COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3439 **Cir. Ct. No. 00-FO-2105**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DANIEL J. PHILLIPS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 BROWN, J.[1] The State of Wisconsin appeals a ***Terry***[2] issue decided adversely to it. The State argues that when the officer saw a car door fly open while the automobile was making a left turn and then saw the passenger close the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

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

door, that circumstance justified the officer in stopping the vehicle on suspicion that someone in the car might have been trying to get out. We agree with the trial court, however, that the mere opening of a passenger-side door and the closing of it by a passenger, without more, cannot form the basis for a stop based on reasonable suspicion that a crime is being committed. We affirm.

¶2 An officer observed a vehicle making a left turn. At the apex of the turn, the officer observed the passenger door completely swing open and then "the subject in the front seat … reached out and closed it …." The officer thought that was suspicious. The officer said that it was the first time in ten years as an officer that he had seen a car door fly open "as a car is driving." The officer said: "I didn't know if someone was having difficulties in the car, trying to get out of the car. It just appeared to be suspicious to me." The officer stopped the car, smelled intoxicants, tested the driver who, it turned out, was not intoxicated and cited the passenger, Daniel J. Phillips, for underage consumption of intoxicating beverages contrary to WIS. STAT. § 125.07(4)(b). Phillips thereafter brought a motion to suppress all evidence obtained subsequent to the stop on the grounds that the stop was illegal because it was not based on reasonable suspicion that a crime had occurred, was occurring or was about to occur. The trial court granted the motion and the State appeals.

¶3 Whether an investigatory stop meets constitutional and statutory standards is a question of law which the appellate court reviews de novo. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶4 The State correctly relates the standards by which questions relating to investigatory stops are reviewed. We will repeat the State's citations to that effect as follows: An investigative stop of a vehicle is appropriate when an officer

possesses specific and articulable facts which would warrant a reasonable suspicion that the occupants have committed or may commit a crime. ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). This standard has been codified in WIS. STAT. § 968.24. Reasonable suspicion is a test of common sense. ***State v. Anderson***, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990). A reviewing court must consider what a reasonable officer would reasonably suspect in light of his training and experience. ***Id.*** at 83-84. An officer is not required to rule out the possibility of innocent behavior, nor is the officer required to have probable cause that a crime has occurred before initiating the stop. ***Id***. Suspicious conduct is by its very nature ambiguous and the function of the stop is to freeze the situation so as to resolve the ambiguity quickly. ***Id***. An officer's training and experience are factors to be considered. An officer must "reasonably suspect, in light of his or her own experience, that some kind of criminal activity has taken or is taking place." ***Richardson***, 156 Wis. 2d at 139.

¶5 With this legal backdrop as its guide, the State then launches into its theory of why the officer's stop here was based on reasonable suspicion. The State points out that the officer had ten years of experience, had never before seen a car door fly open and be closed in the manner that it did, and that this lack of past history alone made it reasonable to investigate whether a kidnapping was underway.

¶6 The State observes that the trial court opined how a car door opening and closing while the car is moving is not a violation of the law. The State then takes issue with the trial court's conclusion that, without more facts, an officer could not make the reasonable inference that a crime was being or had been committed. In the State's view, innocent behavior does not prevent an officer from making a stop on reasonable suspicion that a crime is being committed

simply because it is innocent behavior. The State cites ***State v. Waldner***, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), where our supreme court related a brief accounting of facts and the ultimate holding of the United States Supreme Court based on those facts in the seminal case of ***Terry v. Ohio***, 392 U.S. 1 (1968). According to the ***Waldner*** court, the facts in ***Terry*** were as follows: An officer saw two persons repeatedly walk back and forth in front of a store window at 2:30 in the afternoon and confer with each other. ***Waldner***, 206 Wis. 2d at 59. The United States Supreme Court acknowledged that while walking back and forth in front of a store in mid-afternoon is perfectly legal behavior, the court was satisfied that reasonable inferences of criminal behavior, though lawful, could be suspicious. ***Id.***

¶7 Based on the State's reading of how our supreme court treated ***Terry*** in its ***Waldner*** decision, the State comes to the following conclusion: ***Terry*** must stand for the proposition that conduct, innocent or not, can be suspicious and that an officer's instinct based on training and experience can alone determine whether innocent conduct can nonetheless be categorized as suspicious.

¶8 A closer reading of ***Terry*** yields the conclusion that an officer's experience does *not*, standing alone, suffice to turn innocent behavior into suspicious criminal behavior. In truth, ***Terry*** stands for a totally different proposition. A close reading shows the following: An experienced police officer observed the actions of two men. ***Terry***, 392 U.S. at 5. He saw one of the two leave and walk past some stores, pausing to look into a store window, and then walk on a short distance, turn around and walk back toward the corner, pausing once again to look into the same store window. ***Id.*** at 6. He rejoined his companion and the two conferred briefly. Then the second man went through the same series of motions, strolling down the same street, walking a short distance,

turning back, peering into a store window again and returning to confer with the first man at the corner. ***Id.*** The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. ***Id.*** At one point, the two men conferred with a third man and then resumed their measured pacing, peering and conferring. ***Id.*** This went on for ten to twelve minutes. The officer, based on his experience and training, suspected that the two men were casing a job, a stick-up. ***Id.***

¶9 What this shows is much more than simply two men walking back and forth in front of a store window in the middle of the afternoon. The facts show a plan, a modus operandi, going on between three men. The going back and forth is more than mere happenstance and more suggestive of something other than innocent conduct. It occurs over a time span of ten to twelve minutes and is conduct which is conducive to something other than innocent behavior. A logical inference can be drawn that the two men were planning or casing the store for subsequent criminal activity. Thus, all the facts taken together weave a story such that a reasonable person with the facility for logical deduction could arrive at the inference that a stick-up was imminent. That is what ***Terry*** is about.

¶10 ***Waldner*** also provides valuable insight. There, an officer saw Waldner's car traveling down main street at a slow rate of speed. ***Waldner***, 206 Wis. 2d at 53. It stopped briefly at an intersection, although there was no stop sign or light, and then accelerated suddenly. ***Id.*** The officer then observed the car stop, the driver's side car door open and the driver pour what looked like a mixture of liquid and ice out of a plastic glass onto a roadway. It was 12:30 in the morning. ***Id.*** The trial court opined that "[n]ormally, a person drives at a rate of speed, comes to a corner, they want to turn the corner and they turn the corner. They may slow down, but they don't drive in this manner." ***Id.*** at 57-58. Our

supreme court agreed with the trial court that while each fact standing by itself is innocent activity, when all the facts are put together, there was a reasonable basis to believe that the driver was not acting normally and was operating while intoxicated. ***Id.*** at 58. Of particular importance to the analysis in this case, our supreme court wrote:

> Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts. That is what we have here. The facts gave rise to a reasonable suspicion that something unlawful might well be afoot.

Id.

¶11 Neither ***Terry*** nor ***Waldner*** stands for the proposition that even based on one innocent detail, an experienced officer can deduce that criminal activity might be afoot. Rather, both cases stand for the proposition that it was a convergence of several facts which allowed the officers to deduce certain logical conclusions. In ***Terry***, one trip or a few trips to a store window might be innocent. But two dozen trips by two people who confer with each other, and then a third person, can lead a reasonable person to believe that the trips are not for an innocent purpose. In ***Waldner***, slowing down at an intersection and speeding up again may be innocent activity. But when coupled with the fact that the driver then stopped and poured a mixture of liquid and ice from a plastic cup at 12:30 in the morning, the logical deduction is that impaired driving was taking place. As Phillips cites ***Belich v. Szymaszek***, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999), in his brief:

> An elementary principle is that an inferred fact is a logical, factual conclusion drawn from basic facts or historical

> evidence. It is the probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience.

¶12 Thus, we learn that certain "consequences" or conclusions can be drawn from basic facts. It may not be the right conclusion, ultimately. But, according to the law on investigative stops, it does not have to be. Still, the officer has to get from the facts to the consequence by means of "logic and human experience." It is not enough that an officer draws an inference based upon training and experience. The officer must have observed building blocks of articulable facts which, even though innocent by themselves, when taken together, the sum and substance thereof leads to a reasonable conclusion—dictated by logic and human experience—that a crime has been or is about to be committed. That is the proper test we apply.

¶13 This case is not merely about a car door opening and closing while the car is operating. This case is about an officer observing a passenger side-car door swinging open and the passenger himself reaching out and closing that car door. There is nothing inherently suspicious about a passenger closing a passenger-side door that has swung open. In fact, in human experience, people in cars open and close doors while the car is in motion all the time. Sometimes it is to secure the door. Sometimes it is to throw something out. But the fact is, opening and closing a car door, without more, simply is not indicative of criminal conduct by any measure of human experience. Moreover, if a car door accidentally swings open, human experience would dictate that the person nearest the errant door would want to close it for safety reasons. Not only is the closing of such a door innocent activity, it is responsible and commonsense behavior.

¶14 In this case, we have no more basic facts or historic evidence available which would lead to a different logical inference. There is, for example, no evidence of erratic driving, no evidence of a struggle going on in the car, no evidence that the car door was closed to keep someone from being able to get out. There is simply nothing here, when all the facts are accumulated, which leads a person to logically believe that things are occurring which are out of the ordinary—out of the ordinary enough for a reasonable police officer to believe that criminal conduct is either occurring or is about to occur.

¶15 We have perused cases in other jurisdictions in an attempt to find one instance where a court upheld a stop simply because the officer saw a passenger close a door that had opened while the car was moving—on the basis that a kidnapping might be taking place. We have found none. We did find the following cases. In ***Gonzalez v. City of New York***, 2000 WL 1678036 (S.D.N.Y.), *aff'd*, 2002 WL 500313 (2d Cir. N.Y. 2002), an officer observed a car where "[t]he horn was honking like someone needed help. The car was swerving, stopping, moving, stopping, swerving and then we saw the passenger side door kick open with feet coming out. That's what I saw, like, someone was, like, trying to get out." Based on these facts, the district court had no trouble finding that the stop was reasonable. ***Gonzalez*** provides a nice contrast with the case here. ***Gonzalez*** was laced with several facts, building blocks, which would lead a reasonable person to believe that the door to the car was opened because someone wanted to get out. We do not have that here.

¶16 In ***Weaver v. State***, 430 S.E.2d 60, 61 (Ga. Ct. App. 1993), police had a tip from an anonymous tipster that a vehicle contained drugs. The officers saw the car and applied their flashing lights and siren. ***Id.*** At that time, the vehicle sped past the squad car and one officer saw the passenger door of the

suspect vehicle open and close. ***Id.*** Again, we see a building block of facts, which, when taken together, lead to a logical conclusion that drugs were being thrown out of that car, just like there was a logical conclusion in ***Terry*** that two men were casing a business for a stick-up and just like the logical conclusion in ***Gonzalez*** that someone was trying to get out of a moving vehicle. We do not have those building blocks here.

¶17 Finally, we mention ***In the Matter of Sean H.***, 578 N.Y.S.2d 156 (N.Y. App. Div. 1992). In this case, officers saw a leg protruding from an open rear door of a moving cab. When the officers approached the cab, they observed an individual flee from the cab. The individual was pursued and caught. ***Id.*** The cab driver told the officers he had been robbed. It was the convergence of an unusual sight, a leg sticking out of a moving cab and flight, that gave officers the reasonable suspicion to believe that criminal activity had taken place. We do not have that convergence here.

¶18 In sum, innocent activity alone cannot lead to a conclusion that criminal activity is at hand. In this instance, all we have, other than the car door swinging open and the passenger's closing of the car door, is the officer's experience that he had never seen that happen before. But we do not understand how this could possibly lead to an inference that someone is in the car wanting to get out. There has to be some other fact or facts that point to such a deduction, otherwise the deduction is not founded on logic or human experience. We affirm.

By the Court.—Order affirmed.

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