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DISTRICT II

July 30, 2021

To:

Hon. Brad Schimel
Circuit Court Judge

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District Attorney

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Clerk of Circuit Court

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1039-CR State of Wisconsin v. Michelle A. Dantonio (L.C. #2018CF1724)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michelle A. Dantonio appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), fifth offense. She argues that the police officer lacked reasonable suspicion to conduct an investigatory stop and that evidence obtained during the stop should be suppressed. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2019-20).[1] We agree that reasonable suspicion supported the investigatory stop and therefore affirm the judgment.

The facts underlying Dantonio's conviction were testified to at the suppression hearing by the arresting officer, Deputy Tanner Markut. On Saturday, December 1, 2018, at approximately 8:00 p.m. in the Village of Sussex, Markut observed a vehicle pull into and sit for approximately one minute near the gated entranceway to a sports complex affiliated with the nearby Sussex Hamilton High School, a public high school. The vehicle, identified as that driven by Dantonio, then made a U-turn and proceeded to the public high school. Dantonio parked approximately fifty to one hundred feet from the main entrance to the parking lot. There were no activities at the sports complex or the high school and no other vehicles in the parking lot. Dantonio did not exit the vehicle or turn off the engine or her lights.

After approximately ten minutes, Markut approached Dantonio's vehicle perpendicularly and parked his marked squad car behind Dantonio's car without activating its emergency lights and siren. As he was about to exit, Dantonio began to drive away. Markut then initiated the emergency lights and siren to conduct a traffic stop. In the course of the stop, the officer arrested Dantonio for OWI.

After Dantonio was charged with OWI, fifth or sixth offense, one count of operating with a prohibited alcohol content, fifth or sixth offense, one count of felony bail jumping, one count of misdemeanor bail jumping, and one count of resisting an officer, she filed a motion to suppress the evidence discovered during the traffic stop. Dantonio alleged that the police officer

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

did not have reasonable suspicion to believe she was engaged in criminal activity. The circuit court denied her motion. Dantonio subsequently pled guilty to OWI, fifth offense.[2] Dantonio appeals, challenging the stop but not the arrest.

The temporary detention of an individual constitutes a seizure within the meaning of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996); *see also* ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). The United States Supreme Court has recognized that although a temporary detention constitutes a seizure under the Fourth Amendment, in certain circumstances an officer may detain an individual for the purposes of investigating possible criminal behavior as long as the officer has reasonable suspicion that criminal activity is afoot. *See* ***Terry v. Ohio***, 392 U.S. 1, 30 (1968). "We are bound to follow the United States Supreme Court's interpretation of the Fourth Amendment that sets the minimum protections afforded by the federal constitution." ***State v. Felix***, 2012 WI 36, ¶36, 339 Wis. 2d 670, 811 N.W.2d 775.

Whether evidence gathered from an investigatory stop should be suppressed for lack of reasonable suspicion is a question of constitutional fact. ***State v. Alexander***, 2008 WI App 9, ¶7, 307 Wis. 2d 323, 744 N.W.2d 909 (2007). We will uphold the circuit court's findings of fact unless clearly erroneous, and the determination of reasonable suspicion is a question of law we review de novo. ***State v. Martwick***, 2000 WI 5, ¶19, 231 Wis. 2d 801, 604 N.W.2d 552.

[2] A defendant may appeal an order denying a suppression motion despite a guilty plea. WIS. STAT. § 971.31(10).

The reasonableness of a stop is determined by a commonsense test; namely, would the facts of the case warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). To meet this test, an officer must show "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the stop]." ***Terry***, 392 U.S. at 21. An investigatory stop must be based on more than an "inchoate and unparticularized suspicion or 'hunch.'" ***Id.*** at 27. However, the officer is not required to rule out the possibility of innocent behavior. *See* ***Anderson***, 155 Wis. 2d at 84. "[S]uspicious conduct by its very nature is ambiguous," and "therefore, 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 purpose of inquiry." ***Id.***

The reasonableness of a stop is determined by the totality of the circumstances. ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. Therefore, if a stop is made based on observations of lawful conduct, it must be shown that reasonable inferences can be made from that "lawful conduct ... that criminal activity is afoot." ***State v. Waldner***, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996). "The burden of establishing that an investigative stop is reasonable falls on the state." ***Post***, 301 Wis. 2d 1, ¶12.

Here the facts are not disputed. The officer saw Dantonio sit approximately one minute at the gated entrance to the sports complex and park for approximately ten minutes in the public high school parking lot. There were no other vehicles in the area. There were no signs prohibiting parking in the lot (although the entrance did have such signs) and no traffic violation

occurred. There were no activities going on at either location, and the interior lights in the school were out.

The State points out that, where each observed factor alone may not support further investigation, we look to the totality of the facts as building blocks of reasonable suspicion. *See* ***id.***, ¶28; ***Waldner***, 206 Wis. 2d at 58. The State argues there are three such building blocks: (1) Dantonio parked her vehicle for approximately one minute near a closed sports complex, then reversed directions and parked for ten minutes in the parking lot of a high school that was closed; (2) drug transactions and other criminal activities often happen on school grounds; and (3) after Markut pulled up behind Dantonio's vehicle, parked his squad car, and was about to exit it, Dantonio drove away.

While the officer was not familiar with this high school, he had previously responded to one call for weapons activity and was aware of another for drug activity after hours, and based on his experience patrolling other high schools, he noted, students sometimes "meet up with other kids to potentially do illegal behavior" on school grounds. Having conferred with school resource officers, Markut learned that area schools struggled with end-of-semester vandalism and trespassing—information that was relayed to deputies who monitored the parking lots overnight. Given the fact that no activities were taking place at the school, combined with the length of time Dantonio sat there, the officer determined to investigate further. As the circuit court noted, the length of time exceeded the amount of time it would take to check for directions, rendering innocent explanations for Dantonio's presence less and less likely.

Then, just as Markut had parked behind Dantonio and was about to exit the squad car, Dantonio drove away—in a "normal" fashion. While Dantonio argues that she did not speed off

and was free to leave, evasion can support reasonable suspicion if supported by the totality of circumstances. In ***Illinois v. Wardlow***, 528 U.S. 119 (2000), the Supreme Court found that the Illinois police, "converging on an area known for heavy narcotics trafficking in order to investigate drug transactions," had reasonable suspicion to stop the defendant, who "looked in the direction of the officers and fled." ***Id.*** at 121-22. The Court observed that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion," but noted that individuals have a right to ignore the police, and that "any 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.'" ***Id.*** at 124-25 (quoting ***Florida v. Bostick***, 501 U.S. 429, 437 (1991)). That said, the Supreme Court noted, "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." ***Id.*** at 124. The defendant's unprovoked flight after seeing the police in a high crime area supported reasonable suspicion. ***Id.*** at 125.

Wisconsin cases are in accord: evasion can support reasonable suspicion. *See* ***State v. Fields***, 2000 WI App 218, ¶¶13, 15, 23, 239 Wis. 2d 38, 619 N.W.2d 279 (officer could not infer a guilty mind from defendant's long pause at the stop sign because there was no flight or evasion by the defendant and no evidence that he knew he was facing a squad car); ***Anderson***, 155 Wis. 2d at 79 (actual flight after it was clear the defendant observed the police supported reasonable suspicion for a traffic stop).

Here, the question is whether there is more than Dantonio's departure and whether that departure reflected an attempt to evade the officer. We agree that it was unlikely mere coincidence that Dantonio determined to leave just as the officer pulled up behind her. The inferences from the fairly scant record evidence suggest she was aware of the officer's presence,

as the officer testified that he approached with his marked squad car perpendicularly, and both vehicles' headlights were on. While Dantonio did not engage in "[h]eadlong flight" as in ***Wardlow***, the circuit court appropriately found that Dantonio's decision to drive away as Markut was about to exit his squad car to approach her was a factor to consider in determining reasonable suspicion. *See* ***Wardlow***, 528 U.S. at 124.

This is a close case, and we acknowledge Dantonio's contention that the reasons for her decisions to stop and park in an empty school parking lot and to pull away after the officer parked behind her are arguably innocent and therefore, ambiguous. However, Dantonio ignores that an officer is not required to rule out the possibility of innocent behavior before conducting a ***Terry*** stop. As our supreme court stated in ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989):

> Doubtless, many innocent explanations for [the defendant's] conduct could be hypothesized, but suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal.... We conclude that if any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.

The State finds support in ***State v. Beckman***, No. 2010AP2564-CR, unpublished slip op. (WI App June 29, 2011).[3] In that case, we found reasonable suspicion when Beckman was observed driving and stopping in a dark parking lot behind one closed business before proceeding to the parking lot of another dark, closed business, around midnight, in an area where

[3] The State cites this unpublished, authored opinion, issued after July 1, 2009, for its persuasive value. *See* WIS. STAT. RULE 809.23(3)(b).

several burglaries had been reported. ***Id.***, ¶12. These facts supported reasonable suspicion that Beckman may have been engaged in burglarious activity. ***Id.***

Similarly, here, the facts point to reasonable suspicion warranting a brief investigatory investigation. Markut observed Dantonio's vehicle at 8:00 p.m. on a wintery Saturday night in an empty school parking lot where there were no school activities of any sort taking place. Markut considered this activity unusual in light of his knowledge that trespassing and vandalism were issues after hours at local schools, and in fact, officers patrolled these public spaces in light of this concern. There was no apparent reason for Dantonio to be in the parking lot. Just as Markut pulled up behind Dantonio, she drove off, after sitting there for approximately ten minutes. Considering the totality of the circumstances, we hold that Dantonio's conduct could give rise to a reasonable inference of wrongful conduct and, as such, Markut had reasonable suspicion to conduct a ***Terry*** investigation. *See* ***Anderson***, 155 Wis. 2d at 84.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals