COURT OF APPEALS DECISION DATED AND FILED

April 12, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1992-CR

Cir. Ct. No. 2004CM53

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT V. RICHARDSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Reversed and cause remanded with directions*.

¶1 HIGGINBOTHAM, J.[1] Kurt V. Richardson was convicted based on no-contest pleas to misdemeanor charges of possession of tetrahydrocannabinols (THC), contrary to WIS. STAT. § 961.41(3g)(e), and possession of drug paraphernalia, contrary to WIS. STAT. § 961.573(1). He appeals the judgment of conviction and the circuit court's order denying his motion to suppress evidence. The sole issue on this appeal is whether the arresting officer had reasonable suspicion to stop Richardson's motor vehicle. We conclude the officer did not. We therefore reverse the circuit court's order denying Richardson's suppression motion and the judgment of conviction.

BACKGROUND

¶2 The following facts are taken from the criminal complaint and testimony at the hearing on Richardson's motion to suppress. On February 7, 2004, City of Montello Police Officer Michael J. Sullivan stopped Richardson as he was traveling on Highway 23. The officer testified he observed no suspicious driving behavior by Richardson. However, the officer stopped Richardson because he believed Richardson's driving privileges were cancelled. Prior to stopping Richardson, the officer ran a routine registration check; the check indicated the vehicle belonged to Richardson. Following the stop, the officer searched Richardson's vehicle and seized the THC and drug paraphernalia found in the car. Additional facts will be discussed as necessary in the opinion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All remaining references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Richardson moved to suppress this evidence. The trial court denied the motion. At a separate plea hearing, Richardson pled no contest to the two charges and the court entered judgment accordingly. Richardson appeals.

DISCUSSION

¶4 Richardson argues that the State failed to carry its burden in establishing that Officer Sullivan had reasonable suspicion to stop him; therefore the court erred in denying his motion to suppress the evidence. We agree.

¶5 When reviewing a motion to suppress evidence, we will uphold a trial court's findings of historical fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, whether the court's findings of fact meet the constitutional requirement of reasonableness is a question of a law, which we review de novo. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶6 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. The detention of a motorist by a law enforcement officer constitutes a "seizure" within the context of the Fourth Amendment. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 436-39 (1984). If a detention is illegal and violates the Fourth Amendment, all statements given and items seized during this detention are inadmissible. ***Florida v. Royer***, 460 U.S. 491, 497-507 (1983). An investigative detention is not unreasonable if it is brief in nature and justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. ***Berkemer***, 468 U.S. at 439; *see also* WIS. STAT. § 968.24.

¶7 According to ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be premised on specific facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be in the works and that action is appropriate. ***Id.***; *see also* ***State v. Longcore***, 226 Wis. 2d 1, 8, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. "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, 834, 434 N.W.2d 386 (1989). This test is designed to balance the personal intrusion into a suspect's privacy generated by the stop against the societal interests in solving crime and bringing offenders to justice. *See* ***State v. Guzy***, 139 Wis. 2d 663, 680, 407 N.W.2d 548 (1987).

¶8 The sole issue in this case is whether the information Officer Sullivan had when he stopped Richardson that Richardson's driver's license was cancelled was stale, such that the officer lacked reasonable suspicion to stop Richardson. There is no dispute that this was the only reason the officer had to stop Richardson. To determine whether an officer's knowledge that a person's license was cancelled is stale, we perform a classic ***Terry*** analysis: considering the totality of the circumstances, what would a reasonable officer deduce? *See* ***State v. Kassube***, 2003 WI App 64, ¶7, 260 Wis. 2d 876, 659 N.W.2d 499; *also* ***State v. Amos***, 220 Wis. 2d 793, 798-99, 584 N.W.2d 170 (Ct. App. 1998).

¶9 ***Kassube*** governs the resolution of this case. In ***Kassube***, an officer stopped Kassube because he believed that Kassube did not possess a valid driver's license. ***Kassube***, 260 Wis. 2d 876, ¶2. The issue there was whether the officer

had reasonable suspicion to stop Kassube, based on the officer's personal knowledge that Kassube did not possess a driver's license at any time during a period of nine to twelve years. We concluded, based on the totality of the circumstances, that the officer had a reasonable basis for suspecting that Kassube was driving without a license. Kassube argued that, under a Mississippi case, ***Boyd v. State***, 758 So.2d 1032, ¶¶13-14 (Miss. 2000), where the court determined that because an officer's information that a driver's license was suspended eight years earlier was too stale to justify the stop, the court in his case should conclude that the officer's information was also too stale. ***Kassube***, 260 Wis. 2d 876, ¶6. We rejected that argument, explaining:

> Here, Kassube did not simply have his privileges temporarily suspended, but had never had a license at all during the nine to twelve years James knew him. It was reasonable for [the officer] to believe that if Kassube had not obtained a license in nine to twelve years, he did not do so in the last eleven months and was likely to be driving without a license.

Id., ¶8.

¶10 Applying our reasoning and holding in ***Kassube***, we conclude that Officer Sullivan lacked a reasonable basis to stop Richardson. Unlike the defendant in ***Kassube***, Richardson had a valid driver's license when the officer cited him in the hit-and-run accident in July or August 2003. In the absence of information supporting the officer's suspicion that Richardson's license was cancelled on February 7, 2004, we must conclude that the stop was unconstitutional. Thus, we look to the record and the State's explanation of that record to determine whether such evidence exists. We conclude that it does not.

¶11 The State argues that at the time of the stop, Officer Sullivan believed Richardson's license was cancelled because he did not receive

information from the DOT that Richardson had undergone a medical evaluation after the 2003 traffic accident. The State argues that "[s]ince Officer Sullivan had received no information that [Richardson] had changed his stance and obtained an examination, it was certainly reasonable for him to conclude the situation involving [Richardson] had not changed." The officer's testimony, however, differs from how the State portrays it in its brief. The officer testified that he first learned that Richardson's license had been cancelled when he "ran information" on Richardson at some time between the accident in July or August 2003 and the stop in February 2004; he assumed that Richardson had not taken the medical evaluation since he knew Richardson's license had been cancelled. The State concedes that the officer did not remember when he ran Richardson's traffic record.

¶12 The totality of the circumstances do not support a reasonable basis for Officer Sullivan's suspicion. Unlike in ***Kassube***, the officer here could not remember when he learned that Richardson's license was cancelled. Officer Sullivan testified that he learned about the license's status while running Richardson's traffic record; he ran the information while issuing Richardson a citation at some time after the hit-and-run accident. However, the officer also testified that he did not recall issuing Richardson another citation other than the one issued following the hit-and-run accident. The officer's testimony on this topic was uncertain and inconsistent. Indeed, the trial court stated it could not make a factual finding as to when the officer learned about the cancelled license when pressed by defense counsel to do so.

¶13 The import of Officer Sullivan's inability to state when he learned about the license cancellation is that, as Richardson points out, under Wisconsin statutes Richardson could have reinstated his license at any time between the

summer of 2003 and when the officer stopped him on February 7, 2004. This is not a small point. In ***Kassube*****,** we recognized the potential for a different outcome where the facts involve the temporary suspension of a driver's license. ***Kassube***, 260 Wis. 2d 876, ¶8. That is the circumstance presented here.

¶14 Richardson appears to concede that his license was cancelled by operation of either WIS. STAT. § 343.25(7), for failing or refusing to submit to a medical or other special examination, or WIS. STAT. § 343.16(5)(b), because of a consequence of the examination itself. Richardson points out that under § 343.25(7), the cancellation may be discontinued or rescinded if the person complies by under going a medical evaluation. We agree. He also explains that under WIS. STAT. § 343.26, any person whose license has been cancelled, may apply for a new license "at any time." We also agree with this reading of § 343.26. With respect to a license being cancelled because of a consequence under § 343.16(5)(b), Richardson explains that the cancellation decision may be reversed by a reviewing board, and, if so, the person may apply for a new license at any time under § 343.26. We also agree with his reading of § 343.16(5)(b). Thus, as Richardson points out, and as we recognized in ***Kassube***, "[i]n such a situation, a driver may have regained his or her license at any time without the officer's knowledge." ***Kassube***, 260 Wis. 2d 876, ¶8. Thus, because Officer Sullivan could not remember when he first learned that Richardson's license was cancelled, and because, under Wisconsin statutes, Richardson could have regained his license without the officer's knowledge, the officer's belief that Richardson's license was still cancelled was unreasonable.

¶15 In sum, we conclude that Officer Sullivan's information that Richardson's license was cancelled was stale. The officer did not remember when he learned that Richardson's license was cancelled. This is fatal because, under

WIS. STAT. §§ 343.25(7), 343.26, and 343.16(5)(b), Richardson's license was temporarily cancelled and could have been reinstated at any time after the officer learned of the cancellation. In his testimony, the officer admitted that there was nothing suspicious about Richardson's driving prior to the stop. The only reason he offered for stopping Richardson was his "prior knowledge" that Richardson's license had been suspended after the incident the previous summer. However, he admits that he did not check to see if Richardson's license was still revoked before he stopped him, despite having checked to see if his license plates were suspended. In short, when the officer stopped Richardson on February 7, 2004, he was speculating as to whether Richardson was driving with a cancelled license. Speculation does not support reasonable suspicion.

CONCLUSION

¶16 For the above reasons, we reverse the court's order denying Richardson's motion to suppress evidence and the judgment of conviction, and remand for the court to enter judgment dismissing the complaint against Richardson.

By the Court.—Judgment and order reversed and cause remanded with directions.

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