COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3013-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD D. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Richard Martin pled guilty to operating while under the influence of an intoxicant, second offense, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000.

§ 346.63(1)(a).[2] He appeals his conviction, contending that the trial court erred when it denied his motion to suppress evidence. Martin claims that the arresting officer lacked reasonable suspicion to detain him and conduct an investigation. This court concludes that the officer had sufficient cause to temporarily detain Martin, and therefore affirms the trial court's order denying Martin's motion to suppress and the judgment of conviction.

BACKGROUND

¶2 The following evidence was adduced at a hearing on Martin's suppression motion. In the early morning hours of April 2, 2000, Oneida County Sheriff's deputy Bryan Wege was driving east on Kemp Street, approaching Boyce Drive, in the City of Rhinelander.[3] As he approached the intersection, he observed a vehicle make a "very, very wide" turn from Boyce onto Kemp.

> That area of the road actually has an extra lane for people to pass on the right while individuals are turning left on to Boyce Drive or Highway 17. And this vehicle pulled way into that lane. The—the lane that's provided for the passing. And as it came around, it almost struck the bridge before it got back on to the traveled or the main portion of the highway.

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[2] WISCONSIN STAT. § 346.63(1)(a) provides in part:

> No person may drive or operate a motor vehicle while:
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving ….

[3] Wege was the only witness to testify at the hearing.

¶3 Martin was later identified as the driver. The manner in which Martin turned his vehicle did not violate any traffic safety regulations. Wege testified, however, that in making the turn, the vehicle almost struck a bridge and then swerved at a "very severe angle to avoid striking the bridge."

> He was pulled up almost on a angle …. Like he was going to turn east on to Kemp and then all of a sudden he came … very, very close to this curb [referring to a diagram, exhibit 6] and then he had to come back out and it just was very unusual.[4]

Wege thus decided to turn his squad around and follow the vehicle, to further observe it. This entailed crossing the bridge that Martin almost struck, before Wege able to turn around.

¶4 By the time Wege was able to catch up to Martin's vehicle he observed that it was slowing and that its left turn signal was on. Therefore, Wege "was unable to observe in [sic] a lot of driving." Martin pulled into the parking area of a gas station and convenience store. Wege followed, pulled in behind Martin's vehicle, exited his squad and approached the vehicle. As Wege was walking toward the vehicle he observed four occupants. He thought it was unusual that no one got out as he approached.

> Q: For how long a period of time?
>
> A: I called in my stop. My sergeant was behind me. I got out. I described to him what I observed as far as the turn. And still nobody is getting out.

[4] Before presenting his detailed depiction of Martin's driving, Wege initially characterized it as "a little erratic."

¶5 When Wege arrived at the vehicle, he stood outside the driver's door while Martin just looked at him. Wege signaled to Martin to roll down the window and Martin complied. In the ensuing conversation, Wege smelled intoxicants.

¶6 At the hearing, Martin argued that he was stopped and detained when Wege asked him to roll down his window. Yet, he contends, Wege did not have a reasonable suspicion necessary to detain him. In this regard, Martin stressed that he "made a somewhat wide turn," but did not violate any traffic or other laws. The State claimed alternatively that Martin was not detained and, if he was, it was pursuant to reasonable suspicion.

¶7 Although in the course of deciding the motion the trial court made findings that would sustain a conclusion that Wege had reasonable suspicion to investigate Martin,[5] it nevertheless did not pursue that line of reasoning. Rather, it determined that the proper place to begin its analysis was at the point Wege walked up to Martin's window, because Martin voluntarily stopped his vehicle; Wege did not stop it.

[5] The trial court implicitly embraced Wege's depiction of the events. Referring to the erratic driving, the court stated:

> It certainly sounds like that was a peculiar maneuver that would call anyone's attention to the defendant's vehicle. And the officer, of course, was within his rights and certainly had an obligation to try to figure out why that was happening. …
> ….
>
> The officer pulls up in the vicinity of the vehicle, and the next peculiar thing happens while the officer is making radio contact and describing the situation to his sergeant. No one gets out of the vehicle. I think that's peculiar as well.

¶8 The court characterized the issue as whether approaching the vehicle that Martin voluntarily stopped and signaled him to roll down the window was a detention under the Fourth Amendment. The trial court held that it was not. It concluded that the intrusion was so minimal as to not be constitutionally infirm. In reaching this determination, the trial court considered that Martin's driving was "a little erratic," the occupants remained in the vehicle and that there was an odor of an intoxicant once Martin voluntarily complied with Wege's request to open the window. The court therefore denied the motion to suppress, and Martin appeals.

STANDARD OF REVIEW

¶9 When reviewing an order denying a motion to suppress evidence, this court will sustain the trial court's findings of fact, if any, unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, appellate courts will independently examine the case's circumstances to determine whether the constitutional requirements of reasonableness have been satisfied. ***State v. Callaway***, 106 Wis. 2d 503, 511, 317 N.W.2d 428 (1982).

DISCUSSION

¶10 Martin argues that the trial court erred by concluding that the case did not involve "a Fourth Amendment stop." He contends that a Fourth Amendment search and seizure is implicated because, although a conventional stop was not involved, there was investigatory contact. "It is clear from the record that the Deputy was pursuing [Martin's] vehicle for an investigative purpose." Martin then submits that the only suspicious driving that Wege saw was the wide turn into a wide intersection. "When [Martin's] further driving was observed, he was not weaving, drove at an appropriate speed, and signaled and properly turned

into an open gas station/convenience store." He also acknowledges that no one "immediately" exited the vehicle once it was parked, but claims that the evidence of the time-frame was vague. Martin asserts that these facts, and the absence of evidence that Martin knew a law enforcement officer was observing him, do not provide a reasonable suspicion of wrongdoing. This court disagrees.

¶11 The trial court correctly observed that not all police-citizen encounters constitute a "seizure." "Given th[e] diversity in police-citizen contacts, it is apparent that not every such encounter is subject to Fourth Amendment restrictions. The Fourth Amendment comes into play only if the police have made a 'seizure.'" 4 Wayne R. LaFave, *Search and Seizure*, § 9.3 at 86 (3d ed. 1996). The United States Supreme Court "has repeatedly emphasized that not all personal intercourse between the police and citizens rises to the level of a stop or seizure." ***United States v. Young***, 105 F.3d 1, 5 (1st Cir. 1997) (citing ***Florida v. Bostick***, 501 U.S. 429, 434 (1991)). Thus, law enforcement "may approach citizens in public places and ask them questions without triggering the protections of the Fourth Amendment." ***Id.*** at 6.

¶12 This court, however, need not consider whether the circumstances amount to a stop and seizure under the Fourth Amendment because, accepting Martin's argument as correct, Wege's temporary investigation was justified by reasonable suspicion.[6]

[6] This court would be inclined to affirm the trial court on the grounds upon which it decided the case. In ***United States v. Mendenhall***, 446 U.S. 544, 554-55 (1980), a plurality opinion, the United States Supreme Court provided the test for determining whether a person has been seized:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person

(continued)

¶13 For an investigatory stop to be valid, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). This court must determine whether the specific and articulable facts, taken together with the rational inferences therefrom, constitute reasonable suspicion. ***State v. Dunn***, 158 Wis. 2d 138, 146, 462 N.W.2d 538 (Ct. App. 1990). If any reasonable inference of wrongful conduct can be objectively discerned, officers have the right to temporarily detain the individual for purposes of inquiry. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶14 The fundamental focus of the Fourth Amendment and WIS. STAT. § 968.24 is reasonableness. ***Id.*** at 83. "Reasonableness" is subject to a common sense evaluation. ***Id.*** "What would a reasonable police officer reasonably suspect

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> would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. … In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. (Footnote and citations omitted.)

See ***Michigan v. Chesternut***, 486 U.S. 567, 573 (1988) (majority of the Supreme Court approved of the ***Mendenhall*** test for when a "seizure" of the person occurs); *see also* ***State v. Smith***, 119 Wis. 2d 361, 366, 351 N.W.2d 752 (Ct. App. 1984).

It appears that none of the circumstances described in ***Mendenhall*** as examples of police activity that might convert "inoffensive contact" into a seizure have been proven to be present here. However, although it is unnecessary to reiterate it here, suffice it to say that Martin advances a plausible argument that he was not free to leave until he had cooperated with Wege. Martin also points out that Wege characterized his contact with Martin as a "stop." Therefore this court affirms upon a different theory. *See* ***State v. Gaines***, 197 Wis. 2d 102, 109 n.5, 539 N.W.2d 723 (Ct. App. 1995) (appellate court may affirm a circuit court's decision even if lower court reached result for different reasons).

in light of his or her training and experience?" ***Id.*** at 83-84. This common sense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility to effectively yet constitutionally prevent and detect crime. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). This objective evaluation focuses

> on the reasonableness of the officer's intrusion into the defendant's freedom of movement: "Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or "hunch" ... will not suffice.'"

Id. (citations omitted).

¶15 Wege had more than a hunch that Martin may have been impaired. Wege testified that during the early morning hours, Martin's vehicle made a "very, very wide" turn and in doing so, came "very, very close" to a curb. The vehicle almost struck a bridge and then swerved at a "very severe angle to avoid striking the bridge." Wege characterized this driving activity as "very unusual." His suspicion was heightened when, once the car was parked, the occupants stayed in the vehicle, a circumstance that Wege again described as unusual.[7] This latter

[7] Martin claims that the "record is void of an indication of how much time elapsed while [Martin] and his passengers remained at the Phillips 66 station, with the exception of a vague response to that very question." Martin's interpretation of Wege's testimony is not, however, sufficient to render clearly erroneous the trial court's implicit finding that the occupants stayed in the car for a suspiciously long period. "[A]nd the next peculiar thing happens while the officer is making radio contact and describing the situation to his sergeant. No one gets out of the vehicle. I think that's peculiar as well."

(continued)

circumstance supports a reasonable inference that Martin knew an officer had observed his erratic driving and was therefore attempting to avoid contact with the officer. This court is therefore satisfied that the specific and articulated facts, taken together with the rational inferences therefrom, constituted reasonable suspicion.

¶16 Martin nevertheless stresses that Wege did not see him violate any laws. An officer, however, need not observe an unlawful act to have reasonable suspicion to conduct a temporary investigation. ***Waldner***, 206 Wis. 2d at 59.

> When an officer observes unlawful conduct there is no need for an investigative stop: the observation of unlawful conduct gives the officer probable cause for a lawful seizure. If Waldner were correct in his assertion of the law, there could never be investigative stops unless there was simultaneously sufficient grounds to make an arrest. That is not the law. The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. The law of investigative stops allow [sic] police officers to stop a person when they have less than probable cause. Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.

Id.

¶17 This court concludes that the suspicious activity Wege observed warranted the minimal intrusion of Martin's privacy that requiring him to roll

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Martin also implies that Wege had a meaningful opportunity to see Martin's further driving after the suspicious turn. This suggestion does not faithfully recount Wege's testimony that by the time he was able to cross the bridge, turn around, cross a bridge again and catch up to Martin, the latter was already slowing for and signaling the turn into the gas station. Recall that Wege testified that he "was unable to observe in [sic] a lot of driving." Wege testified that because Martin was turning into the station, he did not activate his emergency lights, flashers or siren.

down his window constituted. Martin does not argue that Wege lacked a reasonable basis to continue his investigation once he detected the odor of an intoxicant after Martin opened the window. Therefore, because Wege's investigation was predicated upon a reasonable suspicion, the trial court's order denying Martin's motion to suppress and the judgment of conviction are affirmed.

By the Court.—Judgment and order affirmed.

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