COURT OF APPEALS
DECISION
DATED AND RELEASED

July 10, 1997

NOTICE

No. 96-3497-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD V. LAUTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: RICHARD L. REHM, Judge. *Affirmed.*

ROGGENSACK, J.[1] Leonard V. Lauth appeals his conviction for a second offense of operating a motor vehicle while intoxicated (OMVWI). He claims that the arresting officer detained him without constitutionally sufficient justification; and therefore, the court erred when it denied his motion to suppress

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

the evidence obtained as a result of his traffic stop. However, the record shows that the arresting officer did have reasonable suspicion sufficient to stop Lauth's vehicle. Accordingly, the judgment of the circuit court is affirmed.

BACKGROUND

Shortly after midnight on May 18, 1994, Officer Roger Brandner of the Columbia County Sheriff's Department observed Lauth's slowly moving vehicle make an unsignalled U-turn on a hill on an isolated rural stretch of Highway 22. The vehicle then pulled over to the shoulder and turned off its lights. The officer turned his squad car around and pulled up behind Lauth's vehicle. After Brandner activated the squad's oscillating lights and exited his squad car, Lauth drove away. Brandner followed using both the squad's lights and siren. After making contact with Lauth, Brandner formed the opinion that Lauth was intoxicated and eventually arrested him for OMVWI.[2] When Lauth failed a chemical breath test, he was cited for, and eventually charged with, one count of OMVWI as a second offense, contrary to § 346.63(1)(a), STATS.

Lauth moved to suppress the evidence of his intoxication on the grounds that he had been unlawfully stopped. At the suppression hearing, Brandner testified that the U-turn was suspicious, and that patrols in this area were on notice to be alert for suspicious behavior, due to numerous night-time burglaries in the vicinity. Brandner also testified that his initial purpose in pulling up behind Lauth was to check on the welfare of the occupants of the vehicle. He explained that his police report listed only the suspicious U-turn, and not the

[2] The defendant concedes that the officer's observations after he pulled Lauth over were sufficient to create probable cause for the officer to believe that Lauth had been driving while intoxicated.

burglaries in the area, as the reason for investigating, because it focused on the eventual OMVWI arrest.

The circuit court ruled that Lauth's initial approach of the vehicle was justified by the officer's duty to investigate troubled motorists, and that the subsequent stop was supported by a reasonable suspicion of criminal activity due to the defendant's leaving the scene of a police safety inquiry. After his suppression motion was denied, Lauth pled no contest to the second OMVWI charge. The court sentenced Lauth to thirty days in jail, revoked his driver's license for sixteen months, assessed a $818 fine, and ordered an alcohol assessment.

DISCUSSION

Standard of Review.

When a suppression motion is reviewed, the circuit court's findings of fact will be sustained unless they are clearly erroneous. ***State v. Roberts***, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, the appellate court will independently examine the totality of circumstances at the time of the complained of conduct, to determine whether the officer's acts were reasonable. ***Id***.

Legality of Traffic Stop.

The Fourth Amendment prohibits the unreasonable seizure of a person without a warrant supported by probable cause. U.S. CONST. amend. IV. The detention of a motorist by police for a routine traffic stop constitutes a "seizure" of a person within the meaning of the Constitution. ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). Statements given and items seized during

a period of illegal detention are inadmissible. ***Florida v. Royer***, 460 U.S. 491, 501 (1983). However, an investigative detention is not "unreasonable" if it is brief in nature, and is justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. ***Berkemer*** at 439; *see also* § 968.24, STATS.

Under ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must rest on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable person to believe that criminal activity may be afoot, and that action would be appropriate. ***Id.*** at 22. "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. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989). The test is designed to balance the personal intrusion into the suspect's privacy occasioned by the stop against the societal interests in solving crime and bringing offenders to justice. ***State v. Guzy***, 139 Wis.2d 663, 680, 407 N.W.2d 548, 556 (1987).

Investigation of criminal activity need not be the only reasonable justification for the detention of a motorist, however. Certain community caregiver functions, essential to the role of the police, but "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" may also satisfy the Fourth Amendment requirements for a seizure.[3] ***Cady v. Dombrowski***, 413 U.S. 433, 441 (1973); ***Bies v. State***, 76

[3] When relying on a community caretaker function to justify a Fourth Amendment seizure, the state must first show that the police conduct was a *bona fide* community caretaker activity, and then make a further showing that the public interest outweighs the intrusion upon the individual's privacy. ***State v. Anderson***, 142 Wis.2d 162, 169, 417 N.W.2d 411, 414 (Ct. App. 1987).

Wis.2d 457, 471, 251 N.W.2d 461, 465 (1977). For instance, an officer's obligation to investigate and assist motorists in distress may justify stopping a motor vehicle in certain circumstances. *See* ***State v. Baudhuin***, 141 Wis.2d 642, 649-50, 416 N.W.2d 60, 63 (1987) (noting that the constitutionality of a "Good Samaritan" stop is still an open question in Wisconsin).

1. Moment of Fourth Amendment Seizure.

The first issue which must be addressed in this case is when were Lauth and his vehicle "seized," for Fourth Amendment purposes. Lauth contends that he was initially stopped the moment that Brandner pulled up behind his parked car and turned on the squad car's flashing lights. He also contends he was stopped again after the officer followed him and pulled him over. The state argues that there was only one stop, which did not occur until after Brandner used his lights and siren to stop Lauth.[4]

The test to determine when police questioning triggers Fourth Amendment scrutiny is whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that she was free to leave. ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980). However, there is nothing in the Constitution which prevents police officers from addressing questions to anyone on the street. ***Mendenhall***, 446 U.S. at 552 (opinion of Stewart, J.). As long as the person to whom the questions are addressed remains

[4] The parties' positions in this regard are directly opposite from the arguments they made to the circuit court, where the state attempted to justify the first stop on community caregiver grounds, and the defendant tried to invalidate the later stop on the theory that any concerns over his welfare had dissipated by that point. However, this court may consider new arguments on appeal, so long as the issue itself was presented to the circuit court. ***State v. Holland Plastics Co.***, 111 Wis.2d 497, 504-05, 331 N.W.2d 320, 324 (1983).

free to disregard the questions and walk away, there has been no seizure for Fourth Amendment purposes. Moreover, even a show of authority intended to effect a stop does not constitute a seizure unless and until the subject actually submits to the officer's authority. ***California v. Hodari D.***, 499 U.S. 621, 626 (1991) (holding that a fleeing suspect was not seized until tackled); ***Brower v. County of Inyo***, 489 U.S. 593, 596 (1989) (holding that a seizure did not occur during a high speed chase).

Applying ***Mendenhall*** and ***Hodari*** to the facts of this case, we must conclude that Lauth was not seized until he pulled off the road a second time, in reaction to the police siren and flashing lights. Lauth had pulled over to the side of the road on his own. And, just as there is nothing to prohibit an officer from approaching someone on the street, there is nothing prohibiting an officer from making contact with a stopped motorist, so long as the officer does not restrain the individual's liberty in any way. In fact, the officer might well have an obligation to check on stranded motorists. *See* ***State v. Goebel***, 103 Wis.2d 203, 208, 307 N.W.2d 915, 917 (1981) ("Contacts of this sort are not only authorized, but constitute an important duty of law enforcement officers"). In this context, Brandner's activation of his flashing lights after he initially pulled over to the side of the road behind Lauth could be viewed as a normal safety precaution to make his own vehicle visible to traffic on the narrow road. This act is consistent with the idea that the officer was doing no more than checking on the welfare of the car's occupants, and would not necessarily lead a reasonable person to believe that he was not free to go.

Even if the flashing lights of the squad car could be interpreted as a show of authority which would lead a reasonable person to feel constrained to stay put, it is clear that Lauth did not initially submit to that authority. He drove off

before Brandner could speak with him. Therefore, Lauth was not seized, for Fourth Amendment purposes, until he finally pulled over a second time in response to the siren, and submitted to being detained by the officer.

2. Justification for Detention.

The next question is whether it was constitutionally reasonable for Brandner to have followed and stopped Lauth. Lauth argues that the officer lacked a reasonable suspicion of any criminal activity since Lauth's U-turn was legal, and that any care-giving rationale dissipated as soon as he drove away. He also maintains that it is impermissible for an officer to have mixed motives for a stop. We disagree with each of these contentions.

First, we note that "[a]s long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal." ***Baudhuin***, 141 Wis.2d at 651, 416 N.W.2d at 63. In ***Baudhuin***, an officer detained a motorist after observing him drive at a speed well below the posted speed limit. The officer's purpose in effecting the stop was merely to ascertain whether the defendant was having trouble with his vehicle, not to ticket Baudhuin for any violation of the law. However, because an objective view of the circumstances supported an arrest for impeding traffic, the Wisconsin Supreme Court upheld the stop and subsequent OMVWI arrest, notwithstanding the officer's motivation. ***Id***. Therefore, it does not matter whether Brandner continued to believe that Lauth might be a motorist in need of assistance at the time he made the stop, so long as his actions were objectively supported by reasonable suspicion.

Brandner had specific and articulable facts in his possession that would lead a reasonable police officer to believe that criminal activity might be

afoot. He had observed Lauth's vehicle make a U-turn and then park with its lights off on an isolated stretch of highway in the middle of the night, within half a mile of the sites of repeated night-time robberies. More importantly, Brandner had observed Lauth drive off after being approached by an officer. "[B]ehavior which evinces in the mind of a reasonable police officer an intent to flee from the police is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police." ***State v. Anderson***, 155 Wis.2d 77, 88, 454 N.W.2d 763, 768 (1990). Lauth's driving away also removed a possible innocent explanation for parking his car on the highway – that his vehicle might be disabled. Thus, Lauth's inherently suspicious conduct of sitting on the highway in the middle of the night was rendered even more suspicious by extinguishing his lights. Coupled with the officer's knowledge of burglaries in the area, the officer was justified in investigating the situation to obtain more information.

CONCLUSION

By the time Lauth was detained, for Fourth Amendment purposes, the arresting officer had a reasonable and articulable suspicion that he might be involved in criminal activity. Therefore, the traffic stop was constitutional, and the evidence of Lauth's intoxication which was subsequently gathered was properly ruled admissible.

By the Court.—Judgment affirmed.

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