COURT OF APPEALS
DECISION
DATED AND RELEASED

May 23, 1996

NOTICE

No. 95-3136

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

CITY OF MADISON,

Plaintiff-Appellant,

v.

JOHN P. KAVANAUGH,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Reversed*.

VERGERONT, J.[1] The City of Madison appeals from an order granting John Kavanaugh's motion to suppress certain evidence obtained after a police officer stopped Kavanaugh's vehicle.[2] The issue is whether the police

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

[2] We granted the City of Madison's petition for leave to appeal from the trial court's nonfinal order by order dated December 1, 1995.

officer had reasonable suspicion to stop the vehicle. We resolve this issue in favor of the City and reverse.

BACKGROUND

Kavanaugh was charged with operating a motor vehicle while under the influence of an intoxicant in violation of § 346.63(1)(a) and (b), STATS. The facts surrounding the stop of Kavanaugh's vehicle are as follows. On May 8, 1995, at approximately 11:00 p.m., Officer Mark Kinderman of the City of Madison Police Department was parked in the parking lot of Bank One, located on the corner of the intersection of East Washington Avenue, Wright Street and Fair Oaks Avenue. Traffic conditions were relatively light. While he was completing reports in his squad car, Kinderman heard a crash. The crash sounded like metal crunching and came from the direction of the intersection of East Washington and Fair Oaks. Kinderman could not see the intersection from where he was parked, so he moved his squad car forward in the parking lot for an unobstructed view. At this point, he observed Kavanaugh's vehicle stopped on Fair Oaks approximately forty feet short of the stoplight at the intersection. Kinderman did not observe any other vehicles on Fair Oaks in the intersection or in the area of Kavanaugh's vehicle.

On direct examination, Kinderman testified that Kavanaugh's vehicle appeared to be up over the curb and on the sidewalk near a metal fence that runs along Gardner Bakery on Fair Oaks. Kinderman then observed Kavanaugh back up a short distance, proceed north on Fair Oaks to the intersection, and turn onto Wright Street. Kinderman suspected the vehicle had struck the fence and initiated a stop of Kavanaugh's vehicle. Kinderman did not inspect the fence prior to initiating the stop. Kavanaugh was ultimately arrested for operating a motor vehicle while under the influence of an intoxicant.

On cross-examination, Kinderman testified that while it appeared Kavanaugh's vehicle was up over the curb and on the sidewalk, he did not know whether or not it was. Kinderman could not say how far over the curb Kavanaugh's vehicle was, and did not notice whether the vehicle moved up and down as Kavanaugh backed up. Kinderman conceded that the vehicle may actually have been on the roadway and only thought it was up against the fence

because the fence is so close to the roadway. Although Kinderman testified on direct examination that he believed that there was sidewalk between the Gardner Bakery fence and the road, he acknowledged during cross-examination when shown a photograph of the area that the space between the fence and the road is a terrace, not a sidewalk. Kinderman also acknowledged that what he had been referring to as the Gardner Bakery fence was actually a fence probably installed for a pedestrian underpass.

In response to questioning by the trial court, Kinderman testified as follows:

> THE COURT: All right. Did you observe that vehicle at any time actually on the terrace?
>
> THE WITNESS: I can't say exactly where it was. It just appeared to me that it was so close to the fence that it was off the road.
>
> ....
>
> THE COURT: All right. And as you are sitting here today, can you tell me that it was ever off the roadway?
>
> THE WITNESS: All I can say is that it appeared it was alongside the fence, and I can't say if it was off the roadway or not. That's all I can say.

The trial court granted Kavanaugh's motion to suppress all evidence obtained after the stop on the grounds that there was no reasonable suspicion for the stop. The trial court stated:

> What I find here is that the subsequent events, although very weak ... lead to under the totality of the circumstances the officer making his determination are all predicated upon a false assumption to begin with, and that is the vehicle was not on the street. If in point of fact the officer could see clearly that the vehicle was not on the terrace, what we would have had was a crash and the car backing up a little bit and then

> proceeding forward. I don't believe that the officer who again was honest today and said he really couldn't tell where the car was, that this kind of situation leads to enough articulable suspicion to make the stop. The officer says the car could very well have been in the street, and that leaves me with just a crashing sound. The car backing up and proceeding forward, I don't think that's grounds to pull a vehicle over unless the backing up in any way endangered pedestrians or other vehicles, and there's no testimony of that. The officer has today under cross-examination conceded that first, he thought there was a sidewalk there and there wasn't a sidewalk there. All of those factors went into his initial assessment.

In reviewing a trial court's decision on a motion to suppress evidence, we must uphold the court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Whitrock***, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991). However, whether a search and seizure has occurred and, if so, whether it meets statutory and constitutional standards is a question of law subject to our de novo review. ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990).

DISCUSSION

Both the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Wisconsin Constitution guarantee the right of citizens to be free from unreasonable searches and seizures. Stopping an automobile and detaining its occupant is a "seizure" which triggers the protections of the Fourth Amendment. ***State v. Guzy***, 139 Wis.2d 663, 674, 407 N.W.2d 548, 553, *cert. denied*, 484 U.S. 979 (1987).

In ***Terry v. Ohio***, 392 U.S. 1 (1968), the United States Supreme Court held that under the Fourth Amendment, if a police officer observes unusual conduct that leads the officer to reasonably suspect, in light of his or her experience, that criminal activity may be afoot, the officer may briefly stop the suspicious person and make reasonable inquiries aimed at confirming or

dispelling his or her suspicions, even though there is no probable cause to arrest. ***Terry***, 392 U.S. at 20-22. The purpose of the stop is to determine the identity of the suspicious individual or to maintain the status quo momentarily while obtaining more information. ***Adams v. Williams***, 407 U.S. 143, 146 (1972). An investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture, *i.e.*, a traffic violation. *See* ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65 (Ct. App. 1991).

The officer's reasonable suspicion must be based on specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. ***Terry***, 392 U.S. at 21. In evaluating the reasonableness of the stop, the facts must be judged against an objective standard of whether the facts available to the officer at the moment of the stop warrant a reasonable person in the belief "that the action taken was appropriate." ***Terry***, 392 U.S. at 21-22. The same test applies to the stopping of a vehicle and the detention of its occupant. ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834. The focus of an investigatory stop is on reasonableness, and the determination depends on the totality of the circumstances. ***Id.***

We conclude that, under the totality of the circumstances, Officer Kinderman had reasonable suspicion to stop Kavanaugh's vehicle. Kinderman heard a crash that he originally believed to be a motor vehicle accident. The crash noise sounded like crunching metal and came from the direction of the intersection of Fair Oaks and East Washington. After moving forward in the parking lot to get an unobstructed view of the intersection, the only vehicle Kinderman observed in the area was Kavanaugh's vehicle. The vehicle was stopped approximately forty feet short of the stoplight at the intersection. Kinderman believed that the vehicle was very close to the Gardner Bakery fence. Kinderman then observed the vehicle back up ten to fifteen feet before proceeding through the intersection. These facts available to the officer warranted a reasonable suspicion that Kavanaugh had crashed his vehicle against the fence. A brief stop to obtain information from Kavanaugh was reasonable.

It is true that Kinderman could not say at the hearing whether the vehicle was, in fact, off the roadway. However, the trial court's conclusion that the only specific and articulable facts available to the officer at the moment of the stop were the sound of the crash and the act of backing up ten or fifteen feet is incorrect. It is undisputed that when the officer observed the vehicle stopped

approximately forty feet short of the intersection, it was "so close to" or "alongside" the fence. This is another specific and articulable fact available to the officer supporting a reasonable suspicion that Kavanaugh had crashed his vehicle against the fence.

The trial court also concluded that because Kinderman could not testify that he was certain that Kavanaugh's vehicle was off the roadway, he did not have reasonable suspicion that Kavanaugh struck the fence. This conclusion is erroneous. While Kinderman was unable to state definitively that Kavanaugh's vehicle was off the roadway, he testified that he inferred from the fact that Kavanaugh was unusually close to the fence that Kavanaugh was off the roadway and had struck the fence. A police officer may base his or her reasonable suspicion on specific and articulable facts and the rational inferences drawn from those facts. ***Terry***, 392 U.S. at 21. The inference Kinderman drew was rational.

It is also true that Kinderman believed there was a sidewalk between the fence and the street, when, in fact, it is a terrace. But we fail to see how this bears on Kinderman's reasonable suspicion that Kavanaugh had struck the fence. Kinderman's reasonable suspicion was based on the sound of a crash, the fact that Kavanaugh's vehicle was stopped forty feet short of the intersection, the fact that Kavanaugh's vehicle was the only vehicle in the area, the proximity of Kavanaugh's vehicle to the fence, and the act of backing up. It was never suggested that Kinderman's reasonable suspicion was based in any part on his impression that the space between the fence and the street was paved.

Kavanaugh finally argues that Kinderman "had no objective evidence that any offense had been committed." However, the Fourth Amendment does not require objective evidence that any offense has been committed before an investigative stop may be initiated. The principal purpose of the investigative stop is to quickly resolve the ambiguity of suspicious activity and establish whether the suspect's activity is legal or illegal. ***State v. Jackson***, 147 Wis.2d 824, 835, 434 N.W.2d 386, 391 (1989). Under the totality of the circumstances, Kinderman had reasonable suspicion to investigate Kavanaugh's activity.

By the Court.—Order reversed.

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