

The court went on to find that Schubel's attention was appropriately drawn by the presence of Beckman's vehicle in the parking lot of one closed business and then another closed business when there had been reports of burglaries in the area. While the court acknowledged that it was later discovered that one of Beckman's passengers resided in the residential component of the building housing the second closed business, this fact was unknown to Schubel at the time of the stop.

¶10 Beckman contends that Schubel's brief observation of Beckman's vehicle and his concern regarding burglaries of small businesses in the area did not give rise to reasonable suspicion. Beckman argues that while Judge Dreyfus relied on the general notion that an officer is expected to check on businesses, Judge Kieffer relied on Schubel's representation that there had been "reports of burglaries in the area" without explicitly finding Schubel's testimony credible. Beckman contends that Schubel's testimony regarding the burglaries is vague, convenient, lacks corroboration and is not credible. We are unpersuaded. It is implicit in both the circuit court's original decision and the circuit court's decision on reconsideration that it found Schubel's testimony concerning reports of small business burglaries to be credible, and we have no reason to overturn this finding on appeal. *See* WIS. STAT. § 805.17(2) ("[f]indings of fact shall not be set aside

unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.”)⁴

¶11 Finally, Beckman contends that this “is a classic example of behavior that cannot give rise to reasonable suspicion because it is consistent with conduct that is not just innocent but commonplace.” She notes that there is “nothing overtly unusual about a vehicle traveling on a Sunday night between two locations with closed businesses.... For all Schubel knew, Beckman could have been looking for some place that was still open, or coming up to businesses to get a good look at their addresses to figure out her location.” However, Beckman ignores that an officer is not required to rule out the possibility of innocent behavior before conducting a *Terry* stop. See *State v. Fields*, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. As our supreme court stated in *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989):

Doubtless, many innocent explanations for [the defendant’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.... 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 in order to investigate further.

⁴ Beckman complains that the transcript review on reconsideration lacked the “key advantages” of a trial court that observes testimony firsthand; however, when Beckman requested reconsideration she was aware that a new judge had been assigned and the request for review was based on the transcript. Further, at the outset of the motion hearing, the State indicated that the court’s decision could be based on its review of the transcript and Beckman did not object.

¶12 Here, Schubel observed Beckman's vehicle at 11:40 p.m. on a Sunday night in a parking lot behind one closed business before it proceeded to the parking lot of another closed business. There were no lights on at either location. Schubel considered this activity in light of his knowledge that there had been reports of burglaries of small businesses in the area. Considering the totality of the circumstances, we hold that Beckman's conduct could give rise to a reasonable inference of wrongful conduct and, as such, Schubel had reasonable suspicion to conduct a *Terry* investigation. See *Anderson*, 155 Wis. 2d at 84. We affirm the judgment.

By the Court.—Judgment affirmed.

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

