COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP2731-CR **Cir. Ct. No. 2006CM913**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. PETERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Reversed and cause remanded with directions.*

¶1 SNYDER, J.[1] Michael D. Peters appeals from a judgment of conviction for obstructing an officer, contrary to WIS. STAT. § 946.41(1). Peters first contends that the circuit erred when it held that Peters was the subject of a legal investigatory traffic stop. He asserts that the officer's decision to stop him was based merely on a hunch and that the officer in fact provoked the driving behavior later characterized as suspicious. Peters also argues that his arrest for obstruction was not supported by probable cause. He asserts that the court should have granted his motions to suppress evidence obtained subsequent to the stop or, alternatively, subsequent to the arrest. Peters also argues that the circuit court failed to properly instruct the jury on the charge of obstruction. We agree with Peters that the evidence should have been suppressed because the investigative stop was unlawful and the arrest was not supported by probable cause. Accordingly, we reverse the judgment and remand the matter with directions.

¶2 Just after 2:00 a.m. on May 11, 2006, Peters was driving home from his second shift job at Kenosha Engine Plant. On the way, Peters noticed a vehicle behind him that was closing the distance between them. Peters believed the vehicle wanted to pass him, but when it did not make a move to go around him, Peters decided to get out of the way. He signaled and turned left into the parking lot of the local fire department. The tailing vehicle did not follow him into the lot.

¶3 Peters then pulled back out onto the roadway and continued toward home, in the same direction he had been traveling before. Shortly thereafter, Peters saw the same vehicle ahead of him, now parked on the right side of the road

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

in a dirt driveway, perpendicular to the roadway. As Peters passed by the vehicle, he noticed that it was marked as a sheriff's squad car. The squad pulled out from the driveway, closed the distance, and followed Peters again. Peters again slowed to allow the car to pass, but the car continued behind him.

¶4 Peters began to suspect he was the object of pursuit and decided to pull over to see if the squad car would pass or to find out why he was being followed. Peters pulled over onto the narrow right shoulder, but his car remained partly on the road. The squad, with emergency lights now on, pulled in behind him. Sheriff's Deputy Jon Thomas Jones asked Peters to identify himself, but Peters refused and asked why he was being followed. Jones told Peters to step out of his vehicle and eventually reached in to unlock the door, and then unbuckled Peters' seatbelt and took him out of his seat because Peters would not exit his truck voluntarily. Jones then handcuffed Peters and placed him under arrest for obstruction.

¶5 The State charged Peters with obstruction of justice, contrary to WIS. STAT. § 946.41(1). Peters filed two pretrial motions to suppress. The first challenged the legality of the traffic stop and the second challenged the arrest. The court conducted a motion hearing on October 18, 2006, and ultimately denied both motions. A jury trial ensued and, at the close of arguments, Peters requested that the court instruct the jury that refusal to provide identification to an officer is not, in and of itself, obstruction. Peters also requested an instruction on the legal standard for a traffic stop. The court refused to allow either instruction. The jury returned a verdict of guilty and the court entered judgment accordingly. Peters appeals.

¶6 We begin by addressing the circuit court's decision to deny both of Peters' motions to suppress evidence. In reviewing such orders, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law, which this court reviews de novo. ***Id.***

¶7 We turn first to the investigative traffic stop, often called a ***Terry***[2] stop. The law of investigative stops allows police officers to stop a person when they have less than probable cause. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). To justify an investigatory seizure, the police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating or has violated the law. ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. "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. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶8 When deciding whether events were sufficient to justify a traffic stop, the court must examine the totality of the circumstances. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Here, the circuit court stated that it was "quite clear the defendant broke no laws up to the point of the stop." Nonetheless, the court decided that when Peters turned into the empty fire department parking lot at 2:44 a.m. on a rainy night, it was "sort of out of the

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

ordinary." When Peters subsequently pulled over, the court determined that he had the right to do so, but noted that because his car was still partly on the road it was not the usual and customary place for such a stop. The court then determined that Jones had a right to initiate an investigation. The court ultimately held that Jones acted within his authority because two "somewhat out of the ordinary" events gave Jones "reasonable suspicion of something," although "not necessarily anything in particular."

¶9 The circuit court's analysis fails to address the issue of provocation. Peters' "out of the ordinary" actions were prompted by Jones' coming up quickly from behind and following closely. The law does not condone the successful prosecution of offenses that are caused by the state's agents. *See* ***State v. Brown***, 107 Wis. 2d 44, 55, 318 N.W.2d 370 (1982). Where reasonable suspicion for a traffic stop stems from behavior caused by the state itself through the actions of a law enforcement officer, the public interest in allowing the violator to claim a defense outweighs the public interest in prosecution. *See* ***id.***

¶10 Our reading of the record indicates that Jones engaged in provocative behavior in his search for drunk drivers.[3] Peters' responses, to give Jones the opportunity to pass and then to stop and find out why he was being tailgated, were reasonable under the circumstances. We ascertain no specific articulable facts or reasonable inferences from which Jones could have concluded

[3] Peters posits that Jones' intent seemed to be to "flush out drunk drivers by provoking them with aggressive driving behavior." It was approximately 2:44 a.m. when Jones first saw Peters, and Jones testified that he was on the lookout for "possibly intoxicated drivers." The State conceded that Jones was following Peters and that Peters' actions were "responsive" to being followed. We fully agree that keeping the roads safe from drunk drivers is a laudable goal; however, harrying drivers into making unusual maneuvers is not a justifiable approach.

that Peters was violating or had violated the law. *See* ***Colstad***, 260 Wis. 2d 406, ¶8. We further note that the circuit court's determination that Jones had reasonable suspicion of "something," although "not necessarily anything in particular" does not reflect a specific articulable basis for making the stop. *See* ***id.*** An unparticularized suspicion or hunch is not sufficient. ***Terry v. Ohio***, 392 U.S. 1, 22, 27 (1968). Thus, the investigative stop was not supported by reasonable suspicion and was unlawful. *See* ***id.***

¶11 We next address the obstruction of justice charge that arose during the illegal stop. Peters argues that there was no probable cause to support the arrest. Probable cause to arrest refers to that quantum of evidence that would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. McAttee***, 2001 WI App 262, ¶8, 248 Wis. 2d 865, 637 N.W.2d 774. The relevant statute here states that "[w]hoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor." WIS. STAT. § 946.41(1). The facts underlying the obstruction charge stem from Peters' refusal to produce identification when Jones demanded it.

¶12 The State argues that Jones was authorized to demand to see Peters' license under WIS. STAT. § 343.18, which states that a motorist must carry his or her license at all times while operating a vehicle and must produce it upon demand by an officer. The State also asserts that, when Peters refused to produce his license, Jones had the authority to take him into custody pursuant to WIS. STAT. § 345.22, which allows an officer to arrest a citizen without a warrant if the officer has reasonable grounds to believe the person is violating or has violated a traffic regulation.

¶13 Peters responds by emphasizing that the State never made this argument before the circuit court and therefore cannot raise it on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (we will not entertain arguments raised for the first time on appeal). The State concedes that its argument was not raised below. In its appellate brief, the State acknowledges, "The authority for an officer to demand a driver's license of a motorist under [WIS. STAT. §] 343.18 was not argued to the circuit court or testified to as justification for arrest by Deputy Jones." The circuit court based its ruling on the view that Jones had a right to demand Peters' identification "because of the way [Peters] was driving." The court stated:

> I believe the officer had a right to learn the identity of the defendant. If the defendant … had given his name, there was nothing else because he wasn't drinking and there was no crime here. There has been no evidence of any crime…. I suspect that the more the defendant attempted to vindicate his anonymity position, the more the officer continued his attempts to obtain the identity, and it led to the obstructing charge.

¶14 We agree with Peters that the State's attempt to introduce a new legal justification for the arrest is inappropriate on appeal. Furthermore, we conclude it is not relevant because Peters was arrested for obstruction, not for failing to carry a license contrary to WIS. STAT. § 343.18.

¶15 We also observe that a police officer may ask a person to identify himself or herself if the officer's inquiry is justified at its inception by reasonable suspicion and the inquiry is related to that suspicion. *See* ***Hiibel v. Sixth Judicial Dist. Court of Nevada***, 542 U.S. 177, 185-86 (2004). A person obstructs justice when he or she "knowingly resists or obstructs an officer while such officer is doing any act in an official capacity *and with lawful authority*." WIS. STAT. § 946.41 (emphasis added). Here, the entire encounter arose from an illegal stop.

¶16 Finally, although Jones' department policy may be otherwise,[4] our supreme court has held that failing to identify oneself is not, in and of itself, obstruction. *See* ***Henes v. Morrissey***, 194 Wis. 2d 338, 354, 533 N.W.2d 802 (1995) (where defendant refused to identify himself but did not give false information, did not flee, and did not act in a violent manner toward the officers, there was no obstruction).

¶17 The State has failed to demonstrate reasonable suspicion to support the investigative stop. It has also failed to establish that Jones had probable cause to arrest Peters for obstruction. Accordingly, the circuit court erred when it denied Peters' motions to suppress. Because we reverse on the evidentiary issues, we do not reach Peters' arguments regarding the jury instructions. We reverse the judgment of conviction and remand the case to the circuit court. We direct that, because the stop was unlawful and the arrest unsupported by probable cause, all evidence obtained therefrom must be suppressed.

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

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

[4] Jones testified that, based on his training, he was to take a person into custody for obstruction if that person continued to refuse to identify himself or herself.