

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**DECEMBER 3, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

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

No. 96-1319-CR

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**Plaintiff-Appellant,**

**v.**

**BRENDAN MICHAEL TIGHE,**

**Defendant-Respondent.**

APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

CANE, P.J. The State appeals the trial court's order granting Brendan Tighe's motion to suppress evidence of drugs found in his vehicle because the stop was not based upon a reasonable suspicion of unlawful activity. The facts are undisputed. At approximately 3:45 p.m., trooper Dennis Lewis was parked two miles west of Somerset Village while observing slow moving traffic traveling east on State Highway 64 toward a concert. His police car was parked at an angle to the roadway and was partly concealed from eastbound traffic by a wooded area. He was about thirty feet from the passing traffic lane.

As Lewis observed a vehicle pass, he saw a rear passenger smoking a cigarette while leaning over and concealing it in his hand. He saw

the person put the cigarette to his mouth and then put it back down. Based upon the appearance of the cigarette and the manner in which the cigarette was being held and smoked, Lewis believed the cigarette was marijuana. He then followed the car with a truck between them as they traveled toward Somerset where the concert was to be held. Lewis testified that as the traffic traveled eastbound at no more than ten miles per hour, he had his window down and could smell the odor of burning marijuana coming from in front of him. Lewis was approximately three to four car lengths behind the car with the suspected marijuana.

After observing what he believed to be a marijuana cigarette and smelling burning marijuana, Lewis stopped the car and saw the two rear passengers "moving around a lot" and appear to be hiding something. When Lewis approached the stopped car and spoke to the driver, he did not detect any odor of marijuana. However, upon opening the rear door closest to Tighe, Lewis found a marijuana cigarette on the floorboard carpet. Lewis arrested all the occupants and then continued the search finding a tin with four unburned cigarettes, a small bag of marijuana and a pipe, and baggies of mushroom substance.

Concluding that the trooper did not have a reasonable suspicion of unlawful activity, the trial court granted Tighe's motion to suppress the seized evidence. The trial court observed that although the trooper honestly thought that he saw a passenger smoking marijuana and smelled marijuana while on the highway, the suspicions of unlawful behavior were not reasonable. The court noted that on the day of the concert, the officer could probably smell marijuana between the cities of Houlton and Hudson and therefore it was unreasonable to conclude that the marijuana odor came from the suspected vehicle.

To execute a valid investigatory stop, *Terry*<sup>1</sup> and its progeny require that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of unlawful activity has taken or is taking place. *State v. Richardson*, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). Such reasonable suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Id.* These facts must be judged against an objective standard: would

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

the facts available to the officer at the moment of the seizure warrant an officer of reasonable caution in the belief that the action taken was appropriate? *Id.* This test applies to the stopping of a vehicle and detention of its occupants. *Id.* The focus of an investigatory stop is one of reasonableness, and the determination of reasonableness depends on the totality of the circumstances. *Id.*

Essentially, the State relies on two facts: a young male appeared to be smoking something in cupped hands while leaning forward in a car and, later, while the officer followed the car with a truck between them, an odor of marijuana could be detected coming from in front of his police car. The trial court rejected this information as a reasonable basis for the stop. This court agrees.

The trooper could not see whether the cigarette was commercially prepared or hand-rolled. He merely saw a passenger lean forward and smoke a cigarette with cupped hands. That alone is insufficient to support a basis to stop the car. The only additional fact is the smell of marijuana detected while following the car. However, the officer conceded that this occurred while on the open road with a large number of cars ahead of him and a truck between them. The trooper could not say the smell of marijuana came from the car occupied by Tighe. Suspecting that a passenger in a car is smoking what might be a marijuana cigarette because of the manner in which it is smoked and then later smelling marijuana on the open road coming from somewhere in front of the officer on a crowded highway is simply not a sufficient reason to stop the car. The law does not authorize a police officer to stop a car based on mere suspicion.

*By the Court.* – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.