COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2258-CR **Cir. Ct. No. 03CM001037**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. BROCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] David J. Brock appeals from a judgment of conviction for possession of a controlled substance pursuant to WIS. STAT. § 961.41(3g)(e). Brock claims that the trial court erred by denying his motion to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

suppress based upon his claim that the arresting officer improperly broadened the scope of a routine traffic stop by asking Brock to step out of the vehicle and then asking Brock to consent to a search of his person. We reject Brock's argument. We affirm the judgment of conviction.

HISTORY

¶2 The State charged Brock with possession of a controlled substance. Brock responded with a motion to suppress. We take the facts from the testimony presented at the motion hearing.

¶3 On July 15, 2003, at approximately 1:15 a.m., City of Sheboygan Police Officer Jason McGill observed a speeding vehicle with a defective taillight. McGill stopped the vehicle and observed two male occupants. McGill asked both men for identification. The driver produced a driver's license. The passenger explained that he did not have a state I.D., but provided his Tecumseh work identification card, which identified him as David Brock. McGill then asked the driver "where they were coming from and he told me from work." McGill did not believe this since Tecumseh was not located on the route traveled by McGill as he had followed the vehicle.[2] In addition, McGill testified that the route taken by the vehicle "went out of their way to get to the location they were in." During this time, a backup officer arrived on the scene. This backup officer advised McGill that he was familiar with Brock based on previous drug charges.

[2] McGill also testified that he believed the driver was trying to deceive him by this answer. The trial court sustained an objection to this testimony as calling for a conclusion of the witness. Later, on cross-examination, McGill testified that both Brock and the driver had been dishonest with him.

¶4 McGill then returned to the suspect vehicle and asked Brock to step out of the vehicle. Brock complied and McGill then asked him for permission to search his person. Brock again complied. The search revealed marijuana on Brock's person. When asked on cross-examination as to why he asked Brock to step out of the car, McGill stated:

> Well, the reason I asked him out of the car was after speaking with [the backup officer], I was told that your client has had previous drug problems and drug arrests. With the information they provided me, I knew they were trying to mislead me.

McGill could not recall if he had issued the driver a warning for the traffic violations. However, the driver of the vehicle testified that McGill did issue him a warning before McGill asked Brock to step out of the vehicle.

¶5 Relying on the driver's testimony that McGill had issued the warning before asking Brock to step out of the vehicle, Brock argued that the traffic matter had concluded and therefore McGill's subsequent questioning and search of Brock was an unreasonable expansion of the traffic stop not supported by reasonable suspicion or probable cause. In response, the State relied, in part, on ***State v. Williams***, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834, where the supreme court held that a request for permission to search was valid because the traffic stop had already concluded. ***Id***., ¶26. Under those circumstances, the ***Williams*** court concluded, "a reasonable person [in Williams' position] would have felt free to decline to answer the officer's questions and simply 'get on his way.'" ***Id***., ¶28. The trial court agreed with the State's argument under ***Williams*** and denied Brock's motion.

¶6 At an ensuing bench trial based on stipulated facts, the trial court found Brock guilty. Brock appeals.

DISCUSSION

¶7 We begin by setting out what is not in dispute. Brock does not challenge the initial stop of the vehicle or McGill's request for identification. For its part, the State concedes that Brock was seized for purposes of the Fourth Amendment. *See* ***State v. Harris***, 206 Wis. 2d 243, 246, 557 N.W.2d 245 (1996) ("We hold that when police stop a vehicle, all of the occupants of that vehicle are seized and thus have standing to object to the seizure.").

¶8 Thus, the question on appeal narrows to Brock's argument that McGill's issuance of the warning ticket to the driver concluded the traffic stop and therefore the ensuing investigation of Brock was improper because it was not supported by any reasonable suspicion or probable cause.

¶9 The State makes three alternative arguments in support of the trial court's ruling denying Brock's motion to suppress. First, the State argues that the traffic stop had not concluded and therefore the investigation of Brock was part and parcel of that process. Second, the State argues that even if the traffic stop had concluded, McGill had independent grounds constituting reasonable suspicion to further detain and question Brock. Third, the State argues that even if Brock did not have grounds to detain Brock, he was not seized under the Fourth Amendment and was free to decline McGill's requests that he step out of the vehicle and consent to a search. This latter argument invokes ***Williams*** and is the basis upon which the trial court resolved the matter.

¶10 We choose to resolve this case on the basis of the State's second argument, which contends that even if the traffic stop had concluded, McGill otherwise had sufficient and independent grounds to further investigate Brock. We do so because this argument most squarely addresses Brock's contention that

McGill improperly broadened the scope of the traffic stop. We appreciate that this is not the basis upon which the trial court decided this issue. However, whether a search or seizure comports with constitutional standards presents a question that we decide independent of the trial court's ruling. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶11 In ***State v. Malone***, 2004 WI 108, 274 Wis. 2d 540, 683 N.W.2d 1, the supreme court addressed the question of when a police officer may broaden the scope of a traffic stop. We quote the court at some length:

> The seizure here was a traffic stop, and we evaluate the reasonableness of [the police] conduct under principles similar to those used to address a so-called *Terry* stop. Under this approach, we must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *However, if 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.* We might conceptualize this as a new, distinct investigation, but in reality there may not be a distinct line separating the two investigations—the first investigation may overlap the second, without any outward indication of a shift.

Id., ¶24 (citations omitted; emphasis added). The supreme court further held that the reasonableness of the police action is measured by two variables: (1) the nature of the police action, which inquires whether the "incremental intrusion" of the additional questions is unreasonable when balanced against the public interest; and (2) whether the duration of the questioning extends the stop beyond the time necessary to fulfill the purpose of the stop. ***Id***., ¶26 (citation omitted) ("If an investigative stop continues indefinitely, at some point it can no longer be justified

as an investigative stop."). Brock's argument goes only to the first of these variables. He does not address the duration of the stop.

¶12 Here, Brock's identification card identified him as a Tecumseh employee. In response to McGill's question as to where the driver and Brock were coming from, the driver advised that they were coming from work. From this, McGill reasonably surmised that the driver was referring to Tecumseh. Yet, Tecumseh was not on the route taken by McGill as he followed the vehicle. More importantly, in McGill's opinion, the route taken by the vehicle during the pursuit "went out of their way to get to the location they were in." This triggered McGill's suspicion that the driver was trying to mislead him. This suspicion was heightened when McGill's backup officer advised that he was familiar with Brock as the result of previous drug charges. Finally, we note an additional matter. The driver's testimony at the suppression hearing did not fully comport with his statement to McGill that he and Brock were returning from work. We appreciate that this testimony was not known to McGill at the time of the traffic stop. But "[w]hen reviewing a suppression ruling, we are not limited to the record before the [trial] court at the time of the suppression ruling. Other information produced before or after the suppression hearing may be used to support the [trial] court's decision." ***State v. Begicevic***, 2004 WI App 57, ¶3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293.

¶13 "The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape." ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Rather, "[t]he law of investigative stops allow[s] police officers to stop a person when they have less than probable cause." ***Id***. "[P]olice officers are not required to rule

out the possibility of innocent behavior before initiating a brief stop." ***Id***. Instead, a police officer has the right to temporarily freeze a situation so as to investigate further. ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991). Evasion of the police may indicate a guilty mind, and may, by itself raise sufficient suspicion to justify a brief investigative detention. ***State v. Amos***, 220 Wis. 2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998).[3] On the other hand, an investigative stop may not be based on a mere hunch. ***State v. Fields***, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279.

¶14 Under the facts here, we hold that McGill's suspicion of Brock was not based on mere speculation or hunch. Instead, it was based on observable facts and reasonable inferences drawn therefrom suggesting that Brock might have committed, was committing or was about to commit a crime. *See* WIS. STAT. § 968.24, codifying ***Terry v. Ohio***, 392 U.S. 1 (1968). Based upon the driver's statement that he and Brock were returning from work, and the unusual route of travel during the pursuit, McGill concluded that the driver was trying to mislead or deceive him. The backup officer's information regarding Brock's prior drug history provided a possible motive for such deception. Finally, the driver's testimony at the suppression hearing was not consistent with his explanation offered to McGill.

¶15 Based on the totality of the circumstances and the totality of the trial court record, we hold that McGill had the requisite reasonable suspicion to

[3] While neither Brock nor the driver physically evaded McGill, the attempt to mislead McGill was the functional equivalent because it sought to divert McGill's suspicion, thus evincing a possibly guilty mind.

temporarily freeze the situation and to further question Brock in order to resolve the matter.

¶16 In summary, we hold that the incremental nature of McGill's investigation was reasonable when balanced against the public interest. ***Malone***, 274 Wis. 2d 540, ¶26. Although Brock makes no separate argument regarding the duration of the questioning, it appears that the further investigation was relatively short, consisting only of asking Brock to step out of the car, the further request that he consent to the search, and the search itself. Thus it does not appear that the stop endured for a period of time such that it could no longer be justified as an investigative stop. ***Id***.

CONCLUSION

¶17 We hold that McGill did not illegally expand the traffic stop. On this different ground, we uphold the trial court's ruling denying Brock's motion to suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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