COURT OF APPEALS DECISION DATED AND FILED

April 23, 2009

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. 2008AP781-CR

Cir. Ct. No. 2004CF2984

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANET RENEE TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN and TIMOTHY M. WITKOWIAK, Judges. *Reversed and cause remanded for further proceedings*.

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 BRIDGE, J. Janet Taylor appeals a judgment of conviction for possession of cocaine, between one and five grams, with intent to deliver, and a ruling by the court denying her motion to suppress. Taylor, who pled guilty after

her motion to suppress narcotics was denied, argues that the narcotics should have been suppressed as fruit of an illegal stop. She contends the circuit court erred in denying her suppression motion because the officer lacked the requisite reasonable suspicion to initiate the stop and because her prolonged detention by the officer was a violation of the Fourth Amendment. We conclude that the narcotics were recovered as the result of an unconstitutional stop, and thus should be suppressed. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

¶2 The following facts are taken from the hearing held on Taylor's motion to suppress and are undisputed. On the afternoon of June 3, 2003, Officer Justin Sebestyen observed Taylor walking down the street on West National Avenue in Milwaukee while carrying what appeared to be a beer bottle wrapped in a brown paper bag. Sebestyen testified that the area in which Taylor was walking is an area "known for a high quantity of public drinking." Suspecting Taylor was in violation of Milwaukee's public drinking ordinance,[1] Sebestyen approached Taylor and asked her, from around five feet away, if she was carrying beer. Taylor replied, "yes, it's a beer" and "no, it ain't open." Taylor then handed Sebestyen the bottle, who verified that the bottle was not open.

[1] Milwaukee City Ordinance 106-1.8 provides,

> **Public Drinking and Possession of Alcohol Beverages.** 1. PROHIBITED**.** It shall be unlawful for any person to consume any alcohol beverage or possess on his or her person, any bottle or receptacle containing alcohol beverages if the bottle has been opened, the seal broken or the contents of the bottle or receptacle have been partially removed upon any public alley, highway, pedestrian mall, sidewalk, or street within the limits of the city….

¶3 Sebestyen asked Taylor for her name in order to check for outstanding warrants. Sebestyen explained that doing so is a common practice of the Milwaukee Police Department. The check revealed that Taylor had multiple outstanding warrants. Upon learning of the warrants, Sebestyen advised Taylor that she would be arrested and searched by a female officer. While being searched, Taylor admitted that she was hiding cocaine on her person.

¶4 Taylor was charged with possession with intent to deliver a controlled substance. She moved to suppress the evidence discovered during the search on the basis that Sebestyen lacked reasonable suspicion to stop her. Following an evidentiary hearing, the circuit court denied Taylor's motion. The court explained:

> I think it's pretty common knowledge that if someone is going to drink in public and doesn't want the bottle to be seen, wrapping it in something like a brown paper bag is not unknown, its fairly common.…
>
> It was reasonably suspicious behavior such that the officers thought that the ordinance was violated ….

As for Sebestyen's inquiry as to Taylor's name once Sebestyen determined that the bottle was unopened, the court stated that it was unaware of any legal reason why the officer could not ask Taylor for that information. Taylor subsequently pled guilty to the charged offense. This appeal followed. We reference additional facts as needed in the discussion below.

STANDARD OF REVIEW

¶5 When we review an order on a motion to suppress, we uphold the circuit court's factual findings unless clearly erroneous. ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. However, the application of

constitutional principles to those facts is a question of law which we review de novo. ***Id.*** Here, the facts are undisputed, and thus only questions of law are before us. *See* ***id.***

DISCUSSION

¶6 On appeal, Taylor argues that the circuit court erred in denying her motion to suppress because the officer lacked reasonable suspicion to stop her and because her prolonged detention was a violation of the Fourth Amendment.[2] The Fourth Amendment and article I, section 11 of the Wisconsin Constitution protect individuals from unreasonable searches and seizures, including unreasonable investigatory stops. *See* ***Terry v. Ohio***, 392 U.S. 1, 20 (1968); *see also* ***State v. King***, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993).

¶7 "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." ***Terry***, 392 U.S. at 22. An investigatory stop may be performed even if the violation only carries a civil forfeiture. ***State v. Krier,*** 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991). Before stopping the individual, however, the officer must have a reasonable suspicion, in light of his or her experience and based on specific articulable facts and reasonable inferences from those facts, that criminal activity has, is, or is about to take place. ***State v. Washington***, 2005 WI App 123,

[2] The State contends that Taylor was not actually stopped and therefore her Fourth Amendment right against unreasonable seizure was not violated. This argument, however, was not raised before the circuit court and will not be considered now. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶16, 284 Wis. 2d 456, 700 N.W.2d 305. *See also* WIS. STAT. § 968.24 (2007-08).[3] Reasonable suspicion is a common sense test, ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996), based on the totality of the circumstances. ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶8 The State contends that Sebestyen had a reasonable suspicion to stop Taylor because Taylor carried a bottle of beer in a brown paper bag with the top of the bottle sticking out "just like someone drinking in public would." The State further contends that reasonable suspicion existed to stop Taylor because the location where Taylor was walking had a high incidence of public drinking and because Sebestyen's experience and knowledge of the location and the common behaviors of individuals drinking in public "provided the type of particularized and objective basis for suspecting criminal activity that equals reasonable suspicion." We disagree.

¶9 The record shows that the sole reason for stopping Taylor was because she was observed walking down a public street in an area known for public drinking, carrying a brown paper bag containing what appeared to be a bottle of beer. Officer Sebestyen admitted that he did not see Taylor drink from

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[3] WISCONSIN STAT. § 968.24 provides:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

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

the bottle, and that there was nothing unusual about Taylor. He also testified that he did not determine whether the bottle was open until after he stopped Taylor. After being stopped, Taylor voluntarily gave the officer the closed bottle of beer.

¶10 We conclude the fact that Taylor was walking down the street while carrying what appeared to be a beer bottle wrapped in a brown paper bag does not, alone, provide a reasonable suspicion that she had or was about to commit a crime, even if it was in an area known for public drinking. Vendors frequently place bottles of alcohol in brown paper bags when they are sold to customers, and thus in and of itself, the fact that the bottle was wrapped is of no significance. Moreover, the officer conceded that he did not observe Taylor drinking from the beer bottle in violation of Milwaukee ordinance, nor did he observe Taylor violating any other laws. The officer merely had a generalized suspicion that Taylor might be engaged in public drinking. Absent any evidence that Taylor was or was about to consume alcohol in violation of the law, we are not persuaded that it was reasonable to stop and question her under these circumstances. That is, the circumstances surrounding the stop were insufficient to give rise to a reasonable, articulable suspicion of criminal activity that would justify the intrusion of an investigatory stop. *See* ***Washington***, 284 Wis. 2d 456, ¶16.

¶11 Lacking a legal basis for the stop and subsequent search, the search was unlawful and the evidence seized from Taylor's person should have been suppressed as fruit of the poisonous tree. *See* ***Wong Sun v. United States***, 371 U.S. 471, 484-85, 487-88 (1963). Accordingly, we reverse the judgment of conviction and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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