COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3052-CR **Cir. Ct. No. 02-CT-102**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY D. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Gary Moore appeals a judgment of conviction following a no contest plea to one count of operating a motor vehicle while intoxicated, second offense. Moore argues the trial court erred by denying his motion to suppress evidence. We disagree and affirm the judgment.

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

BACKGROUND

¶2 Sergeant Mike Mosley of the Augusta Police Department was called to the scene of a car in the ditch just north of the City of Augusta on February 28, 2002, at just after 8 p.m.[2] About the same time as the dispatch, a citizen told Mosley there was a vehicle in the ditch and that he saw a male who appeared to be intoxicated walking near the vehicle.

¶3 When Mosley arrived at the scene, the only person present was Charlotte Moore. Initially, Charlotte said she was the driver of the car. After further questioning, however, she admitted that Larry Scott had been the driver. She stated that Scott and her husband, Gary, had been drinking alcoholic beverages at the Moores' home. After Scott left, Gary and Charlotte learned that Scott's vehicle had gone into the ditch. They went to the scene and Gary gave Scott a ride home.

¶4 Mosley noticed a vehicle driving down the highway toward them, but was unable to identify the driver or how many people were in the car. The car stopped at a stop sign and turned right onto another street. When asked, Charlotte stated Gary was the driver of that car. Mosley followed and stopped Gary's car. Mosley testified that Gary was not under suspicion for violating any laws. Instead, Mosley's sole basis for stopping the car was to see if Scott was inside, which he was not.

[2] Mosely had authoirty outside the City of Augusta based upon a mutual aid agreement between the Augusta Police Department and the Eau Claire County Sheriff's Department.

¶5 After Mosley made the stop, he noted an odor of intoxicants on Gary's breath. Gary was asked to perform field sobriety tests and was placed under arrest for operating while intoxicated.

¶6 Gary moved to suppress all evidence resulting from the stop, arguing there was no legal basis for the stop. The trial court denied the motion, citing ***State v. Krier***, 165 Wis. 2d 673, 478 N.W.2d 63 (Ct. App. 1991). First, the court noted that we determined in ***Krier*** that reasonable suspicion of a civil forfeiture is sufficient to justify an investigative stop. Then the court determined that Mosley had reasonable suspicion that Scott may have been driving while under the influence, a civil offense, and it was reasonable for Mosley to believe Scott was in Gary's vehicle.

¶7 Gary pled no contest and was convicted of one count of operating a motor vehicle while intoxicated, second offense. He now appeals.

ANALYSIS

¶8 When reviewing a trial court's order denying a motion to suppress evidence, we will uphold the trial court's factual findings unless they are clearly erroneous, that is, against the great weight and clear preponderance of the evidence. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether the facts as found by the court meet statutory and constitutional standards is a question of law we review independently. *See* ***id.*** at 137-38.

¶9 An investigative stop is a "seizure" that intrudes upon an individual's right to be free of governmental interference. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11; *see also* ***State v. Harris***, 206 Wis. 2d 243, 254 n.8, 557 N.W.2d 245 (1996). Certain investigative stops are, nevertheless,

permitted due to "the strong public interest in 'solving crimes and bringing offenders to justice.'" ***Harris***, 206 Wis. 2d at 259 (citation omitted). Specifically, an investigative stop is constitutionally permissible if "any reasonable suspicion of past, present, or future" illegal activity can be drawn from the circumstances. ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989); *see also* WIS. STAT. § 968.24; ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968).

¶10 Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." ***Terry***, 392 U.S. at 21. The test is an objective one: Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience? ***Jackson***, 147 Wis. 2d at 834. Additionally, a law enforcement officer may make an investigatory stop based on observations of lawful conduct when reasonable inferences drawn from the conduct are that illegal activity is afoot. ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

¶11 Gary argues the stop was made without probable cause or reasonable suspicion. We first note that any arguments Gary makes regarding probable cause are inapplicable here. The standard for investigatory stops is reasonable suspicion. *See* WIS. STAT. § 968.24; ***Terry***, 392 U.S. at 21-22. We therefore analyze Gary's arguments using that standard only. Furthermore, suspicion is not limited to criminal activity. As the trial court noted, we determined in ***Krier*** that an officer may perform an investigative stop pursuant to § 968.24 when the officer reasonably suspects a person of activity that constitutes either a crime or a civil forfeiture.

¶12 Here, Mosley knew the following: a vehicle was in the ditch; a citizen observed someone near the car who appeared intoxicated; Charlotte initially gave Mosley false information; Scott and Gary had been drinking alcohol and Gary was now driving Scott home; Gary's headlights illuminated Mosley at the scene so that presumably Gary saw the officer; and Gary then turned and drove away from the scene, despite the fact that Charlotte was still there. Based on this information, a reasonable officer would suspect that illegal activity was afoot. An officer could reasonably suspect that Gary did not want to encounter an officer. Perhaps Scott was still in the car, or perhaps Gary, who had been drinking earlier, was himself under the influence. Because an officer would be reasonably suspicious of a criminal or civil offense, the investigatory stop was valid.

¶13 Gary also contends that the trial court's reliance on ***Krier*** was misplaced. Gary argues that, unlike the officer in ***Krier***, Mosley did not suspect Gary of any specific criminal activity or civil violation. Therefore, he maintains Mosley did not have sufficient reasonable suspicion to serve as a basis for the stop.

¶14 Gary's focus on what Mosley actually suspected is misplaced. The test is not what a specific officer suspects, but what a *reasonable* officer would suspect. *See* ***Jackson***, 147 Wis. 2d at 834. Additionally, nothing in the Fourth Amendment or WIS. STAT. § 968.24 requires an officer to conclude that any specific illegal activity is or has taken place. ***State v. Anderson***, 155 Wis. 2d 77, 86, 454 N.W.2d 763 (1990) (citing ***Jackson***, 147 Wis. 2d at 834 (stop was unrelated to any specific reported or observed criminal activity)). Instead, the officer needs to only reasonably suspect that some type of illegal activity is afoot. As explained above, the things Mosley knew at the time he stopped Gary's car

would lead a reasonable officer to believe that some type of illegal activity was afoot.

By the Court.—Judgment affirmed.

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