COURT OF APPEALS
DECISION
DATED AND RELEASED

September 21, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 95-1291-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNY J. WALDNER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Richland County: KENT C. HOUCK, Judge. *Reversed*.

EICH, C.J.[1] Johnny J. Waldner appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant. The sole issue is whether the arresting officer had a reasonable suspicion that Waldner was committing, was about to commit or had committed a crime, so as to justify stopping and detaining him. We conclude that, under the totality of the circumstances of the case, the "reasonable suspicion" standard has not been met, and we therefore reverse the conviction.

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

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.'" ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554, *cert. denied*, 484 U.S. 979 (1987) (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)) (citations omitted); *see* § 968.24, STATS.

The test, which requires applying a generally stated reasonableness standard to the "totality of the circumstances" of the case, ***State v. Jackson***, 147 Wis.2d 824, 833, 434 N.W.2d 386, 390 (1989), is difficult to apply, "particularly by a law enforcement officer confronted with a situation in which he or she may have but a few seconds in which to make a determination." ***Guzy***, 139 Wis.2d at 679, 407 N.W.2d at 555. And we think it is probably best described as a "common sense test":

> What is reasonable under the circumstances? What would a reasonable police officer reasonably suspect in light of his or her training and experience? What should a reasonable police officer do?

State v. Anderson, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990) (citation omitted).

We do know that police officers "are not required to rule out the possibility of innocent behavior before initiating a brief stop," and that, as a result, "if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry." ***Id***. at 84, 454 N.W.2d at 766.

The only testimony taken at the suppression hearing was that of the arresting officer, Sgt. John R. Annear of the Richland Center Police Department. Annear saw Waldner's car traveling on a main street in Richland Center at a slow rate of speed. The car stopped briefly at an intersection where

there was no stop sign or light and then turned onto a cross-street, where, according to Annear, it then accelerated "at a high rate of speed"--which he described as reaching 20 to 25 miles per hour in "several seconds." He acknowledged that no laws had been broken.

Following the car, Annear saw it pull into a legal streetside parking space. The driver's-side door opened and Annear saw Waldner, in the driver's seat, pour some liquid--which he described as looking like "a mixture of liquid and ice"--out of a plastic glass onto the roadway.

Annear pulled up behind the car, noticing that Waldner had gotten out of the car. He described what happened next:

> He [Waldner] began walking around the front of [his car], and when I pulled up and identified myself, he began to walk away from the squad car.

At that point Annear asked Waldner to stop, which he did. The State concedes that the challenged stop was made at that point. The State asks us to accept the following inferences drawn from Annear's testimony to bolster Annear's decision to stop Waldner: (1) that it is likely that anyone driving a car at 12:30 a.m. "would be operating while under the influence of an intoxicant" because "it is common knowledge and common practice in the United States for persons to drink after work and at night"; (2) that because Waldner briefly stopped his car at the intersection, he was "confused," and, further, since "intoxicated persons are easily confused," he was intoxicated; and (3) that Waldner's sudden acceleration to 20 or 25 miles per hour could have been caused by a "sudden mood swing[]," as "[i]t is commonly known ... that intoxicated individuals experience sudden mood swings."

Beginning with the undisputed facts, it appears that, prior to being stopped, Waldner had been engaged in *nothing but* innocent and perfectly legal behavior. We appreciate, as we have noted above, that the law does not require officers to "rule out the possibility of innocent behavior" prior to making a stop, and that the officer is entitled to draw reasonable inferences from the facts, but we reject the State's argument that reasonable inferences from the facts of this case justify the stop under ***Terry***, ***Guzy***, ***Anderson*** and other applicable cases.

There are any number of reasons why someone would be driving a car at 12:30 a.m. that do not involve drinking or intoxication, and we do not think that the hour alone can lead to a reasonable inference that Waldner was driving while intoxicated. Similarly, a driver might well stop briefly before turning onto a lightly traveled street for reasons of safety, unfamiliarity with the neighborhood, some momentary malfunction of the automobile or any number of other reasons; there is nothing in such an act, whether considered by itself or in tandem with the other circumstances of this case, from which intoxication reasonably may be inferred. Finally, to infer from a driver's entirely legal acts of slowing, stopping and accelerating that he or she is experiencing "sudden mood swings" caused by intoxication is to stretch reason far beyond its breaking point. In short, we are not persuaded by the undisputed facts of the case that grounds existed to stop and detain Waldner on the night in question, nor has the State come forth with any *reasonable* inferences from those facts that would lead us to any other conclusion.

Citing ***Anderson***, 155 Wis.2d at 87, 454 N.W.2d at 767, the State next asks us to consider Waldner's act of walking around the front of his car and away from Annear's car as Annear was approaching him as evidence of "flight," which, according to ***Anderson***, may justify a stop. This is not a case like ***Anderson***, however, where the defendant, after spotting a police car while parking his own vehicle, drove away, turned into an alley and then onto another street, and stopped only when the officers activated their flashing red lights. ***Id***. at 80, 454 N.W.2d at 764. Nor is it a case like ***Jackson***, the primary authority relied on by the ***Anderson*** court. In ***Jackson*** the defendant, seeing an approaching police car, fled the scene on foot, "evad[ing] the [chasing] officer ... after running through yards and jumping fences." ***Jackson***, 147 Wis.2d at 826, 434 N.W.2d at 387. In this case, as we have discussed above, Annear testified simply that, as he approached Waldner's car, Waldner "began walking around the front [of his car] ... away from the squad car." Without more, those facts--judged in light of all of the other facts of the case, and in light of ***Anderson*** and ***Jackson***--do not, in our opinion, provide a basis for a reasonable suspicion that Waldner was fleeing, or was about to flee, from Annear at the time the stop was made.

We conclude, therefore, that the totality of the facts facing Sgt. Annear, and inferences *reasonably* drawn from those facts, do not reasonably justify more than the kind of inchoate and unparticularized suspicion or hunch

which fails to provide authority for police to stop or detain an individual under the cases. *See* ***Guzy***, 139 Wis.2d at 675, 407 N.W.2d at 554.

By the Court.—Judgment reversed.

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