COURT OF APPEALS DECISION DATED AND FILED

May 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP1537-CR

Cir. Ct. No. 2010CF987

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THEOPHILUS E. BREWER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Theophilus E. Brewer appeals from a judgment of conviction of possession of heroin with intent to deliver. He challenges the denial of his motion to suppress evidence. He argues that the police lacked a lawful basis

to stop his car and subject him to a search. We affirm the circuit court's denial of the motion to suppress evidence and affirm the judgment of conviction.

¶2 When an appellate court reviews an order denying a motion to suppress evidence, it will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). Brewer does not challenge the circuit court's findings of fact and we recite and rely on those findings.

¶3 An informant offered to make arrangements to buy heroin from a person known to the informant as "June."[1] Earlier in the day that he agreed to assist police, the informant had been arrested for the possession of heroin. He indicated he had bought heroin from June in the past. The informant called June in the presence of a police detective; the call was placed on speaker phone and the detective heard both sides of the conversation. The informant indicated to June that he had $300 and wanted to buy "a gram." Arrangements were made to meet the next day at a grocery store. The informant gave police a fairly detailed description of June, including that he wore "flashy like a gazelle type of eye glasses." The informant also indicated that June would be driving a blue Chevy Lumina in beat-up condition.

¶4 While the detective and informant waited at the grocery store the next day, June called and said he was pulling into the parking lot. Within a minute or minute and one-half, a beat-up blue Chevy Lumina drove into the lot. The

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[1] The informant was designated as a confidential informant throughout the suppression hearing. However, the informant testified at Brewer's jury trial and his identity was not kept confidential.

informant identified the person driving the Lumina as June and the detective observed June's distinctive glasses. Other officers were directed to stop the Lumina. Brewer was the person driving the Lumina and identified as June. Heroin was found in the car and in Brewer's personal possession.

¶5 Brewer argues that because he was immediately pulled from the car, he was arrested and searched incident to arrest. He argues that the police needed, but lacked, probable cause to arrest him because the police stopped his car before a drug transaction occurred and there was no reason to believe that the informant's claim that June was a heroin dealer was reliable. In contrast, the State characterizes the stop as a permissible stop for the purpose of investigating possible criminal behavior. The State contends that probable cause for arrest was not necessary to initiate the contact and that the constitutional "reasonable suspicion" standard adopted in ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), is all that must be satisfied.

¶6 Brewer's claim that he was immediately arrested without probable cause is raised for the first time on appeal. Brewer's trial counsel explained at the start of the suppression hearing that if Brewer testified, he would say he was pulled out of the car immediately and counsel would question whether a ***Terry*** stop occurred. Brewer did not testify at the suppression hearing and there was no evidence as to what occurred immediately after the stop and before the heroin was recovered. Brewer did not argue at the suppression hearing that he was immediately arrested. At trial the police officer who stopped Brewer's vehicle testified:

> I opened the door. The driver was removed from the vehicle. Then I saw laying on the seat what I believed to be heroin. I went to the rear of the vehicle. [Brewer] was

> placed into custody, and then I recovered I believe it was 16 bindles of suspected heroin from his pocket.

Brewer did not testify at the trial. Based on the uncontroverted evidence that Brewer was removed from the car and later placed in custody, we conclude that the officers initially conducted an investigatory ***Terry*** stop.[2]

¶7 To execute a valid investigatory detention of a person, an officer must "reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place." ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830, 834 (1990). The officer's "reasonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" ***Id.*** (quoting ***Terry***, 392 U.S. at 21). Objective and common sense tests apply to the question of whether an investigatory stop is reasonable. *See* ***State v. Waldner***, 206 Wis. 2d 51, 55–56, 556 N.W.2d 681, 684 (1996). Whether an investigative stop meets the constitutional standard of reasonableness is a question of law subject to *de novo* review by this court. ***Id.*** at 54, 556 N.W.2d at 683.

¶8 The police officer listened to the phone conversation in which the informant arranged to purchase drugs from June. The informant gave the officer a description of June and of the car June would likely be driving. The officer heard June confirm his arrival at the meeting place. The details of the informant's descriptions were confirmed by an officer when the car pulled into the parking lot of the arranged meeting spot. The corroboration of the predictive information

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[2] An appellate court is not limited to examination of the suppression hearing record and may also examine the trial evidence. ***State v. Gaines***, 197 Wis. 2d 102, 106 n.1, 539 N.W.2d 723, 725 n.1 (Ct. App. 1995).

provided by the informant demonstrated that the informant's familiarity with June and therefore, it was reasonable for the officer to believe the informant could provide reliable information about June's drug dealing. *See* ***State v. Sherry***, 2004 WI App 207, ¶13, 277 Wis. 2d 194, 203, 690 N.W.2d 435, 440. There was more than a reasonable suspicion that the person driving the described car was in possession of heroin and had come to that location to sell heroin. It was reasonable for the police to stop the car for the purpose of investigating whether an illegal sale of heroin was going to occur and the driver's status as a drug dealer.

¶9 Having a reasonable suspicion to stop Brewer's car and further investigate, the officers could then order Brewer out of the car. *See* ***State v. Johnson***, 2007 WI 32, ¶23, 299 Wis. 2d 675, 692, 729 N.W.2d 182, 190 ("In [***Pennsylvania v. Mimms***, 434 U.S. 106, 111 (1977)], the Court established a per se rule that an officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation."). Removing Brewer from the car was appropriate here for the additional reason that the officers possessed information that Brewer was a drug dealer. Circuit courts recognize the link between dangerous weapons and the drug trade, as well as the serious risks officers undertake when initiating contact with a suspect seated in a vehicle. ***Johnson***, 2007 WI 32, ¶¶25, 29, 299 Wis. 2d at 693, 696, 729 N.W.2d at 191, 192.

¶10 Once Brewer was out of the car, the officer observed in plain view suspected heroin on the seat Brewer had just vacated. Brewer's subsequent arrest and search incident to arrest was lawful. *See* ***State v. Robinson***, 2010 WI 80, ¶33, 327 Wis. 2d 302, 328, 786 N.W.2d 463, 476. There was no basis to suppress the drug evidence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.