

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 2011

A. John Voelker
Acting 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. 2011AP828-CR

Cir. Ct. No. 2009CT53

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW W. ROSENTHAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Andrew Rosenthal appeals a judgment of conviction for operating while intoxicated, fourth offense. Rosenthal asserts the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

circuit court erred by denying his suppression motion, and contends officer Jeffrey Oberg did not have reasonable suspicion to stop his vehicle. We affirm.

BACKGROUND

¶2 Rosenthal was charged with operating while intoxicated, fourth offense. He moved to suppress the evidence, alleging Oberg illegally detained him.

¶3 At the motion hearing, Oberg testified that on December 7, 2008, at approximately 2:30 a.m., he was traveling west on Northland Avenue in Grand Chute, Wisconsin, when the vehicle in front of him turned right on an access road. The access road is a dead-end road that provides access to two businesses: a seasonal greenhouse and a twenty-four hour storage facility. Both businesses were closed; however, general access to the storage facility remained open.

¶4 The vehicle passed the greenhouse and traveled toward the storage facility. Oberg found it peculiar that the vehicle was traveling toward the storage facility because that particular facility was a high priority patrol area and “of all the storage[complexes], ... [that] one gets broken into the most.” He admitted he was suspicious of any vehicle that entered this facility at this time in the morning. Oberg pulled over on Northland Avenue and observed the vehicle as it entered the storage facility complex.

¶5 The storage complex is comprised of a business office and six large buildings that house the individual storage units. When a vehicle enters the complex, it is facing north with the business office on its left and one of the storage buildings on its right. The remaining five storage buildings are set back in a row behind the business office and first storage building.

¶6 When Oberg could no longer see the vehicle from his vantage point on Northland Avenue, he turned around, went back to the access road, and traveled to the storage facility. Oberg explained that it had just snowed, so he was able to follow the vehicle's tire tracks. When Oberg entered the facility, he followed the tire tracks to one of the set-back storage buildings. As he followed the tracks around the building, he was able to observe the vehicle's headlights and knew the vehicle was on the other side.

¶7 Oberg continued to follow the tracks around the building and determined the vehicle had not stopped at a unit. The vehicle then left the storage complex. Oberg found it suspicious that the vehicle had not stopped at a unit because this showed the vehicle did not have business to conduct. Oberg caught up with the vehicle when it reached the access road. Oberg activated his lights and stopped the vehicle. The driver, who was identified as Rosenthal, was ultimately arrested for operating while intoxicated. Oberg conceded that prior to stopping Rosenthal, he observed no bad driving.

¶8 The circuit court denied Rosenthal's motion to suppress, concluding Oberg had reasonable suspicion to stop the vehicle based on the totality of the facts. Rosenthal subsequently pled no contest and was convicted of operating a motor vehicle while intoxicated, fourth offense.

DISCUSSION

¶9 Whether there is reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. "A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the 'clearly erroneous standard,'

and the application of these historical facts to constitutional principles, which we review de novo.” *Id.*

¶10 A police officer may temporarily stop an individual when the officer reasonably suspects that the person has committed, is committing or *is about to commit an offense*. *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968); *see also* WIS. STAT. § 968.24. “Such a stop must be based on more than a police officer’s inchoate and unparticularized suspicion or hunch.” *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citations omitted). “The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *Id.*

¶11 Police officers, however, are not required to rule out the possibility of innocent behavior before initiating a *Terry* stop. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). If any reasonable inference of present or potential wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences, the police have a right to temporarily detain the suspect for purposes of inquiry. *Id.*

¶12 On appeal, Rosenthal argues that “[e]ven with the cumulative effect of the officer’s observations, any inference that Rosenthal was committing or about to commit a crime was nothing more than a hunch.” In support, Rosenthal relies on our decision in *State v. Young*, 212 Wis. 2d 47, 569 N.W.2d 84 (Ct. App. 1997).

¶13 In *Young*, an officer, who was conducting surveillance in a heavy drug trafficking area at 1:15 p.m., observed Young briefly meet with another individual. *Id.* at 420. Young was subsequently stopped on suspicion that a drug transaction had taken place. *Id.* We observed that “stopping briefly on the street

when meeting another person is an ordinary, everyday occurrence during daytime hours in a residential neighborhood.” *Id.* at 429-30. We concluded that, because Young’s conduct also “described the conduct of a large number of law-abiding citizens in the neighborhood,” the officer did not have enough particularized information to give rise to a reasonable suspicion of criminal activity. *Id.* at 430, 433.

¶14 Here, conversely, we conclude that Rosenthal’s conduct does not describe the conduct of a large number of innocent persons. *See id.* at 433. Oberg observed Rosenthal travel to a storage facility under the cover of night, enter the complex, encircle one of the set-back buildings, and then attempt to leave without stopping at a specific unit. Although it is not unlawful to travel to a twenty-four hour storage complex at 2:30 a.m., Oberg testified the activity was peculiar and explained he became very suspicious when the vehicle, after driving around one of the buildings, failed to stop at a unit, and attempted to leave. Oberg also considered this activity in light of his knowledge that the storage complex suffered the most break-ins of any storage facility and had been designated a high-priority patrol area. Considering the totality of the circumstances, we conclude Rosenthal’s conduct could give rise to a reasonable inference that Rosenthal was “casing” the premises² and, thus, Oberg had reasonable suspicion to conduct a *Terry* investigation. *See Anderson*, 155 Wis. 2d at 84.

² We also note that, while distinguishable, *Terry v. Ohio*, 392 U.S. 1, 4-7, 27-28 (1968), was a case where the Court determined the officer lawfully stopped Terry after making observations that led the officer to believe Terry was “casing a job.”

By the Court.—Judgment affirmed.

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

