COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1879-CR **Cir. Ct. No. 01-CM-16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR B. PATTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: WILBUR W. WARREN, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, P.J.[1] Arthur B. Patton appeals from a judgment of conviction for obstructing an officer as a repeat offender contrary to WIS. STAT. §§ 946.41(1) and 939.62(1)(a). Patton contends that the trial court erred in

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

denying his motion to suppress evidence because the arresting officer did not have reasonable suspicion to justify an investigatory stop pursuant to WIS. STAT. § 968.24 and ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). We agree with Patton. We reverse the judgment and remand for further proceedings.

FACTS

¶2 The following is a summary of the relevant evidence presented at the suppression hearing. On January 1, 2001, Officer Pablo E. Torres of the City of Kenosha Police Department observed a vehicle with at least two occupants legally parked in front of the Victorian Inn restaurant on 22nd Avenue where a New Year's Eve party was being held. Torres testified that it is very rare to see an occupied vehicle in that area at that time of night and that a car occupied in the early hours of New Year's Day would be of more concern because a lot more people are out drinking. Torres advised dispatch that he and a training recruit would be making contact with the vehicle. Torres testified that he wanted to expose his recruit to "field contacts … as well as to see if the occupants of the vehicle … may be drinking."

¶3 Torres turned his squad car around and parked about four parking stalls to the south of the vehicle. Torres did not activate his siren or flashing lights. As Torres was exiting the squad car and walking toward the vehicle, dispatch informed him that the vehicle was registered to "Mrs. Patton." Torres recognized Patton's name from a prior traffic citation and a prior arrest for carrying a concealed weapon.

¶4 When Torres was approximately four feet from making contact with the driver, he turned on his flashlight. The person in the operator's seat, later identified as Patton, turned around and appeared to be startled by the light. Upon

seeing Torres, Patton "ducked his hands down in between the driver's seat and driver's side door." Torres was concerned for his safety and immediately told Patton to put his hands up. Patton did not comply with Torres' request even after repeated orders to do so. Patton began to argue with Torres, stating that Torres was harassing him and that he, Patton, was doing nothing wrong. Patton was arrested and later charged with two counts of obstructing and resisting an officer.

¶5 Patton brought a motion to suppress, contending that Torres did not have reasonable suspicion under ***Terry***, as codified in WIS. STAT. § 968.24, to conduct an investigatory stop. The trial court, while acknowledging that "there was really no suspicion," nonetheless held that the early morning hour and the high-crime nature of the area justified the investigation. Following the denial of his motion to suppress, Patton pled no contest to one of the charges and the other charge was dismissed. Patton appeals the trial court's denial of his motion to suppress.

DISCUSSION

¶6 When we review a trial court's decision regarding a motion to suppress evidence, the court's findings of fact will be sustained unless they are contrary to the great weight and clear preponderance of the evidence. ***State v. Allen***, 226 Wis. 2d 66, 70, 593 N.W.2d 504 (Ct. App. 1999). However, we independently examine the circumstances of the case to determine whether the constitutional requirements of reasonableness have been satisfied. ***Id***.

¶7 In ***Terry***, 392 U.S. 1 at 22, the Supreme Court stated that "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." In order to execute a valid investigatory

stop, ***Terry*** requires that a police officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***Allen***, 226 Wis. 2d at 71. The test for the validity of a stop was set forth in ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996):

> The test is an objective one, focusing on the reasonableness of the officer's intrusion into the defendant's freedom of movement: "Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or "hunch" … will not suffice.'" (Citation omitted.)

¶8 Whether a stop meets statutory and constitutional standards are questions of law which we review de novo. ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶9 Patton argues that the facts known to Torres at the time of the stop were not sufficient to create a reasonable suspicion. The State does not defend the trial court's ruling that the early morning hour and the high-crime nature of the area justified Torres' decision to detain the occupants of the vehicle under ***Terry*** and WIS. STAT. § 968.24. Instead, the State argues that the investigatory stop did not begin until Torres observed Patton make a "furtive gesture" and that such gesture constituted reasonable suspicion.

¶10 We disagree with the State. A ***Terry*** stop occurs when an officer in some way restrains the liberty of a citizen by means of physical force or show of authority. *See* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). In determining whether a contact between a citizen and a police officer is a "stop" that implicates ***Terry***, the crucial consideration is whether the citizen was under a reasonable

impression that he or she was not free to leave the officer's presence. ***United States v. Wylie***, 569 F.2d 62, 68 (D.C. Cir. 1977). Whether a reasonable impression exists depends on what a reasonable person, innocent of any crime, would have thought had he or she been in the citizen's shoes. ***Id***.

¶11 We conclude that the stop began when Torres, in uniform and accompanied by another officer, shined his flashlight on Patton and Patton became aware of Torres' presence. This conduct constituted a show of authority such that a reasonable person in Patton's position would not have considered himself or herself free to leave. Only thereafter did Torres observe Patton's furtive gesture. It logically follows that a ***Terry*** stop cannot be justified by evidence or observations obtained after the stop has commenced; rather, the justification for the stop must be grounded in facts and information known to the police officer prior to the detention. Therefore, we reject the State's argument that Torres' observation of Patton's furtive gesture can be factored into the reasonable suspicion analysis.

¶12 We therefore turn to the different justification offered by the trial court for the detention, even though the State does not defend that ruling on appeal. In denying Patton's suppression motion, the trial court stated:

> There are things about this that trouble me with respect to Officer Torres approaching the vehicle when there was really no suspicion, which I think the State concedes, as to any criminal activity or any type of activity afoot that would be worth investigating …. But given the circumstances, that which is unreasonable at 1:00 o'clock in the afternoon may not be unreasonable at 3:55 in the morning in an area such as that described here [as being a high-crime area].

> [I]f this exact same set of facts had occurred at 1:00 o'clock in the afternoon at the same location, I would clearly find there is no basis for a ***Terry*** stop ….[2]

¶13 While the early morning hour and the high-crime neighborhood are factors to consider in determining reasonable suspicion, *see* ***Allen***, 226 Wis. 2d at 75, we conclude that the absence of ambiguous behavior on Patton's part weighs against a finding of reasonable suspicion in this case.

¶14 In ***Waldner***, 206 Wis. 2d at 60-61, the court held that while there was nothing illegal about the suspect's unusual driving at a late hour or his dumping of liquid and ice from a plastic cup, this series of acts "do coalesce to add up to a reasonable suspicion." The court observed that:

> 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. These facts gave rise to a reasonable suspicion that something unlawful might well be afoot.

Id. at 58.

---

[2] We note that the trial court additionally relied upon a "community caretaker" function in denying Patton's motion, observing that given the early morning hour in January, the police are often "assisting stranded motorists" and "people who need assistance." Torres testified that he approached the vehicle "[a]s a community caretaker, and also … that [he had] made prior drug arrests in that area, and that [he knew] people commonly sit in cars when it's cold outside to conduct illegal activity."

The present state of community caretaker law does not allow for the application of that doctrine to the facts in this case because Torres harbored a suspicion of illegal activity when he decided to approach Patton's vehicle. ***State v. Ferguson***, 2001 WI App 102, ¶¶10-11, 244 Wis. 2d 17, 629 N.W.2d 788 (the community caretaker function must be totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute).

¶15 Likewise, in ***Allen***, the court observed that while hanging around in a high-crime area, alone, would be insufficient to support a finding of probable cause, "hanging around late at night in a residential neighborhood, briefly getting into a car that stops and then remaining in the neighborhood for five to ten minutes after the car leaves" together formed a basis for reasonable suspicion. ***Allen***, 226 Wis. 2d at 74-75.

¶16 At the time Torres approached Patton's vehicle, there was no indication that Patton was committing, had committed, or was about to commit a crime. While Patton was parked in a high-crime area at an early morning hour, there are no other "building blocks" upon which to base a finding of reasonable suspicion.[3] We therefore conclude that the trial court erred in denying Patton's motion to suppress. We reverse the judgment of conviction and remand for further proceedings on the criminal complaint.

By the Court.—Judgment reversed and cause remanded.

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

[3] We note that Torres received information while exiting his squad car that the vehicle he was approaching was registered to a "Mrs. Patton." However, prior to shining his light on the driver and Patton turning toward him, Torres did not know whether the individual in the car was indeed the Patton he had previously arrested for carrying a concealed weapon. And even if Torres had known that Patton was in the vehicle, we see nothing about the surrounding circumstances which reasonably suggests that Patton "is committing, is about to commit or has committed a crime" as required by WIS. STAT. § 968.24.