COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2362 **Cir. Ct. No. 02-CT-21**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TERRY L. HOLLOWAY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Reversed.*

¶1 PETERSON, J.[1] The State appeals an order suppressing evidence. The court determined that there was no reasonable basis to stop Terry Holloway's vehicle and therefore the stop was unlawful. We conclude there was reasonable basis for the stop and reverse the order.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All statutory references are to the 2001-02 version unless otherwise noted.

BACKGROUND

¶2 On March 30, 2002, just before 3 a.m., deputy Jeffrey Wallace made a traffic stop near an intersection of a county highway in rural Rusk County. While performing field sobriety tests on the driver, Wallace noticed a white vehicle pass by three times in about five minutes at a speed of twenty-five to thirty miles per hour in a fifty-five-mile-per-hour zone. Wallace became concerned for his safety as well as the safety of the people in the car he had stopped, so he requested another deputy to come to the scene.

¶3 Deputy Peter Jones arrived to assist Wallace. After Jones's arrival, the white vehicle passed by two more times. Jones then left the scene of the stop to attempt to find the white vehicle. After finding it, Jones followed as the vehicle again headed back toward the location of the stop. Jones noted the vehicle swerved slightly in its lane.

¶4 Jones activated his overhead lights to stop the car. He observed the car veer right, veer left crossing the centerline, come almost to a complete stop in the middle of the road, and then pull over onto the shoulder of the road. The driver, Holloway, was ultimately arrested and charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol concentration.

¶5 Holloway filed a motion to dismiss the complaint challenging its sufficiency. At the hearing, it was determined that she was actually concerned with the legality of the stop, not with the adequacy of the complaint. The trial court ruled there was no reasonable suspicion and suppressed all evidence obtained after the stop. The State appeals.

DISCUSSION

¶6 "We apply a two-step standard of review to questions of constitutional fact." ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Reasonable suspicion for an investigatory stop is a constitutional fact because it relates to the constitutional protections against unreasonable searches and seizures afforded by the United States Constitution and article I, section 11 of the Wisconsin Constitution. ***Id.*** The first step in the two-step standard of review is to "review the circuit court's findings of historical fact, and uphold them unless they are clearly erroneous." ***Id.*** The second step is to "review the determination of reasonable suspicion de novo." ***Id.*** Here, there is no dispute as to the court's findings of fact. We therefore proceed to the second step.

¶7 To stop a person, a police officer must have reasonable suspicion that criminal activity is afoot. ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). Reasonableness is measured against an objective standard taking into consideration the totality of the circumstances. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). The question of what constitutes reasonable suspicion is a commonsense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. ***State v. Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989).

¶8 Holloway argues there was no reasonable suspicion because she had not committed any traffic violation or any other crime, nor was there any reason to suspect she had. She maintains that the only facts the officers had were that she had driven slowly by the scene a number of times at night in a rural area. She

claims these facts do not support a reasonable belief that she was committing a crime.

¶9 The State argues that there was reasonable suspicion to justify the stop. We first note, however, that the State includes Holloway's actions after Jones turned on his overhead lights to stop her. We conclude that the stop began when Jones activated his overhead lights. This conduct constituted a show of authority such that a reasonable person in Holloway's position would not have considered herself free to leave. A ***Terry***[2] 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 do not include in our analysis the veering, crossing the centerline and stopping in the middle of the road.

¶10 Even without that information, however, we conclude the stop was reasonable. In ***Terry v. Ohio***, 392 U.S. 1 (1968), the Supreme Court recognized 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." ***Id.*** at 22. The Fourth Amendment does not require officers to simply shrug their shoulders and allow a crime to occur or a criminal to escape. Instead, ***Terry*** recognizes that it may be the essence of good police work to adopt an intermediate response. *See* ***id.*** at 23. A brief stop may be reasonable in light of the facts known to the officer at the time. ***Id.*** at 21-22.

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

¶11 We stress that the standard is an objective one: what a reasonable officer could have reasonably suspected, not what these particular officers suspected. The officers had the following information available to them: the incident took place at just before 3 a.m., which is shortly after bar-closing time; they were in a dark, rural area with no other traffic; Holloway's car passed by multiple times, traveling at only twenty-five to thirty miles per hour in a fifty-five-mile-per-hour zone. This is unusual driving behavior. An officer could reasonably suspect that criminal activity was afoot. For example, an officer could reasonably suspect that Holloway was intoxicated or was preparing to interfere with the arrest taking place. We therefore conclude that the trial court erroneously suppressed the evidence.

By the Court.—Order reversed.

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