COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 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.

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No. 97-0076

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY SAILING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

VERGERONT, J.[1] Jeffery Sailing appeals from a trial court order revoking his operating privileges upon a finding that he improperly refused to submit to a chemical test as required by § 343.305, STATS. The sole issue raised

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

on appeal is whether the arresting officer's initial detention of Sailing violated the Fourth Amendment. We conclude that it did not, and therefore affirm.[2]

The pertinent facts are supplied by the testimony of the arresting officer, Jeffrey Wissink. He was employed by the Village of Cross Plains Police Department on August 14, 1996, and was on regular patrol duty on that date. At approximately 2:30 a.m., he was driving in the 2700 block of Church Street, County Highway P, in the Village of Cross Plains, when he observed two vehicles in the lower parking lot of Potts Inn, a bar. Both vehicles had their headlights on. He noticed the vehicles because Potts Inn had been closed for over an hour and he had driven by several times earlier and saw no vehicles there. Officer Wissink did not see anyone outside the vehicles. Officer Wissink testified that "[his] thought process at the time was … is there a burglary going on, possibly a drug transaction, something to that effect, some type of illegal activity."

He then observed one of the vehicles drive out of the parking lot, turn left onto the highway, and drive over a hill and out of sight. The other vehicle turned right, in Wissink's direction. Wissink did not observe this vehicle speeding, it turned properly into its lane, and the headlights were working properly. Wissink "felt [he] should stop the vehicle and find out what was going on there to make sure there had not been any type of illegal activity such as a

[2] An officer may request a person to provide samples of his or her breath, blood or urine upon an arrest for operating a motor vehicle under the influence of an intoxicant or with a prohibited alcohol concentration. Section 343.305(3)(a), STATS. If the person refuses, the officer issues a notice of intent to revoke and of the right to request a hearing to challenge revocation. Section 343.305(9)(a). One of the issues the person may raise at the hearing is whether there was probable cause to believe he or she was driving while under the influence of an intoxicant or with a prohibited alcohol concentration. *See* § 343.305(9)(a)5a. Sailing stipulated at the hearing that his challenge to revocation was based solely on the legality of the initial stop and the subsequent detention to administer field sobriety tests. On appeal, he challenges only the legality of the initial stop.

burglary." He turned his car around, put on his emergency lights, and the vehicle he was attempting to stop turned off the highway onto a cross street and stopped.

Officer Wissink went up to the vehicle and asked the driver, who later identified himself as Sailing, what he was doing in the parking lot of a closed business. Sailing answered that he and his friend were talking. Sailing did not give Officer Wissink his friend's name when asked, but said he was "just one of [his] buddies." Officer Wissink did not ask Sailing to get out of the car when he first approached the vehicle in order to pat him down for weapons and did not search his car for weapons or burglary tools at that point. When walking up to the vehicle, Officer Wissink did shine a flashlight into the vehicle to make sure he could see any passengers and see if there were burglary tools or anything else in the back seat, which is his common practice. He did not search the trunk.

While talking to Sailing, Officer Wissink smelled a strong odor of intoxicants coming from Sailing's breath and asked Sailing how much he had had to drink that evening. Sailing said he had three beers. Sailing agreed to perform field sobriety tests in response to Officer Wissink's request. The testimony stops at that point in time.

The trial court determined that Officer Wissink had a reasonable suspicion of criminal activity such as drug dealing or usage, burglary or criminal damage to property based on these facts: it was 2:30 a.m. on a Wednesday; the bar had closed; the vehicles of the bar patrons would have left; and there were no vehicles in the lot when the officer went by earlier. The trial court also concluded that it was reasonable under the circumstances for the officer to stop only one of the vehicles and, upon making the stop, the officer asked proper questions

designed to satisfy himself about the reasons for Sailing's presence in the parking lot.

On appeal Sailing contends that the facts relied on by the trial court do not constitute a basis for a reasonable suspicion to believe that the driver of the detained vehicle had committed, was committing or would commit a crime, as required by ***Terry v. Ohio***, 392 U.S. 1 (1968). Since Sailing does not challenge any of the factual findings made by the trial court, we review de novo the question of law: whether those facts meet the applicable constitutional standards. *See* ***State v. Krier,*** 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). We consider this a close question, but we decide against Sailing because we conclude that the standard for a lawful investigative stop is not as narrow as he would have it.

To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. ***Terry***, 392 U.S. at 22 (1968).

In assessing whether there exists reasonable suspicion for a particular stop, we must consider all the specific and articulable facts, taken together with the rational inferences from those facts. ***State v. Dunn***, 158 Wis.2d 138, 146, 462 N.W.2d 538, 541 (Ct. App. 1990). 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, 831, 434 N.W.2d 386, 389 (1989).

It is true, as Sailing contends, that there are innocent explanations for two cars with headlights on being in the parking lot of a closed bar one hour after bar time at 2:30 a.m. However, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***State v. Anderson,*** 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990). Suspicious conduct is by its very nature ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity. ***Id.*** If any reasonable inference of wrongful conduct can be objectively discerned, the officer has a right to temporarily detain the individual to inquire, in spite of the existence of other innocent inferences that could be drawn. ***Id.***

It is also true, as Sailing contends, that this case does not contain certain facts that might make the State's position stronger--such as the vehicles driving away from the parking lot at a high speed or persons observed out of the vehicles near or attempting to enter the building. However, the proper focus of our inquiry is whether the specific articulable facts in this case warrant a reasonable belief that Officer Wissink acted appropriately in stopping Sailing, *see* ***Anderson,*** 155 Wis.2d at 83, 454 N.W.2d at 766, not how the facts in this case measure up to the facts in a hypothetical case.

We conclude that it was reasonable for Officer Wissink to suspect that the cars he observed in the parking lot were engaged in, had engaged in, or were about to engage in criminal activity. The bar had been closed for an hour and Officer Wissink had not seen any vehicles in the parking lot when he had driven by previously. Therefore, it was reasonable to infer that the vehicles had

arrived after the bar closed and that their presence was unrelated to patronizing the bar. The inference that Officer Wissink drew--that the occupants of the vehicles might be engaged in burglary or a drug transaction--was reasonable, given the time of night, the location, and the absence of any apparent legitimate explanation for their presence.

We think Sailing's argument minimizes the significance of the time and location. This is not a situation of "any two people conversing at night," as he contends, but of two vehicles being in a location at a time when there is no apparent legitimate purpose for their presence. Sailing also appears to suggest that Wissink needed to have reasonable suspicion of a particular criminal activity, but that is not the law. The court in ***Anderson*** held that nothing in the Fourth Amendment or § 968.24, STATS.,[3] the statutory codification of ***Terry,*** requires that the officer's suspicions relate to a particular criminal activity. ***Anderson***, 155 Wis.2d at 86, 454 N.W.2d at 767.

Finally, we do not agree with Sailing that certain of Officer Wissink's actions in stopping Sailing demonstrate that the circumstances did not warrant a reasonable suspicion of criminal conduct. Sailing points to the facts that Officer Wissink stopped only one vehicle and did not radio for other law enforcement personnel to stop the other vehicle, did not have Sailing get out of his

[3] Section 968.24, STATS., 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 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.

vehicle in order to conduct a pat down search for weapons, and did not search his vehicle for weapons or evidence. Officer Wissink explained that he did not have enough information about the second vehicle--description, license plate number, direction other than going north on County P, which has multiple streets to turn off--to make a useful communication, and his main concern was to stop at least one of the vehicles and "work from there." Assuming without deciding that the reasonableness of this conduct is pertinent to the lawfulness of the stop, we agree with the trial court that Officer Wissink acted reasonably in stopping the vehicle coming toward him and not radioing a message about the second vehicle.

We also conclude that Officer Wissink's failure to conduct a pat down and automobile search do not make his suspicion of wrongful conduct any less reasonable. Here Sailing turns the usual inquiry--whether the circumstances of the stop justify such intrusions--on its head. We do not accept this inversion as a relevant inquiry. After shining the flashlight into the vehicle, observing one person and seeing nothing in the back seat, Wissink could reasonably have decided to ask Sailing a few preliminary questions while Sailing was still in the car and before deciding whether more intrusive actions were warranted. The odor of alcohol coming from Sailing's breath then determined the subsequent steps Officer Wissink did take. Whether Wissink would have been justified in initially taking more intrusive actions based on his suspicion does not make his suspicion more or less reasonable.

By the Court.—Order affirmed.

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