COURT OF APPEALS
DECISION
DATED AND RELEASED

June 10, 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. 97-0185-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CLIFFORD J. LENNIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT CRAWFORD, Judge.[1] *Reversed.*

SCHUDSON, J.[2] Clifford J. Lennie appeals from the judgment of conviction, following his no contest plea, for operating a motor vehicle with a

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[1] Although the judgment was entered by Judge Crawford, the suppression motion that is the subject of this appeal was decided by Judge Daniel L. Konkol.

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

prohibited alcohol concentration of 0.10% or more. He argues that the trial court erred in denying his "motion to suppress evidence based upon lack of reasonable suspicion" justifying the police stop. Lennie is correct and, therefore, this court reverses.

The facts are undisputed. City of Milwaukee Police Officer Lisa Baake, the only witness who testified at the suppression hearing, was on patrol on October 10, 1995, at about 3:40 A.M. While on her way to another call, she observed a car stopped at a red light. Lennie was the driver. Officer Baake testified that she "saw the driver get out of the vehicle, walk around to the passenger side, kind of try the door handle, knocked on the window, walked back around, got back in the driver's side." Officer Baake stated that, based on that observation, she "thought there was going to be a fight" so she called for another police squad and stopped Lennie. Officer Baake then made additional observations of Lennie and arrested him for drunk driving.

Officer Baake also testified that she thought Lennie "stumbled as he exited the vehicle a couple times and when he went back around." She did not, however, say that Lennie's stumbling led her to suspect that he was intoxicated or that the stumbling had anything to do with her basis for stopping him. Nor did Officer Baake state that Lennie had committed any traffic offense or that his exiting the car violated any law. Instead, Officer Baake testified that the single basis for her stop was the 10 to 15 second observation leading her to conclude, "I thought there was going to be a fight."

At the suppression hearing, the State offered little argument in support of the stop, stating only:

> I think [Office Baake] was just attempting to make sure everything was okay. This wasn't a traffic stop, but she had reasonable suspicion to believe that there may be something going on, there may be a fight. Given the defendant's actions, she had a concern and was making sure everything was okay ….

The trial court agreed, concluding:

> Under all the circumstances, I feel that the officer did have the basis for what in effect was a ***Terry*** stop to investigate the situation. I feel that the officer did have a reasonable and articulable suspicion that there may be some criminal conduct involved that would need to be investigated or potentially a fight that could be developing, and the officer certainly, as a peace officer, *had a basis to stop and see* if there was some activity that might be violent that was about to happen, whether that could be prevented.
>
> The fact that the defendant exited the vehicle when the car is in the lane of traffic at the stop sign and goes over to the passenger's side and starts knocking on the window apparently does seem to be very strange conduct, and I'm sure that *the officer wouldn't have any idea* as to whether the defendant at that point is asking the passenger to come out and start a fight, whether he might be engaged in innocent conduct of trying to get the passenger to move over to the driver's seat and he get into the passenger seat, or wouldn't even know if the passenger, for instance, might be someone that is being kidnapped by a serial killer, and I think that if the officer doesn't stop to investigate that, it could be a potentially very dangerous situation that could be involved. There could have been a kidnapping in progress. *The officer doesn't know. The officer is just seeing some awfully strange conduct* at 3:40 in the morning.
>
> I think under all of those circumstances, had the officer not gone *to investigate*, I think the officer would not be performing her duties for the community and seeing what was happening. And as counsel indicates, it could be very innocent conduct. It could have been criminal conduct. The officer, under these circumstances, does have *the right to investigate that conduct and see if it is in fact innocent conduct or if it's criminal conduct*, and I think that she has testified sufficiently to a reasonable and articulable

> suspicion that there may have been some fight that was potentially about to take place and could have been in effect some sort of criminal conduct about to occur with regard to either disorderly conduct or battery or some such nature.

(Emphasis added.)

Police may stop a person if they have specific and articulable facts that, together with rational inferences from those facts, support a reasonable belief that a person has committed, is committing, or is about to commit an offense. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968); § 968.24, STATS. The facts necessary to support a stop must be judged by an objective standard: would the facts available to the police at the time of the stop warrant a person of reasonable caution to believe that a stop was appropriate. ***Id***. Police also may stop a driver if they reasonably suspect that he or she has committed a traffic violation. ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65-66 (Ct. App. 1991). Whether undisputed facts satisfy the constitutional requirement of reasonableness for a stop presents a question of law that this court decides *de novo*. ***State v. Griffin***, 183 Wis.2d 327, 331, 515 N.W.2d 535, 537 (Ct. App.), *cert. denied*, 513 U.S. 950 (1994).

Here, if Office Baake had any reasonable basis for suspecting that Lennie's conduct was a precursor to a battery, she did not articulate it at the suppression hearing. As the trial court correctly observed, based on what Officer Baake testified, she could not have had "any idea" of whether Lennie's conduct was wholly innocent or not. Although Officer Baake certainly did not need to be certain of anything in order to stop Lennie, she at least needed to have a "reasonable suspicion" that he had committed a traffic offense, or that he had committed, was committing, or was about to commit a crime.

The trial court correctly concluded that Lennie's strange conduct provided Officer Baake with "a basis to stop and see." That, however, is not the same as a basis to *stop Lennie*. Similarly, the trial court correctly concluded that Officer Baake had the "right to investigate." That, however, is not the same as the right to investigate by stopping Lennie without reasonable suspicion. Frustrating and risky though it may be, before stopping a person police sometimes have to observe from a short distance to try to determine whether that person has committed, is committing, or is about to commit a crime. In this case the police failed to do so.

By the Court.—Judgment reversed.

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