

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2002

Cornelia G. Clark
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. 01-1995-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CM-1101

**IN COURT OF APPEALS
DISTRICT II**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN E. AVERY,

DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, P.J.¹ Shawn E. Avery appeals a judgment of conviction for possession of marijuana contrary to WIS. STAT. § 961.41(3g)(e). Avery pled no contest to the offense after the trial court denied his motion to

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

suppress evidence. Avery challenges this ruling on appeal. Avery argues that (1) the officer lacked probable cause to stop his vehicle for a traffic violation, and (2) the officer lacked reasonable suspicion to extend the stop and detain him and the other occupant of the vehicle.

¶2 We assume *arguendo* that the officer's initial stop of Avery's vehicle for a traffic violation was reasonable. However, we further conclude that the officer lacked reasonable suspicion to extend the stop and detain Avery and his passenger. As such, the evidence seized following the initial stop of the vehicle should have been suppressed. We reverse the judgment and remand for further proceedings.

FACTS

¶3 Officer James Olson of the City of Sheboygan Police Department testified at the suppression hearing that he observed Avery's vehicle enter a dead-end street in Sheboygan at approximately 2:10 a.m. on August 26, 2000. He observed the car reach the dead-end and turn around, returning to the intersection. Olson testified that his suspicions were heightened when he observed this, given the early morning hour. Olson had also just "cleared" a vandalism report in the area.

¶4 As Avery's vehicle returned, Olson pulled in behind it and "observed a bunch of stuff hanging from the rearview mirror." Olson testified that one of the items was an air freshener, but did not recall the size of the air freshener or what other items, if any, were also hanging from the rearview mirror. Olson proceeded to stop Avery's vehicle for "an obstructed view of the windshield" in

violation of WIS. STAT. § 346.88(3)(b).² Olson testified that prior to the traffic stop, he had not observed any other suspicious activity by Avery or his passenger, nor had Avery committed any other traffic violations.

¶5 When Olson made contact with Avery, Avery explained that he was from Two Rivers, Wisconsin, was not familiar with the area and was attempting to head north back home. Olson then completed a Department of Transportation (DOT) check on Avery which indicated that Avery did not have any outstanding warrants, that Avery was in fact from Two Rivers and that he had prior police contacts for drug offenses.

¶6 Olson testified that at that point, he had no reason to suspect anything but continued to hold Avery and his passenger at that location until he finished the traffic stop. Olson additionally testified that he had no reason to believe that either occupant was armed or dangerous. Following the DOT check, Olson requested the passenger exit the vehicle in order to interview him further. Olson denied that the passenger did anything to cause him to continue the interview. When the passenger exited the vehicle, he dropped a bag containing marijuana. The passenger was then taken into custody. Because the passenger was the registered owner of the vehicle, the police intended to search the vehicle incident to his arrest.

¶7 Officer Eric Edson of the City of Sheboygan Police Department provided backup to Olson. Edson testified that when he made contact with Avery,

² WISCONSIN STAT. § 346.88(3)(b) provides: “No person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver’s clear view through the front windshield.”

the passenger had already been taken into custody. Edson had Avery exit the vehicle and stand near the rear of the vehicle. Edson asked Avery if he had any weapons and then asked Avery if he would allow him to check. Avery then gave consent for a pat-down search, which revealed a marijuana pipe and marijuana in Avery's pocket. Avery was arrested and charged with possession of marijuana and drug paraphernalia.

¶8 On January 22, 2001, Avery filed a motion to suppress the physical evidence raising various challenges to the officer's stop of his vehicle. Following a hearing on May 23, 2001, the trial court denied Avery's motion. Avery subsequently pled no contest to the charges on May 31, 2001.

DISCUSSION

¶9 When we review a trial court's ruling on a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Fields*, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. However, the application of constitutional principles to the facts is a question of law that we decide de novo without deference to the trial court's decision. *Id.* Nonetheless, we value a trial court's decision on such a question. *Scheunemann v. City of West Bend*, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶10 As indicated, Avery challenges the initial stop of the vehicle and the extended duration of the stop. Although we view the question as very close, we will assume for purposes of argument that Olson had probable cause to stop the vehicle Avery was operating for the motor vehicle "obstructed view" offense. Therefore, we move to Avery's second issue concerning the extension of the vehicle stop.

¶11 Once stopped for a violation, a driver may be asked questions reasonably related to the nature of the stop. *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). This questioning may include inquiry as to the individual's destination and purpose. *Id.* "Such a stop and detention is constitutionally permissible if the officer has an 'articulable suspicion that the person has committed or is about to commit [an offense].'" *Id.* at 93-94 (citations omitted).

The key is the "reasonable relationship" between the detention and the reasons for which the stop was made. If such an "articulable suspicion" exists, the person may be temporarily stopped and detained to allow the officer to "investigate the circumstances that provoke suspicion," as long as "[t]he stop and inquiry [are] reasonably related in scope to the justification for their initiation." Stated another way, the scope of the questions asked during an investigative stop must bear a reasonable relationship to the reasons for which the stop was made in the first place.

Id. at 94 (citations omitted).

¶12 Here, Olson informed Avery that he had been stopped because of his obstructed view out of the front windshield. However, after making the stop, Olson never asked Avery any questions, nor conducted any further investigation of this alleged motor vehicle violation. Olson did, however, inquire as to Avery's identity, destination and purpose. This was proper. Avery responded that he was from Two Rivers, was not familiar with the Sheboygan area and was trying to head north to go home. Avery also provided Olson with his identification.

¶13 Once an individual provides this preliminary information, the scope of the officer's inquiry may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention. *Id.* These factors must be particularized and objective. *Id.* Thus,

[i]f, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun.

Id. Furthermore, the validity of the extension is tested in the same manner and with the same criteria as the initial stop. *Id.* at 94-95.

¶14 Here, there is no indication that Olson had any additional suspicious factors sufficient to give rise to a reasonable articulable suspicion that Avery and his passenger had committed or were committing an offense separate and distinct from the obstructed window violation. Avery's identification allowed Olson to verify that he was, in fact, from Two Rivers.³ There was no reason for Olson to doubt Avery's story or to separate the passenger for questioning. This is borne out by Olson's own testimony:

[Counsel:] And isn't it true that you had no reason to suspect that they were going to engage in any type of criminal behavior?

[Olson:] I would have no way of suspecting. I mean, that's why I stopped them was to check them out, see what they were up to, I guess.

[Counsel:] And after you received the explanation, you had no reason to suspect anything other than what he had told you, correct?

[Olson:] After he explained his activities, no, I had no reason to suspect anything.

³ The State's brief suggests that Avery's prior drug contacts with the police may have given Olson reason to further question Avery. However, we have observed before that there is widespread recognition that police awareness of an individual's prior criminal record, in and of itself, is insufficient to provide a basis for reasonable suspicion that would justify stopping and detaining the individual. *State v. Betow*, 226 Wis. 2d 90, 95 n.2, 593 N.W.2d 499 (Ct. App. 1999).

Olson additionally testified that he did not believe Avery or the passenger to be either armed or dangerous. Nor had he received any reports that either the vehicle or the occupants had been involved in criminal activity.

¶15 In light of Olson's own testimony, we cannot conclude that he had the requisite reasonable suspicion to continue or expand the traffic stop past the point of questioning Avery and verifying his identification. As such, we conclude that the trial court erroneously denied Avery's motion to suppress evidence.

CONCLUSION

¶16 Assuming arguendo that Olson had probable cause to stop the vehicle Avery was operating for a motor vehicle offense, we nonetheless conclude that Olson did not have the requisite reasonable suspicion to extend and continue the detention for purposes unrelated to the motor vehicle offense. Therefore, the evidence obtained as a result of the continued detention should have been suppressed. We reverse Avery's judgment of conviction and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

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

