COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2290-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER UPCHURCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Christopher Upchurch was pulled over late at night after leaving what constituted, at least partially, an underage drinking party. He appeals his judgment of conviction for driving while under the influence of an

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

intoxicant in violation of WIS. STAT. § 346.63(1)(a). He contends that the circuit court erred by denying his motion to suppress evidence because: (1) probable cause is necessary for an investigatory stop of a violation of a noncriminal regulation; and (2) even if reasonable suspicion would have authorized his stop, the police officer did not have sufficient facts to satisfy that standard. This court concludes that an officer must have reasonable suspicion of a violation of the law before making an investigatory stop and that the officer in this case had sufficient facts to satisfy that objective standard. The judgment is therefore affirmed.

¶2 At approximately 3:30 a.m. on November 26, 1998, Town of Grand Chute police officer Gregory Mohr assisted another officer in conducting a field interview of two brothers who had been seen walking away from a residence located at 825 South Bluemound Drive. Both brothers had been drinking and one was under the age of twenty-one. The officers cited him for underage drinking. The underage drinker told Mohr that "there were possibly other people" at the residence who were also underage.[2]

¶3 Mohr observed a car backing out of the residence's driveway. Although he did not see the driver leave the house or enter the vehicle, he decided to pull the car over. After stopping the vehicle, Mohr determined that Upchurch was the driver and that he was twenty-three years old. In talking with Upchurch, however, Mohr smelled a strong odor of intoxicants and noticed that Upchurch's eyes were bloodshot. Accordingly, Mohr conducted field sobriety tests and

[2] Upchurch notes that the older brother was over 21 and told the officers that there were others at the party who were of legal drinking age. Upchurch intimates that this information was somehow inconsistent with the younger brother's statement that there were possibly more underage drinkers present. If that is his allegation, this court disagrees.

concluded that Upchurch was under the influence of intoxicants. Upchurch was arrested and charged accordingly.

¶4 Upchurch brought a motion to suppress, claiming that Mohr did not have the authority to pull over his vehicle. The circuit court denied the motion. It concluded that the reports Mohr received concerning underage drinking at the residence gave him sufficient cause to pull over a vehicle leaving the premises.

¶5 Stopping a motor vehicle constitutes a seizure that triggers Fourth Amendment protections against an unreasonable search and seizure. *See* ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). A challenge to a stop raises an issue of constitutional fact, which reviewing courts treat as a mixed question of fact and law. *See* ***State v. Phillips***, 218 Wis. 2d 180, 189 ¶12, 577 N.W.2d 794 (1998). The circuit court's historical findings of fact are reviewed under a clearly erroneous standard and will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***id.*** at ¶13. The application of constitutional principles to the facts determined by the circuit court, however, is made without deference to the circuit court's determination. *See* ***id.***

¶6 In executing a valid investigatory stop, a law enforcement officer need only reasonably suspect, in light of his or her experience, that some kind of criminal activity is afoot. *See* ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). The constitutional standard established in ***Terry*** was codified by the Wisconsin legislature in WIS. STAT. § 968.24.[3] In interpreting the scope of the statute, this

[3] WISCONSIN STAT. § 968.24 provides:

> **Temporary questioning without arrest.** After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects

(continued)

court must review the facts leading to an investigatory stop in light of ***Terry*** and its progeny. *See* ***State v. Waldner***, 206 Wis.2d 51, 55, 556 N.W.2d 681 (1996).

¶7 Upchurch contends that ***Terry*** applies only when an officer is investigating activity that could constitute a crime. He correctly notes that underage drinking is not a crime.[4] When an officer suspects someone is committing illegal activity that does not constitute a crime, he argues, the officer needs probable cause to make an investigatory stop.

¶8 In support of his argument Upchurch cites a series of decisions that use the term "crime" when discussing the appropriate circumstances for making a ***Terry*** stop. While a litany of United States Supreme Court and Wisconsin Supreme Court decisions speak of an investigative stop based upon criminal conduct, this court concludes that the language is descriptive of the offense to which the reasonable suspicion applied in each case. It does not limit an officer's right to conduct an investigatory stop based on reasonable suspicion of illegal conduct punishable only by a civil forfeiture.

¶9 No United States Supreme Court case has ever concluded that reasonable suspicion is an insufficient constitutional basis to stop an individual

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> that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

[4] Under certain circumstances, WIS. STAT. § 125.07(4)(b) prohibits an underage person to knowingly possess or consume alcohol beverages. Although imprisonment is not a possible punishment, there are a variety of possible penalties for underage drinking including forfeiture, driver's license suspension and community service. *See* WIS. STAT. § 125.07(4)(c). If a person cannot be punished by imprisonment, the unlawful act is not a crime. *See* ***State v. Beasley***, 165 Wis. 2d 97, 100, 477 N.W.2d 57 (Ct. App. 1991).

suspected of illegal but not criminal activity. In fact, the Court, in dicta, has suggested that a motorist can be stopped based upon reasonable suspicion of an offense relating to motor vehicle regulations. In ***Delaware v. Prouse***, 440 U.S. 648, 663 (1979), a driver was stopped for a purely random, discretionary check of the driver's license and vehicle registration. While the Court affirmed the Delaware Supreme Court's decision suppressing evidence, the Court stated:

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Id.

¶10 Upchurch argues that ***State v. Krier***, 165 Wis. 2d 673, 478 N.W.2d 63 (Ct. App. 1991), controls our decision and requires an officer to have probable cause before conducting an investigatory stop of suspected illegal, but not criminal, activity. In ***Krier***, the court reviewed whether an officer needs reasonable suspicion or probable cause to pull over a car driven by someone suspected of driving without a license. Driving without a license can be a civil or criminal matter depending on whether the driver has prior offenses. The court held that "when a person's activity can constitute either a civil forfeiture or a crime, a police officer may validly perform an investigative stop …." ***Id.*** at 678. The court also discussed the application of WIS. STAT. § 968.24 and concluded that the statute applied "because the police had an articulable and reasonable suspicion that he was engaged in an activity that *could* be criminal. That verb is all that is required here." ***Id.***

¶11 The issue presented in ***Krier***, however, is different from that presented here. There, the officer suspected the driver of conduct that could have constituted either a criminal or civil violation based on factors the officer had no way of discovering without identifying the driver. Therefore, the court was presented a different question from the one at issue in this case. Here, Officer Mohr testified that he suspected the driver of underage drinking, a violation that could never constitute a crime.

¶12 This question was presented squarely, however, in ***State v. Griffin***, 183 Wis. 2d 327, 329, 515 N.W.2d 535 (Ct. App. 1994). The officer stopped a vehicle in ***Griffin***, because he suspected that the driver had failed to properly register his vehicle or display issued registration plates—violations that could result only in a forfeiture. *See* ***id.*** at 331. The court held that the absence of a registration plate and the reasonable inferences that could be drawn from that fact constitute reasonable suspicion sufficient to justify an investigatory stop of a motor vehicle. *See* ***id.*** at 333. The language in ***Griffin*** clearly and unambiguously provides that an investigatory stop based on reasonable suspicion is constitutionally valid even when the suspicion relates only to a violation of a noncriminal regulation. We are bound by the provisions of ***Griffin*** and are required to apply those provisions to the contentions advanced in this case.[5]

¶13 The remaining question is whether Mohr actually had reasonable suspicion to stop Upchurch. The reasonableness of a stop depends upon the facts and circumstances of the situation. *See* ***Guzy***, 139 Wis. 2d at 675. Where the facts

[5] *See also* ***County of Dane v. Campshure***, 204 Wis. 2d 27, 32, 552 N.W.2d 876 (Ct. App. 1996) (citing ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991) for the proposition that "[a]n investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture.").

are undisputed, as here, the question whether a stop was valid is a question of law that this court reviews without deference to the circuit court's decision. *See* ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989).

¶14 In determining what cause is sufficient to authorize police to stop a person, "the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." ***United States v. Cortez***, 449 U.S. 411, 417 (1981). Only with a view toward the totality of the circumstances is this court able to determine the reasonableness of an officer's actions.

¶15 Although the test is objective, a "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants that intrusion." ***Terry***, 392 U.S. at 30. The question what constitutes reasonableness is a common sense test: What would a reasonable police officer reasonably suspect in light of his or her training and experience? This common sense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility. *See* ***Waldner***, 206 Wis. 2d at 56.

¶16 Upchurch contends that Officer Mohr had almost no facts supporting the conclusion that he was either underage or consuming alcohol. He notes that Mohr did not see him enter the vehicle and observed no erratic driving. He also argues that Mohr could have investigated further without stopping him by using his car's license plates to run an investigative check of the registered owner's age. This court disagrees.

¶17 Even if less intrusive investigatory techniques are available, the constitution does not require police officers to employ them when they already have authority to conduct a ***Terry*** stop. Such a rule would "unduly hamper" an officer's ability to make swift decisions and would require "unrealistic second-guessing." ***State v. Sokolow***, 490 U.S. 1, 10 (1989). Mohr had just spoken with an underage drinker who had recently left the residence. The young man indicated that there were possibly more underage drinkers present. It was after 3:30 a.m. when a car backed out of the driveway of the residence. Mohr decided to investigate further. He already knew that illegal activity had been taking place inside the residence and, given the underage drinker's indications, he had reason to believe that more underage drinkers were present. He also had reason to further investigate who was responsible for serving the underage man alcohol. From these facts, this court concludes that Mohr had a particularized and objective basis for suspecting Upchurch of unlawful activity.

By the Court.—Judgment affirmed.

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