

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP2087-CR

Cir. Ct. No. 2007CF3861

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TOMIUS L. CURTAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Tomius L. Curtain appeals from a judgment of conviction for one count of possession with intent to deliver cocaine as a second or subsequent offense. He asserts that officers lacked reasonable suspicion to detain him and that a subsequent search of his vehicle was therefore illegal. We

conclude the officers had reasonable suspicion to conduct an investigatory stop and that a protective search of the vehicle was permissible. We therefore affirm.

¶2 On August 9, 2007, around midnight going into the early morning hours, Milwaukee Police Officer Eric Rom was on patrol with his partner. Rom was driving an unmarked vehicle and approached the intersection of 20th Street and Center Avenue, stopping for a red light. While stopped, Rom looked across at a gas station on the intersection's northwest corner. He observed Curtain "hanging out" in the parking lot, off to the side of the station. Another man approached Curtain. They exchanged a few words and appeared to Rom to engage in a hand-to-hand transaction of some sort.

¶3 As the second individual walked away, Curtain stood in the lot for a brief moment, then looked around. When Curtain spotted Rom's vehicle, he realized it was the police and got a startled look on his face. Curtain went to a car and got in the driver's seat. At the same time, an individual came out of the gas station and entered the vehicle's passenger side.¹ The vehicle accelerated "quite fast" out of the parking lot and revved its engine. According to Rom, the car did not have its tail lights illuminated and he initiated a traffic stop.

¶4 As Rom approached the vehicle, Curtain dropped his left shoulder and leaned forward in the car, his head disappearing from view for a second or two. When Rom arrived at the driver's door, Curtain had an open bottle of alcohol in his lap. Rom asked Curtain to get out of the vehicle and Curtain complied.

¹ It is unclear whether this is the individual who engaged in the hand-to-hand transaction or another person. Rom testified that he was not paying attention to that individual when he walked away from Curtain, and Curtain testified it was a friend he met at the gas station.

Rom then began to search the areas it appeared Curtain could have been reaching into: the floor, the side of the seat, and under the seat. Rom then looked in the driver's door pocket, where he saw a transparent brown pill bottle with small plastic baggies in it. The contents of the little bags turned out to be the cocaine for which Curtain was arrested and charged.

¶5 Curtain moved to suppress the cocaine evidence. He argued there was no reasonable suspicion for the stop and if the stop was unreasonable, so was the subsequent search. After testimony from Rom and Curtain, the court denied the motion. The case was tried to a jury, which convicted Curtain. The court sentenced him to two years' initial confinement and four years' extended supervision, but suspended the sentence and gave Curtain four years' probation and a six-month license suspension.

¶6 The decision whether to suppress evidence is a question of constitutional fact. *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182. The trial court's factual findings are sustained unless clearly erroneous, but we independently apply those facts to the relevant constitutional principles. *Id.*

¶7 The Fourth Amendment protects individuals from unreasonable searches and seizures. *State v. Olson*, 2001 WI App 284, ¶6, 249 Wis. 2d 391, 639 N.W.2d 207. It is well-established that stopping a vehicle and detaining its occupants is a seizure; the only question is whether that seizure was reasonable. *Id.* An investigatory stop is reasonable if it is "justified by a reasonable suspicion that the motorist has committed, or is about to commit, a crime." *State v. Amos*,

220 Wis. 2d 793, 798, 584 N.W.2d 170 (Ct. App. 1998); *see also* WIS. STAT. § 968.24 (2007-08).² Reasonable suspicion comes from “specific articulable facts and reasonable inferences from those facts.... *See State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). An inchoate and unparticularized suspicion or hunch will not suffice.” *Id.* What constitutes reasonableness is a common-sense test: “What would a reasonable police officer reasonably suspect in light of his or her training and experience?” *Id.* Reasonable suspicion is based on the totality of the circumstances. *State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999).

¶8 Curtain asserts that Rom’s conclusion he had witnessed a drug transaction “was the result of a hunch.” He points to Rom’s trial testimony that the hand-to-hand exchange could have been a handshake and Rom’s admission that, by itself, Curtain’s parking lot encounter was not the sole reason Rom detained him. Curtain, however, ignores the totality of the circumstances.

¶9 Rom had twelve years’ experience as a police officer. Three and one-half of those years were spent on Milwaukee’s anti-gang unit, where Rom’s duties included targeting drug-dealing activity. Rom estimated he had participated in thousands of drug investigations. An officer’s training and experience is one factor to consider in the totality equation. *Id.*

¶10 On the night in question, Rom was on patrol as part of the department’s Neighborhood Safety Initiative. Under the Initiative, officers were sent to patrol high-crime areas, as determined by statistics of crime trends from the

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

few days preceding an assignment. Moreover, the particular gas station was, according to Rom, a “common spot where we have arrested people or had complaints of people selling drugs there.” The reputation of an area can be a factor in the reasonable suspicion analysis. See *State v. Morgan*, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995). This particular locale certainly had a reputation, with statistical and experiential evidence to reinforce that reputation.

¶11 The transaction occurred at or just after midnight on a Thursday morning. This is not a particularly usual time for a chance encounter with an acquaintance, as Curtain suggests happened. The time of day at which activity is observed can be a factor. See *Allen*, 226 Wis. 2d at 74-75; cf. *State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997) (brief stop on residential street to greet another is “ordinary, everyday occurrence during daytime hours”).

¶12 Although Rom testified that Curtain’s encounter could have been a handshake, “giving five,” or something that was not a drug transaction, Rom also testified that interaction was *most consistent with* a hand-to-hand drug sale.³ Rom based this conclusion on transactions he had observed many times in the past. An officer’s experience may allow him to identify behaviors which, to an untrained layperson, appear wholly innocent. *Young*, 212 Wis. 2d at 428. Further, police are not required to exclude innocent explanations for behavior. *Waldner*, 206 Wis. 2d at 59. To the extent that the gesture was ambiguous, we note that the

³ Some of Rom’s testimony referred to in this opinion is from the trial. When we review a suppression ruling, we are not limited to the record before the court at the time of the suppression hearing. See *State v. Begicevic*, 2004 WI App 57, ¶3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293.

principal function of an investigatory stop is to resolve ambiguities in suspicious activity. *Id.* at 60.

¶13 When Curtain noticed the squad car, he got a startled look on his face. Rom described it as an “oh, crap” or “it’s the cops” look. A subject’s demeanor or unusual nervousness may be considered when assessing probable cause. *State v. Sumner*, 2008 WI 94, ¶38, 312Wis. 2d 292, 752 N.W.2d 783. Although jurisprudence notes that many or most individuals experience some normal nervousness or anxiety when stopped by police, *id.*, we do not think that most individuals experience any particular anxiety simply by observing a passing police cruiser.

¶14 Rom testified that Curtain appeared as though he were going to continue standing in the parking lot until he observed the police, at which point he headed to his vehicle, accelerating out of the parking lot and revving the engine, without illuminated tail lights. We agree with Curtain that this is not fleeing. It is, however, “nervous, evasive behavior ... a pertinent factor in determining reasonable suspicion.” See *Olson*, 249 Wis. 2d 391, ¶8. On appeal, Curtain contends that the engine sounded louder merely because of its size, but Rom was not required to consider or exclude that possibility at the time.⁴ See *Waldner*, 206 Wis. 2d at 59.

⁴ At the suppression hearing, Curtain testified that he was sure the tail lights were working and that the vehicle automatically turned on the headlights when it sensed darkness. The court disregarded Curtain’s testimony, stating it “always got the sense he was kind of coming up with more stuff to try to just obfuscate[.]” See *State v. Fields*, 2000 WI App 218, ¶11, 239 Wis. 2d 38, 619 N.W.2d 279 (where trial court determined witness’s testimony was not credible, court of appeals disregarded that testimony on review).

¶15 Based on the totality of the circumstances, an officer (1) with narcotics experience (2) patrolling a high crime neighborhood (3) in the early morning, who witnesses (4) a hand-to-hand transaction (5) at a location known for drug sales with a suspect who (6) becomes alarmed and (7) turns evasive once observing police, has sufficient reasonable suspicion to stop the suspect's vehicle. While any one of these facts, standing alone, might be insufficient to justify a stop, when taken together, the whole is greater than the sum of its parts. *See id.*, at 58.

¶16 Having established reasonable suspicion to stop the vehicle, the next question is whether the search of Curtain's vehicle was lawful. During an investigative stop, an officer may conduct a protective search of the outer clothing of a person to determine if a person is armed, provided there is reasonable suspicion, based on specific and articulable acts and reasonable inferences therefrom, that the officer's or another's safety might be in danger because the detained individual may be armed. *See Johnson*, 299 Wis. 2d 675, ¶21; *see also* WIS. STAT. § 968.25. The emphasis is on "may be" armed, not "is" armed. *See Morgan*, 197 Wis. 2d at 209. This rule permits the search of a vehicle's passenger compartment for weapons when an officer possesses the appropriate level of suspicion. *Johnson*, 299 Wis. 2d 675, ¶22 n.8.

¶17 Some of the same factors going to reasonable suspicion for a stop also justify a search for weapons. For example, Rom suspected he had observed a drug deal. Although there is no absolute connection between drug crimes and weapons, drug dealing is nevertheless known to be associated with possession of

deadly weapons. *See id.*, ¶38. Further, the time of day, evasive behavior,⁵ and unusual nervousness are also appropriate considerations. *See id.*, ¶¶30-31.

¶18 Alone, those factors might be insufficient to give Rom reasonable suspicion that Curtain might be armed and the officers' safety in danger, but there are two other factors that must be considered here. First, when Rom stopped the vehicle, Curtain immediately engaged in furtive movements. He leaned forward and to the left, his head dropping briefly out of view. Rom had no way to know if Curtain was merely concealing something or instead reaching for a weapon. *See id.*, ¶37.

¶19 Second, when Rom approached the vehicle, Curtain had an open bottle of alcohol in his lap. This meant Rom now had to consider whether Curtain might be intoxicated or impaired which, if true, introduced a risk of unpredictable and even violent behavior. Further, as the State pointed out at the suppression hearing, whatever Curtain was doing when he leaned forward was more important than the open intoxicant. In other words, Curtain's suspicious movement after the car was stopped was not an attempt to conceal the liquor, despite the fact that driving with an open intoxicant is itself a crime. A reasonable police officer could infer Curtain was intent on retrieving a weapon. It was therefore reasonable for Rom to infer Curtain might be armed and the officers' safety might be in jeopardy, and it was reasonable to conduct a protective search of the vehicle.

⁵ Rom did, however, concede that Curtain stopped his vehicle in a timely fashion. For some reason, Curtain felt compelled to testify he stopped because he reached his destination, not because officers were behind him.

¶20 The door pocket was within Curtain's reach and would have been forward and to the left—the direction in which Curtain was moving when he stopped. Rom asked Curtain what he had been reaching for; Curtain told him he had been reaching for his cigarettes. Rom spotted the cigarettes in the door pocket, but also noticed the transparent bottle with the cocaine. Curtain does not dispute that the cocaine was in plain sight, seizable if the search were permissible. *See State v. Applewhite*, 2008 WI App 138, ¶¶14-18, 758 N.W.2d 181 (evidence in plain view may be seized even if officers were only doing a protective search; police are not required to look the other way when they inadvertently discover evidence of a crime). The court properly denied the suppression motion.

By the Court.—Judgment affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

