COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1961-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STANLEY SOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. Stanley Soward appeals from a judgment of conviction for possession of cocaine contrary to WIS. STAT. § 961.41(3g)(c)

(1999-2000).[1] Soward argues that the trial court erroneously denied his motion to suppress. He contends that the police obtained drugs from his vehicle in violation of his Fourth Amendment protection against unwarranted search and seizure. We disagree. We hold that the trial court did not err when it found that Soward's vehicle was properly stopped under ***Terry v. Ohio***, 392 U.S. 1 (1968). Additionally, we hold that the trial court did not err when it found that the search of Soward's vehicle was proper. Therefore, we affirm.

Facts

¶2 On October 11, 1999, Soward filed a motion asking the trial court to suppress all evidence derived from a stop and search of his vehicle on September 24, 1999. The trial court conducted an evidentiary hearing on October 22, 1999, at which four Racine police officers testified.

¶3 The Racine police chose the 1100 block of Villa Street, a Racine residential area, for a sting operation because it "is and has been for a long time a high drug zone for trafficking and problems related to narcotics dealing and purchasing." Detective William Warmington testified that the Racine police had made "15 to 20" drug-related arrests at this location in the past year. Warmington said that he personally had executed three search warrants in the area and had assisted in executing eight or nine additional search warrants in the area in the past several years. Lieutenant James Dobbs testified that the police had received "numerous calls about [drug] activity in this area."

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 On September 24, 1999, Racine police undertook a sting operation in this area aiming to catch those engaged in illegal drug purchases. An undercover officer posed as a drug dealer, while Warmington, Dobbs, and Assistant District Attorney Sharon Riek watched from a nearby surveillance van. At approximately 8:20 p.m., Warmington saw a car enter the area "cruising slowly as if [the driver] was looking to make contact with somebody on the street or on the sidewalk." The undercover officer on the street reported over his body wire to the people in the surveillance van that the driver appeared to be "looking to make a purchase." The undercover officer began to move toward the slow moving car. The officer and the vehicle did not connect because, before this could happen, a man came out of a house located in the middle of the block. This same man had been out on the sidewalk numerous times that evening. The man approached the vehicle, talked to the driver through the passenger side window, got into the vehicle and stayed in the vehicle for twenty to forty-five seconds. He then exited the vehicle. Both Warmington and Dobbs testified that this encounter was "consistent" with drug transactions that they had seen in the past during their police careers.

¶5 After the man had exited the vehicle, the vehicle proceeded in a normal driving fashion along Villa Street and turned westbound onto 11th Street. Police investigator Joseph Mooney and Sergeant David Smetana were positioned near the site of the sting operation in an unmarked "take-down car." Warmington radioed ahead to these officers to stop the vehicle in question**.** After receiving Warmington's radio request, the officers stopped the vehicle in question in the 1100 block of Racine Street, a short distance away from the site of the sting operation.

¶6 Mooney testified that:

> As the vehicle pulled over to the curb [the driver—later identified as Soward] put it into park and sat there for a second and then suddenly he leaned way over to the right as if he were picking something up or putting something on the floor-board on the passenger side.

Mooney stated that he then communicated the above observations to Smetana. Smetana confirmed that at the time Mooney did advise him as to what he had just observed. After Soward stopped the vehicle, Smetana approached and asked Soward to exit the vehicle. Smetana testified that he "was advised that there was probable cause to search the interior of the vehicle based upon the observations made." After Soward exited the vehicle, Smetana conducted a pat-down search. Nothing illegal was found on Soward's person. Soward was then moved to the back of the vehicle where Mooney and another patrol officer who had arrived on the scene accompanied him.

¶7 Smetana then began a search of the interior portion of the vehicle. On the front seat passenger floorboard area, Smetana located a jacket. In the jacket, he found a lighter and two portions of piping, one threaded with "Chore Boy filter." Smetana testified that "[b]ased upon my training and experience those items are used to smoke crack cocaine." In addition, on the driver's seat where Soward would have been sitting, Smetana found an unwrapped off-white chunky substance consistent with rock cocaine. At this point, Soward was handcuffed and placed in a patrol wagon to be transported to the Racine county jail. The items were seized and taken back to the police department for testing. According to the criminal complaint, tests confirmed the off-white chunky substance to be 0.1 gram of crack cocaine.

¶8 At the motion hearing, Soward challenged the stop of his car and the ensuing search of the interior. The trial court found both the stop and search objectively reasonable. The trial court concluded that at the time of the stop, the

officers possessed not only reasonable suspicion for an investigative stop, but probable cause to arrest Soward for involvement in illegal drug trafficking. The trial court further concluded that the search of the interior of Soward's car was justified both as a search incident to arrest and as a search based on probable cause.

Analysis

¶9 First, whether the stop was valid under ***Terry*** is a question of constitutional law that we review de novo. ***State v. Allen***, 226 Wis. 2d 66, 70, 593 N.W.2d 504 (Ct. App.), *review denied*, 228 Wis. 2d 168, 599 N.W.2d 409 (Wis. June 7, 1999) (No. 98-1690-CR). ***Terry*** requires a reasonable suspicion; that is, it requires that there exist "specific and articulable facts which, taken together with rational inferences … reasonably warrant the intrusion." ***Terry***, 392 U.S. at 21. The test is an objective one. ***Id.*** at 21-22. Our inquiry asks what would a reasonable police officer reasonably suspect in light of his or her training and experience. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). The test is a commonsense test that strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). The essential question then is whether the action of the officer was reasonable under all the facts and circumstances present. ***Id.*** at 139-40.

¶10 We conclude that under the collective facts and circumstances present, the stop of Soward's vehicle was justifiable under ***Terry***. In our analysis, we look at the facts of the particular case and then assess the reasonableness of the police conduct. We do not compare individual components of the instant case with individual components of other cases because this comparison would detract from our requirement to look at the totality of the circumstances in each case.

Allen, 226 Wis. 2d at 74. In the instant case, Soward was "cruising," suggesting that he was looking for a contact. The pedestrian had previously been seen on the street, also suggesting that the pedestrian was looking for a contact. The time was evening, offering the cover of darkness. The area was a high crime area, known for drug trafficking. Soward stopped his vehicle in the middle of the street, suggesting a quick exchange. The pedestrian first talked to Soward through the passenger window then got into the car for only twenty to forty-five seconds, again suggesting a quick exchange. Only after the passenger exited the vehicle did Soward drive in a more normal fashion; that is, he was not "cruising" any longer. We recognize that any one of these factors considered individually might not be enough for reasonable suspicion. However, in considering the totality of these facts and circumstances, taken together with rational inferences, we conclude that the whole is greater than the sum of its individual parts and we uphold the stop of Soward's vehicle. ***Waldner***, 206 Wis. 2d at 58.

¶11 Second, we conclude that the police officers had objective and reasonable grounds to be concerned for their safety and to conduct a weapons search. We ground this holding on the factors that justified the stop, combined with Soward's furtive gesture of leaning over and downward towards the passenger side floor as if putting something down or reaching for something. We hold that this gesture, along with the totality of the other facts and circumstances, would reasonably suggest to a prudent police officer that Soward might have been obtaining or hiding a weapon.

¶12 Soward challenges the State's appellate argument that the search can be justified as a weapons search. Soward claims that at trial the State merely argued that this was a permissible search under ***State v. Tompkins***, 144 Wis. 2d 116, 137-38, 423 N.W.2d 823 (1988) (where the Wisconsin Supreme Court held

that where the police have probable cause to believe that evidence of a crime is in an automobile, a search may be made of the automobile without a search warrant and without a showing of exigent circumstances). Soward argues that because the State did not raise the weapons search justification in the trial court, it waived its right to raise this justification on appeal.

¶13 We are not hampered in our decision today even if Soward is correct with regard to the waiver issue. ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), instructs that we can decide a case on a different ground if our analysis upholds the trial court's ruling and if there is no need for further fact finding. Therefore, despite the potential waiver issue, we address the State's weapons search argument on the merits.

¶14 In a ***Terry*** situation, the test does not call for us to look at the subjective purpose of the police in conducting the search. *See* ***Michigan v. Long***, 463 U.S. 1032, 1050 (1983) (stating that the "issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [his or her] safety or that of others was in danger"). Rather, we must determine whether the search was *objectively* reasonable under the law governing a weapons search. ***Id.*** at 1051. In other words, after our independent review of the circumstances, we must determine whether, under the instant circumstances, it would have been reasonable for an officer to have conducted a weapons search, *regardless of whether or not the officer, at the time, had a weapons search in mind.* Here, we uphold the trial court's ruling because the established facts are sufficient to show that the search of Soward's vehicle by the officer was objectively reasonable.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.