COURT OF APPEALS
DECISION
DATED AND RELEASED

May 30, 1996

NOTICE

No. 95-2848-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL H. GATES,

Defendant-Appellant.

APPEAL from an order and a judgment of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Reversed and cause remanded*.

EICH, C.J.[1] Paul H. Gates appeals from a judgment convicting him of possession of marijuana. He pled to the charge, reserving for appeal his challenge to the trial court's order denying his motion to suppress evidence.

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

The issue is whether the police had grounds to stop Gates and search his vehicle (where the marijuana was found). We think they did not and reverse the order and judgment.

The facts are undisputed and derive from the testimony of the only witness to appear at the suppression hearing, the arresting officer, Grant County Deputy Sheriff Jack Johnson. Johnson and several other law enforcement officers were executing a search warrant at a farm owned by Keith Welsh. They were looking for stolen automobiles.

Johnson, who said he had been assigned "to secure the area and stop any vehicle that came into the farm area," saw Gates's car traveling down the adjacent road. Johnson acknowledged that he "did not know if the vehicle was going to be pulling into the [farm] driveway or if it was going to keep going by," but that when it appeared to be slowing down, he "assumed ... it was going to be pulling in," so he "stepped out onto the roadway" and flagged Gates down.

When Gates pulled over, Johnson asked him where he was going, and Gates replied that he and his passengers had been at a lumberyard down the road and were headed into Muscoda, "going the back way into town."[2] Johnson testified that while talking to Gates he smelled "what [he] believed to be marijuana coming from the vehicle." He then asked Gates and the others to get out of the car and, searching Gates, found "a cigarette paper with a green, leafy substance in it," which Johnson believed to be marijuana. In a search of Gates's car, Johnson found "several roaches" in the ashtray. Thus, the fruits of Johnson's search of Gates and his car formed the basis for Gates's conviction.

There is no question that there was no warrant in existence for the search of either Gates's person or his automobile. An officer may, however, stop a person for investigative purposes in cases where he or she may be said to have an "articulable suspicion that the person has committed or is about to

[2] Johnson testified that the road on which Gates was driving was not the most direct route between the two points, stating that "[a] person would not have to drive on Taylor Road to get to Muscoda from the lumberyard." Johnson's opinion in this regard was subject to extensive cross-examination.

commit a crime." ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968); ***State v. Goyer***, 157 Wis.2d 532, 536, 460 N.W.2d 424, 425-26 (Ct. App. 1990). The reasonableness of an investigative "stop" is a question of law, which we decide independently. ***State v. Kiper***, 193 Wis.2d 69, 79-80, 532 N.W.2d 698, 703 (1995).[3]

The only "suspicion" Johnson had--by his own admission--was his "assum[ption]" that the car traveling down the adjacent roadway was going to pull into the driveway of a farm being searched by officers for the presence of stolen automobiles, and Gates questions whether any court has held that police may stop citizens on public highways under the aegis of a warrant for the search of adjacent property.

We think it is an appropriate question on the facts of this case, and the State's only response is to refer us to ***Michigan v. Summers***, 452 U.S. 692 (1981), where police, searching a house for narcotics (pursuant to a warrant), were held to have reasonably detained a person found exiting the house. "Of prime importance in assessing the intrusion," said the Court, was the fact that the police had a warrant issued on "probable cause to believe that the law was being violated *in that house* ...." ***Id***. at 701 (emphasis added). Here, of course, Gates was neither in the Welsh house nor on the Welsh property when Johnson stopped and detained him: he was driving on a public highway. We do not see ***Summers*** as advancing the State's position.[4]

The sum and substance of this case is that the police could stop Gates and detain him for limited investigation only if they had "a reasonable

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[3] We do, of course, accept the trial court's findings of historical fact unless they are clearly erroneous, ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989). As indicated above, however, the facts are undisputed, all coming from the testimony of a single witness.

[4] The Court also emphasized in ***Summers*** that the officer's conduct in detaining the house occupant was reasonable because of two other "articulable facts" which were present in their search for narcotics: the prevention of "flight in the event that incriminating evidence is found [in the search]," and "the interest in minimizing the risk of harm to the officers" in a narcotics search, which, according to the Court, "may give rise to sudden violence or frantic efforts to conceal or destroy evidence." ***Michigan v. Summers***, 452 U.S. 692, 702 (1981). In this case, of course, the officers were simply looking for automobiles with altered identification numbers.

articulable suspicion [that he had engaged or was engaging in] criminal activity." ***State v. Johnston***, 184 Wis.2d 794, 813, 518 N.W.2d 759, 765, *cert. denied*, 115 S. Ct. 587 (1994). We agree with Gates that ***Summers*** might be more on point if he had been found on or leaving the property that was the subject of the search warrant but, as we have indicated, he was not.

It may be that Johnson--who had not even seen the warrant being executed by the other officers--was asked to "[s]top anybody that came into the area [and] [f]ind out why they wanted to come onto the farm." But such an instruction from fellow officers cannot serve to extend ***Summers***-type authority to a point outside the searched premises. The fact remains that all Gates had done before Johnson stopped him was to drive down a public roadway and appear to reduce his speed in an area near the entry to a farm that was being searched by a dozen or more police officers.[5] We conclude that that conduct is insufficient to give rise to the type of reasonable, articulable suspicion of wrongdoing that would justify an investigative stop under ***Terry*** and its progeny. Consequently, we reverse the order and the judgment and remand to the trial court with directions to enter an order granting the defendant's motion to suppress evidence filed with the court on April 4, 1995.

By the Court.—Order and judgment reversed and cause remanded.

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

[5] The State, without giving us the benefit of a pinpoint citation, says that nullifying the stop in this case would be contrary to language in ***Summers*** which it characterizes as granting law enforcement officers "unquestioned command" of premises being searched pursuant to a warrant. Like the State's other arguments, this one is answered by once again pointing out where and how Gates was stopped by the officer. He was *not* on the premises being searched.