COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2059-CR **Cir. Ct. No. 2015CM1047**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SARA ANN PONFIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: TIMOTHY HINKFUSS, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Sara Ann Ponfil appeals a judgment of conviction for possession of cocaine. She argues the circuit court erred in denying her motion to suppress evidence on the basis that law enforcement lacked reasonable suspicion

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

to detain her. We disagree, concluding Ponfil's constitutional rights were not violated. Accordingly, we affirm.

BACKGROUND

¶2 Officer Jeff Brann was the sole witness at the suppression hearing, and the facts are undisputed. Brann entered the parking lot of a local bar at 1:45 a.m. He had conducted prior surveillance of this particular bar as a member of a gang task force. According to Brann, the bar had a reputation as a "cocaine bar" where the drug was sold and used. He also described the bar's immediate vicinity as a hub for the use of open intoxicants and public disturbances, including a substantial fight several weeks prior in the aftermath of which a firearm was discovered.

¶3 Brann parked his squad car and took note of two cars that "appeared to be off by themselves" far from the bar's entrance in a secluded, unlit corner of an overflow parking lot. Brann testified the vehicles were arranged so that "the driver's sides were next to each other," from which he inferred the occupants were familiar with each other. Brann shined a spotlight on the vehicles. Brann saw nobody exit the vehicles during a one-minute observation of them after he entered the lot. He then approached the vehicles on foot with a flashlight in hand. As he did so, he observed the behavior of the vehicles' occupants shift from "a calm and kind of hanging-out demeanor to a hurried, panicked [one]" in which they appeared to be "straightening up" as if caught in a "startled moment."

¶4 As Brann approached the vehicle facing toward him, one of its passengers became "demanding," gave him "some grief," and exhibited "defens[ive] or aggressive actions," which Brann testified seemed "a little excessive for basically just me walking up to a vehicle" without first giving any

commands. When Brann asked what this group was doing, the driver stated they were just about to leave the lot. Brann personally recognized another occupant of that vehicle as a member of the "Latin Kings," a gang known to be engaged in criminal activity. Brann testified he had "heightened awareness" of possible wrongful activity at this juncture.

¶5 Ponfil was in the opposite car's driver's seat. After looking over her shoulder to observe Brann's actions as he addressed the other vehicle, she and another passenger exited her vehicle in a manner indicating she was leaving to enter the bar. Brann observed this movement and requested that Ponfil return to her vehicle. Ponfil complied with this request and returned to the driver's seat.

¶6 Brann then made contact with Ponfil outside the open driver's side door. He observed a clear baggie on the ground outside the vehicle containing a white powder substance, later determined to be cocaine. Ponfil moved to cover up the baggie with her foot, leading Brann to suspect it had just been dropped. Ponfil was eventually arrested.

¶7 Ponfil moved to suppress evidence obtained after she returned to her vehicle. After making findings of fact regarding the "high-crime area" of the bar, the occupants' actions, the location of the vehicles, and the lot's lighting, the circuit court concluded the totality of the circumstances supported detaining the occupants, and it denied Ponfil's motion.[2] Ponfil then pled no contest to

[2] There was dispute before the circuit court about this bar's reputation. Ponfil argued that the crime-reporting rate of the bar was no different from that of a nearby fast-food restaurant and that Brann terming it a "cocaine bar" was based upon unsubstantiated sources. The circuit court rejected both of these claims and found the bar and its immediate vicinity were a "high-crime area." Ponfil does not challenge this finding on appeal.

possession of cocaine. She now appeals the judgment, and we review the order denying her motion to suppress pursuant to WIS. STAT. § 971.31(10).

DISCUSSION

¶8 A motion to suppress evidence presents a question of constitutional fact. *See* ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. As the circuit court's findings of historical fact are undisputed here, we independently review the application of those findings to constitutional principles. ***Id.***

¶9 The parties agree Ponfil was detained when she returned to her vehicle in response to Brann's show of authority, which happened prior to discovery of the cocaine. *See* ***California v. Hodari D.***, 499 U.S. 621, 625 (1991). An officer may briefly detain an individual for further investigation if he or she "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729 (citing ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). The facts need not rise to a preponderance of the evidence or even probable cause, but they must be "something more than an 'inchoate and unparticularized suspicion or 'hunch.'" ***United States v. Sokolow***, 490 U.S. 1, 7 (1989) (citing ***Terry***, 392 U.S. at 27). An officer may draw a reasonable inference of unlawful activity under the totality of the circumstances even if the underlying facts may represent innocent conduct when considered individually. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996); *see also* ***Post***, 301 Wis. 2d 1, ¶¶13, 26.

¶10 Ponfil argues the bar's status as a "high-crime area," the behavior of the vehicles' occupants, and the presence of a known gang member in the other vehicle do not give rise to reasonable suspicion that she was engaged in any illegal conduct. Ponfil is correct to the extent that *only* being present in a "high-crime

area" and *only* keeping company with a known gang member do not objectively indicate one is engaged in criminal conduct. *See* ***State v. Morgan***, 197 Wis. 2d 200, 212-13, 539 N.W.2d 887 (1995); *see also* ***United States v. Di Re***, 332 U.S. 581, 593 (1948) ("Presumptions of guilt are not lightly to be indulged from mere meetings" with those engaged in unlawful behavior.). But Ponfil is incorrect that those facts—themselves generally innocent in isolation—do not create a reasonable inference of unlawful conduct when considered under the totality of the circumstances. *See* ***Waldner***, 206 Wis. 2d at 55-56.

¶11 An officer's perception of a "high-crime area," personal experience with violent incidents at the location, the lateness of the hour, his or her particular observations of irregular conduct, and a suspect's unusual demeanor upon contact, together, support reasonable suspicion when those facts are viewed in concert. *See, e.g.*, ***Morgan***, 197 Wis. 2d at 204, 212-14. Given Brann's own experience with the issues surrounding this bar (such as drug transactions, weapons use, and criminal gang problems), the remote location of the vehicles in the lot, and the occupants' behavior as Brann approached, Brann reasonably had what he termed "heightened awareness" of possible wrongful activity at the time he requested that Ponfil remain in her vehicle.[3] Contrary to Ponfil's suggestion, while Brann observed these other factors, he was not required to assume the vehicles were parked in a dim and secluded part of the overflow lot because there were more vehicles there earlier that night. *See* ***Waldner***, 206 Wis. 2d at 55-56. What is

[3] Brann also testified that "his first thought" after Ponfil exited the vehicle was that someone was about to flee from the scene prior to his command to seize them. While neither the circuit court nor the State considered this statement in their reasonable suspicion analysis, it is clear that evasive action in response to police presence may at the very least be a factor under the totality of the circumstances. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84-85, 454 N.W.2d 763 (1990) ("Flight at the sight of police is undeniably suspicious behavior.").

more, the behavior of the occupants in the opposite vehicle who first confronted Brann as he approached supported his decision to detain anyone in the vehicle occupied by Ponfil, given how and where the cars were aligned in the lot and Brann's reasonable inference of the individuals' familiarity with each other from that positioning.

¶12 Ponfil dismisses Brann's observations as either subjective, post-hoc justifications or exactly the reception a reasonable officer may expect upon approaching a vehicle after shining a spotlight into it. Not so. Brann did not offer a mere conclusory assertion that the vehicle's occupants "looked suspicious" without articulating any other facts. *See* ***Brown v. Texas***, 443 U.S. 47, 52 (1979). More to the point, Brann expressly testified the response he received was *not* what he would expect in a similar situation based upon the particular reactions and surrounding factors. He instead perceived both a drastic demeanor shift in the occupants as he merely walked toward the vehicles and what he termed a "demanding" or "aggressive" response as he made contact with them. This reaction is a far cry from a measured query about the officer's presence, as Ponfil seems to characterize the occupants' reaction—which characterization itself is different from the circuit court's findings. Again, these observed behaviors may have innocuous explanations if considered alone, or even together with some of the other facts in this case, but Brann was not required to rule out those explanations before he acted on his training and experience and ordered Ponfil to remain in her vehicle. *See* ***Waldner***, 206 Wis. 2d at 55-56.

¶13 We conclude there was reasonable suspicion to detain Ponfil. Because of this, the circuit court appropriately denied Ponfil's motion to suppress.

By the Court.—Judgment affirmed.

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