COURT OF APPEALS
DECISION
DATED AND RELEASED

May 6, 1997

NOTICE

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, STATS.

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

No. 96-3559-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK S. BARROWS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

MYSE, J. Mark S. Barrows appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, and operating with a prohibited blood alcohol level. Barrows contends that the officer had no reasonable suspicion upon which to base his initial stop and that his due process rights were violated when the State filed a criminal complaint charging the OWI offense as a criminal rather than an ordinance violation on the day of trial. Because this court concludes that there was a reasonable suspicion

upon which the officer could make the initial ***Terry*** stop[1] and that the filing of the criminal complaint on the day of trial was harmless error, the judgment of conviction is affirmed.

At 4:10 a.m. on December 30, 1995, officer John Cooksey of the Lac du Flambeau Police Department was operating his motor vehicle on State Highway 47 heading into the Town of Woodruff. At that time, he observed a vehicle driven by Barrows heading in the opposite direction. He observed through his rear view mirror the vehicle's brake lights go on and the vehicle execute a U-turn so as to proceed in the same direction as Cooksey's vehicle. The vehicle followed Cooksey into Woodruff and as he turned left into the Woodruff post office, the other vehicle followed and executed an immediate U-turn in the parking lot spinning its tires and returned toward town. Cooksey believed the vehicle was speeding because the vehicle ultimately caught up to Cooksey's vehicle but acknowledged that he may have slowed his vehicle which could account for closing the distance between the vehicles. Cooksey observed no other driving violations, such as crossing over the centerline or other erratic driving. As the vehicle left the post office parking lot, Cooksey stopped the vehicle and made observations sufficient to ultimately lead to Barrows' arrest for OWI. Barrows does not challenge the probable cause for arrest but asserts that Cooksey had no reasonable suspicion for the initial investigative stop.

An investigative stop is permitted if an officer has a reasonable, articulable suspicion of unlawful activity. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). It is not necessary that the officer have probable cause to suspect criminal

[1] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

activity, but merely that the officer have a reasonable basis to perform an investigatory stop. ***State v. Waldner***, 206 Wis.2d 51, 58, 556 N.W.2d 681, 685 (1996). Because such a stop is a Fourth Amendment seizure of the individual, the decision to stop a motor vehicle cannot be based on a hunch but must be based upon a reasonable belief that an investigatory stop is appropriate under the circumstances known to the officer combined with the officer's training and experience. *See* ***id.*** at 58-59, 556 N.W.2d at 684. Whether an officer has a reasonable basis to conduct an investigatory stop is a question of law which this court decides without deference to a trial court's determination. ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987).

At 4 a.m., Cooksey observed a motor vehicle going in the opposite direction suddenly turn and follow him all the way to the post office parking lot before turning around and with tires skidding as it departed. At this hour of the morning in rural Wisconsin on a December day it is reasonable for an officer to attempt to determine why his vehicle was followed all the way to its destination by a vehicle that then turned around and sped away. These circumstances are sufficiently unusual to warrant further inquiry. The reasonable suspicion required to authorize a ***Terry*** stop need not reach the level of probable cause that any specific crime has been committed. ***Waldner***, 206 Wis.2d at 58-59, 556 N.W.2d at 685. It is only necessary that the circumstances create a reasonable suspicion justifying further investigation. ***Id.*** at 58, 556 N.W.2d at 684. The circumstances of Barrows' conduct on the morning in question, given the hour, location and unusual nature of Barrows' conduct in operating his motor vehicle was sufficient to raise a reasonable suspicion warranting an investigatory stop.

Barrows suggests that because Cooksey did not articulate these specific grounds in his testimony, this court must conclude as a matter of law that

the stop was unreasonable. This court in reviewing the question of reasonable suspicion, however, considers all matters known to Cooksey at the time of the stop without regard to only the reasons that were articulated by Cooksey during the course of trial. *See* ***State v. Anderson***, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990). Indeed, it is not the subjective state of mind of Cooksey that controls the right to make a stop but whether a reasonable person would have a basis for making the stop based upon all the information then known to Cooksey. *See* ***State v. Baudhuin***, 141 Wis.2d 642, 647, 416 N.W.2d 60, 62 (1987). Thus, even if Cooksey's state of mind was other than that reflected in the record, because the record discloses a sufficient basis for a reasonable person to determine an investigative stop was appropriate, the stop was valid and the subsequent information discovered from the investigation was properly admissible. This court therefore concludes that there is no basis for Barrows' contention that Cooksey's initial investigatory stop was unlawful.

Barrows next contends that his due process rights were violated when the citation charging OWI first offense was replaced with a criminal complaint alleging OWI second offense on the day of trial. Barrows points out that he was denied the opportunity to challenge the sufficiency of the complaint, and had never been granted an initial appearance or the other rights attendant to a criminal charge. Although this court agrees that the filing of the criminal complaint on the day of trial is inappropriate, the judgment of conviction is only reversed if the State's action prejudiced Barrows. *See* ***State v. Stark***, 162 Wis.2d 537, 547-48, 470 N.W.2d 317, 321 (Ct. App. 1991). The harmless error test applies to violations of the constitutional right to notice. *See* ***id.*** The harmless error test is whether a reasonable possibility exists that the error contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

This court is not required to reverse if "on the whole record … the constitutional error was harmless beyond a reasonable doubt." ***Delaware v. Van Arsdall***, 475 U.S. 673, 681 (1986).

In this case, the charge contained in the criminal information was exactly the same charge as the original charge, containing exactly the same elements as reflected in the traffic citation except for the allegation that this was a second conviction. This allegation was added to reflect that Barrows had been convicted of OWI in Milwaukee County between the time the citation was issued and the date of trial. Accordingly, the prosecution proceeded as a second offense OWI requiring a criminal complaint and the use of the criminal procedure statutes. Barrows does not contest the fact that this was a second conviction and does not assert any prejudice emanating from the filing of the criminal complaint on the day of trial. Indeed, Barrows had already mounted a challenge to the legality of the stop and did not contend at trial or on appeal that the criminal complaint was fatally defective in any way.

Because the elements to be proven at trial were exactly the same, except for the Milwaukee conviction which was not contested, this court concludes that the filing of the criminal complaint on the day of trial was harmless beyond a reasonable doubt. Accordingly, Barrows' motion for a reversal of his conviction based upon a technical nonprejudicial error in regard to the length of time between the service of the criminal complaint and the date of trial is without merit. Because the filing of the criminal charge on the day of trial was harmless, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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