COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2990-CR **Cir. Ct. No. 2003CT2667**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER SUNDQUIST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed and cause remanded with directions*.

¶1 NETTESHEIM, J.[1] Roger Sundquist appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) as a repeat

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

offender pursuant to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b). He argues that the circuit court erred in denying his motion to suppress evidence because the circumstances under which he was stopped were insufficient to justify a ***Terry***[2] stop. We conclude that the officer who stopped Sundquist did so with reasonable suspicion that Sundquist might be engaging or had been engaged in illegal activity. Therefore, we affirm the judgment of conviction. However, we remand for the circuit court to amend the judgment of conviction to correctly recite Sundquist's last name.[3]

¶2 On December 6, 2003, Sundquist was arrested for OWI. On December 26, 2003, the State filed an amended criminal complaint against Sundquist charging OWI, second offense, contrary to WIS. STAT. § 346.63(1)(a) and operating with a prohibited blood alcohol concentration (PAC), contrary to § 346.31(1)(b).

¶3 Sundquist responded to the complaint with a motion to suppress evidence, contending that the arresting officer did not have reasonable suspicion to believe that Sundquist was committing, about to commit, or had committed a crime. Rather, Sundquist contended that the officer had acted upon a mere hunch to justify the stop.

¶4 The hearing on the motion to suppress established the following facts. On December 6, 2003, Deputy Sheriff Brian Mark Skaar of the Waukesha

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

[3] The judgment of conviction spells Sundquist's last name as "Sunquist." Although both spellings are reflected in the trial court record, Sundquist's attorney has clarified that "Sundquist" is the correct spelling.

County Sheriff's Department was on duty. At approximately 2:30 a.m., Skaar was traveling westbound on Highway 59 through the Village of North Prairie when he observed a white vehicle with its headlights on in the parking lot of Bill 's Service Station. The vehicle was parked parallel to the store, and Skaar noticed a male individual in the vehicle who was looking at the store. Skaar knew that the service station was not open for public use that late. In front of the store were a variety of Christmas decorations. The lights inside the service station and the gas-for-sale sign were on, but the pump lights and the canopy lights to the service station were off. In addition, the lights in the parking lot were not illuminated. Skaar was aware that the service station's owner had requested the police to patrol the store due to prior thefts. That request, however, was made between one year and one and one-half years ago. Skaar did not see the occupant of the vehicle or anybody else near the service station engage in any criminal activity.

¶5 Upon observing the parked vehicle, Skaar decided to pull into the parking lot to determine why the vehicle was in the lot of the closed service station. As Skaar proceeded to pull into the parking lot, the driver of the vehicle turned his head towards Skaar and left the parking lot, driving onto Highway 59. Skaar testified that the individual exited the parking lot "somewhat quickly" and had continued to look at the patrol vehicle as he exited. Skaar followed the vehicle onto Highway 59 and pulled it over approximately one hundred yards east of Bill's Service Station. Sundquist proved to be the driver. Upon further investigation, Skaar detected evidence of Skaar's intoxication and Skaar eventually arrested Sundquist for OWI.

¶6 Based upon the foregoing evidence, the circuit court found that Skaar had reasonable suspicion to conduct an investigatory stop. Specifically, the circuit court found that a parked vehicle in a closed business location that had

requested police patrol in the past was a significant articulable factor that justified the investigatory stop. Sundquist subsequently pled guilty to the OWI charge and he appeals from the ensuing judgment of conviction.

¶7 When reviewing a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***State v. Fields,*** 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. The application of constitutional principles to the facts, however, is a question of law that we decide de novo without deference to the circuit court's decision. ***Id***.

¶8 Sundquist argues that the circuit court erred in denying his motion to suppress because Skaar could not identify any facts that would suggest criminal activity was afoot. He proffers various legitimate reasons an individual could be parked near a service station and complains that Skaar did not consider such possibilities before making the stop. Sundquist further claims that Skaar could have taken less intrusive means towards investigating whether crime was afoot. The State disagrees, noting that the store was closed, the service station owner had requested the police to keep an eye on the store, Skaar observed Sundquist looking at him, and Sundquist quickly exited the parking lot.

¶9 WISCONSIN STAT. § 968.24 codifies the rule established by the United States Supreme Court in ***Terry***. The statute reads, "[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 ...." Sec. 968.24. We review the validity of a ***Terry*** stop by considering the totality of the circumstances. ***State v. Williams,*** 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106.

¶10 The primary question under ***Terry*** is "whether the action of the law enforcement officer was reasonable under all the facts and circumstances present." ***State v. Richardson***, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990) (citation omitted). Determining what constitutes reasonableness is a commonsense test, ***State v. Anderson***, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990), requiring a "balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility," ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Lastly, the lower court is the arbiter of credibility. ***Fields,*** 239 Wis. 2d 38, ¶11.

¶11 Sundquist claims that there was no reasonable suspicion to justify an investigatory stop because Skaar could not articulate facts to justify an investigatory stop during his testimony. In particular, Sundquist points to Skaar's testimony that his initial reasoning to pull into the lot was to determine the identity of the driver. According to Sundquist, this subjective determination to identify the occupant of the vehicle is, standing alone, sufficient reason to reverse the circuit court's ruling. However, we have held that in determining whether probable cause exists, we are "not bound by the officer's subjective assessment or motivation." ***State v. Kasian***, 207 Wis. 2d 611, 621-22, 558 N.W.2d 687 (Ct. App. 1996); *see also* ***Terry***, 392 U.S. at 21-22. We apply the same rule when considering whether there is reasonable suspicion and, therefore, we hold Skaar's subjective motivation is irrelevant under the ***Terry*** analysis.

¶12 Furthermore, Sundquist's argument fails to consider the totality of the circumstances confronting Skaar. While Skaar may have initially considered stopping Sundquist for identification purposes, the actual stop took place *after Sundquist had left the parking lot*. Therefore, even if we were to assume that

Skaar's initial reason for entering the parking lot was not supported by reasonable suspicion, his ensuing observations did support such suspicion.

¶13 The facts of this case are analogous to those in ***Waldner*** where a law enforcement officer witnessed a vehicle driving at a slow rate of speed. ***Waldner***, 206 Wis. 2d at 53. The vehicle stopped at an intersection and then accelerated at a high rate of speed. ***Id***. The officer followed the vehicle and saw it stop in a legal parking space on the street. ***Id***. The officer then observed the driver side door open and Waldner, while sitting in the driver seat, pour out a liquid onto the street. ***Id***. Waldner then got out of the vehicle and began to walk around the vehicle. ***Id***. When the officer pulled up and identified himself, Waldner began to walk away from the patrol car. ***Id***. At that point, the officer asked him to stop, which he did. ***Id***. at 53-54.

¶14 In arguing against the validity of the stop, Waldner made two arguments, similar to those made by Sundquist. *See* ***id***. at 56-57. First, Waldner claimed the officer made a stop based merely on a hunch and, second, the officer did not observe any unlawful conduct, therefore, there was no reasonable suspicion. ***Id***.

¶15 The supreme court rejected both arguments, holding that WIS. STAT. § 968.24 allows a law enforcement officer to "make an investigatory stop based on observations of lawful conduct so long as reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." ***Waldner***, 206 Wis. 2d at 57. Specifically, the court stated, "We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn." ***Id***. at 58. Addressing the observation of lawful conduct, the court noted that although separate acts by

themselves may have an innocent purpose or reason, so long as a reasonable inference of unlawful conduct can be established, law enforcement has the right to conduct an investigatory stop. ***Id***. at 60 (citing ***Anderson***, 155 Wis. 2d at 84). Because the basis of an investigatory stop is to freeze a suspicious, yet ambiguous situation, a police officer "is *not* required to rule out the possibility of innocent behavior before initiating a brief stop." ***Waldner***, 206 Wis. 2d at 60 (emphasis added). Ultimately, the court held that the totality of the circumstances "coalesced to form the basis for a reasonable suspicion grounded in specific, articulable facts and reasonable inferences from those facts" to justify the temporary stop. ***Id***. at 53.

¶16 The holding in ***Waldner*** controls under the facts in this case. Sundquist was at the service station at the unusual time of 2:30 a.m. Based on all testimony, the station appeared closed and Skaar knew it was closed based on his prior patrols while on duty. Sundquist's vehicle was parked near store merchandise. Then, as Skaar was pulling into the parking lot, Sundquist exited while looking at Skaar. While Sundquist disputes that he was taking flight from Skaar, the circumstances reasonably suggested to Skaar that this might be so. "[F]light at the sight of police is undeniably suspicious behavior." ***Anderson***, 155 Wis. 2d at 84. The location, the time of night, Sundquist's departure at the time Skaar entered the parking lot, and Sundquist's glimpse at Skaar established reasonable suspicion for Skaar to conduct an investigatory stop.

¶17 Sundquist also argues that the station owner's request for police to patrol his business was too remote in time to create a reasonable suspicion of criminal activity. Additionally, he alleges that the storage of merchandise outside the store shows that the station is in a low crime area. However, even if we

eliminate this information, we hold that the remaining information satisfied the reasonable suspicion requirement.

¶18 Under the totality of the circumstances, we conclude that Skaar had a reasonable suspicion to believe that illegal behavior might be afoot. We uphold the circuit court order denying Sundquist's motion to suppress and we affirm the judgment of conviction. However, as noted, we remand with directions to amend the judgment of conviction to correctly recite Sundquist's last name.

By the Court.—Judgment affirmed and cause remanded with directions.

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