COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP300

Cir. Ct. Nos. 2007TR6850
2007TR6851

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

CITY OF MEQUON,

PLAINTIFF-RESPONDENT,

V.

MARK P. WIKLIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed and cause remanded with directions.*

¶1 NEUBAUER, J.[1] Mark P. Wiklin appeals from a judgment convicting him of both operating a motor vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), contrary to WIS. STAT. § 346.63(1)(a) and (b). Wiklin contends that the trial court erred in denying his motion to suppress evidence because the officer did not have reasonable suspicion to conduct a valid investigatory stop, and therefore violated Wiklin's constitutional rights under the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. Because the totality of the circumstances supports a finding that the officer had the requisite reasonable suspicion to conduct an investigatory stop, we affirm. We remand for entry of judgment on either the OWI or PAC.[2]

FACTS

¶2 We recite the uncontradicted facts from the transcript of the suppression hearing where the sole witness was the arresting officer, City of Mequon Police Officer Benjamin Heinen. On September 5, 2007, Wiklin was stopped by Heinen, and subsequently arrested for OWI. Prior to the stop Heinen had been patrolling Port Washington Road. At approximately 1:40 a.m., Heinen observed a vehicle, later identified as Wiklin's, stop at the intersection of Port Washington Road and Glen Oaks Lane. The vehicle then proceeded eastbound on

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The record includes two conviction status reports reflecting two separate but concurrent sentences for the OWI and PAC which were stayed pending appeal. While WIS. STAT. § 346.63(1)(c) permits the charging of both OWI and PAC, it allows but a single conviction. On remand, a sentence should be imposed for either OWI or PAC, but not both.

Glen Oaks Lane, a street with only office buildings on both sides. Heinen testified that Glen Oaks Lane dead-ends at the freeway after two to three blocks. Glen Oaks Lane intersects with Corporate Parkway, which winds through a corporate business park. Heinen followed the vehicle and observed it turn right onto Corporate Parkway and enter the parking lot of the multi-building Mikkelson business complex. The only entrance and exit to the Mikkelson complex is located at Glen Oaks Lane. The vehicle circled the parking lot, making a large U-turn, and then exited again going eastbound on Glen Oaks Lane. After turning around at the dead-end, the vehicle again entered the Mikkelson parking lot. This time Heinen followed the vehicle into the Mikkelson parking lot where the vehicle drove around the buildings, away from the only exit to Glen Oaks Lane, and eventually pulled into a parking stall in the back of the Mikkelson complex. Heinen pulled behind the vehicle and activated the police car's overhead emergency lights.

¶3 Heinen then observed Wiklin exit his vehicle, "stumble" and "beg[i]n to stagger." Heinen approached Wiklin, and while questioning Wiklin, Heinen observed that Wiklin's eyes appeared glassy and bloodshot, there was a strong odor of intoxicants on his breath, and he appeared uncoordinated and unsteady on his feet when asked to walk back towards the police car. Heinen administered, and Wiklin subsequently failed, a number of field sobriety tests including a preliminary breath test where Wiklin's BAC registered at 0.13 percent. Thereafter, Wiklin was placed under arrest for OWI and taken to the Mequon police department.

¶4 At the motion hearing on February 1, 2008, Heinen testified that although he had not observed Wiklin commit any traffic violations, he had initiated the stop because he felt the vehicle's presence back in the business park

was very suspicious given his training and experience with the location, his knowledge of at least one burglary at the facility, and the fact that no businesses would be open at that time of night. On July 30, 2008, the trial court denied Wiklin's motion to suppress, finding that given all the facts and circumstances of the case, including the manner in which Wiklin operated his vehicle within the time period observed by the officer, the time of day, and the typical hours of operation of the businesses in the immediate vicinity, Heinen could reasonably have suspected that Wiklin may have been engaging in some type of criminal activity.

¶5 On November 7, 2008, Wiklin was convicted of operating a motor vehicle while under the influence of an intoxicant, and operating a motor vehicle with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(a) and (b). Wiklin appeals the judgment of conviction.

DISCUSSION

¶6 On appeal, Wiklin contends that the trial court erred in denying his motion to suppress evidence because Heinen lacked the requisite reasonable suspicion necessary to initiate the stop. Wiklin argues that because Heinen did not observe him violate any law, Heinen's observation of Wiklin's vehicle driving through a business complex parking area did not amount to reasonable suspicion. As such, Wiklin asserts the stop was an unreasonable seizure, in violation of his constitutional rights, under both the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. Consequently, Wiklin seeks to have the circuit court order and judgment of conviction reversed.

¶7 The temporary detention of an individual constitutes a seizure within the meaning of the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. *See* ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996); *see also* ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). The United States Supreme Court has recognized that although a temporary detention constitutes a seizure under the Fourth Amendment, in certain circumstances an officer may detain an individual for the purposes of investigating possible criminal behavior as long as she or he has reasonable suspicion that criminal activity is afoot. *See* ***Terry v. Ohio***, 392 U.S. 1, 30 (1968). Therefore, whether evidence gathered from an investigatory stop should be suppressed for lack of reasonable suspicion is a question of constitutional fact. *See* ***State v. Alexander***, 2008 WI App 9, ¶7, 307 Wis. 2d 323, 744 N.W. 2d 909 (Ct. App. 2007). As such, we will uphold the trial court's findings of fact unless clearly erroneous. ***State v. Martwick***, 2000 WI 5, ¶19, 231 Wis. 2d 801, 604 N.W. 2d 552. However, the determination of reasonable suspicion is a question of law we review de novo. ***Id.***

¶8 When an officer initiates an investigative traffic stop, a constitutional requirement of reasonableness is invoked. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. The reasonableness of a stop is determined by a common sense test, namely, would the facts of the case warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. *See* ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). To meet this common sense test, an officer must show "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the stop]." ***Terry***, 392 U.S. at 21. This does not mean an officer is required to rule

out the possibility of innocent behavior before initiating an investigatory stop. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Suspicious conduct by its very nature is ambiguous and the principle function of the investigative stop is to resolve that ambiguity. ***Anderson***, 155 Wis. 2d at 84. The reasonableness of a stop is determined by the totality of the circumstances. *See* ***Post***, 301 Wis. 2d 1, ¶13. Therefore if a stop is made based on observations of lawful conduct, it must only be shown that reasonable inferences can be made from that lawful conduct that criminal activity is afoot. ***Waldner***, 206 Wis. 2d at 57.

¶9 Here the facts are undisputed and clearly support a finding that Heinen had reasonable suspicion to instigate the stop in light of his training and experience and the totality of the circumstances. At approximately 1:40 a.m., Heinen observed Wiklin driving eastbound on Glen Oaks Lane, a short road he knew dead-ended at the freeway. Wiklin then turned into a business park, where Heinen knew all the businesses would be closed and where Heinen was aware there had been at least one burglary. Wiklin drove through the parking area, exited the business park, and continued eastbound on Glen Oaks Lane, turning around at the dead-end. Wiklin then again entered the closed business park, at which point Heinen followed. Wiklin then drove his car around the buildings to the other side of the building complex, where there was no exit. After Wiklin parked his vehicle behind the buildings (vis-à-vis the street), Heinen pulled behind him activating his emergency lights.

¶10 While each of these observations taken alone may not be sufficient to warrant reasonable suspicion, these facts build upon each other, and as they accumulate, reasonable inferences can be drawn about their cumulative effect. *See* ***id.*** at 58. Thus, when an officer observes lawful but suspicious conduct, if a

reasonable inference of unlawful conduct can be objectively discerned, the officer has the right to temporarily detain the individual for an investigative inquiry. *See* ***id.*** at 60. In the case at bar, we conclude that the requisite reasonable suspicion did exist and that the stop was not made based on an inchoate and unparticularized hunch as argued by Wiklin. Although Wiklin was not observed engaging in unlawful activity, driving his vehicle twice through a closed business park (after driving down a dead-end street in between) and parking behind the buildings at 1:40 a.m., where at least one burglary had previously occurred, constitutes lawful but suspicious conduct that warranted inquiry by Heinen. We therefore uphold the trial court order denying Wiklin's motion to suppress and affirm the judgment of conviction.[3] We remand for correction of the judgment to recite but one conviction and sentence.

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

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

[3] We therefore need not address Wiklin's contention that Heinen was not engaged in community caretaker activity at the time of the stop. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible ground).