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DISTRICT II

August 25, 2021

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

2020AP1398-CR State of Wisconsin v. Catalin A. Capanu (L.C. #2018CF421)

Before Gundrum, P.J., Neubauer and Reilly 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).

Catalin A. Capanu appeals from a circuit court judgment convicting him of three counts of wire fraud and three counts of theft from a financial institution, all as party to a crime. Capanu argues the police did not have reasonable suspicion to stop the car in which he was a passenger, and thus the circuit court erred in denying his motion to suppress evidence obtained after the traffic stop. 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 The circuit court did not err in concluding that the police had reasonable suspicion to conduct the investigatory stop under the totality of circumstances. We affirm.

The parties do not dispute the following facts, which were testified to by police officer Kyle Hoefler, who was the only person to testify at the hearing on Capanu's motion to suppress. Hoefler had been an officer with the Fond du Lac Police Department for seven years. According to Hoefler, on June 10, 2018, a citizen called 911 reporting that he observed suspicious activity at an ATM involving two white males driving a blue Honda Accord. The caller witnessed the men "typing a bunch of stuff on the ATM" before driving away. After the witness used the ATM, the same two men came back and engaged in the same behavior, "sitting there for a long time again pushing a bunch of numbers." The citizen witness provided the 911 dispatcher with the vehicle description and license plate information for the blue Honda Accord.

Hoefler testified that the information from the 911 call was relayed to him via a radio dispatch as he responded to the call, and pursuant to a written computer aided dispatch report (CAD) that he also reviewed contemporaneously and prior to the stop. The recorded call and CAD report were admitted into evidence. Hoefler also testified that the local police had been on the lookout for a "skimming" operation involving two white males since the beginning of June, and Hoefler had been trained in how skimming operations work in light of the recent local activity.

¹ All references to the Wisconsin Statutes are to the 2019-20 version.

When Hoefler, who was driving “a marked squad car,” “came around the corner of the building, where [he] was visible to the vehicle and the occupants inside,” the blue Honda was at the ATM in the location where the caller reported seeing it. Hoefler was able to observe two white males in the vehicle, which matched the police’s information warning of skimmers in the area. Hoefler testified he believed these two males may have been connected with the skimming operation, and as a result intended to make consensual contact with the vehicle to speak with the occupants. However, the vehicle “took off from the ATM immediately upon seeing [Hoefler’s] squad car” and “accelerated through the parking lot quite rapidly.” Hoefler pursued the Honda and activated his lights and sirens.

According to the complaint, the Honda stopped after Hoefler activated his lights and sirens and both driver and the passenger, Capanu, were apprehended after fleeing. The police recovered 137 debit or credit cards in the Honda with PIN numbers written on them, multiple ATM receipts, and approximately \$7000 in cash.

Capanu filed a motion to suppress, arguing the evidence against him was obtained after an unlawful stop. The circuit court denied the motion after the hearing. The court found that with the recent activity of skimmers only a week before this incident in that area, combined with the information relayed to Hoefler by dispatch, which Hoefler was able to corroborate, the stop of the Honda was “appropriate.” The court found that the facts that the caller had witnessed the men “taking an inordinate amount of time” at the ATM and “the retreat of [Capanu] and his accomplice from the ATM, through the parking lot, was quick and swift as soon as the police officer vehicle came into vision” further provided reasonable suspicion for the stop. Capanu subsequently entered a guilty plea and was convicted and sentenced. Capanu appeals.

Whether reasonable suspicion supports an investigatory stop is a legal question we analyze independently, but we accept the circuit court’s findings of historical facts unless they are clearly erroneous. *See State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634.

An investigatory stop, also known as a *Terry*² stop, “usually involves only temporary questioning and thus constitutes only a minor infringement on personal liberty.” *State v. Young*, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. Police officers conducting an investigatory stop may briefly detain someone to “investigat[e] possible criminal behavior even though there is no probable cause to make an arrest.” *State v. Waldner*, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). This type of limited stop complies with the Fourth Amendment so long as the police have reasonable suspicion supported by specific and articulable facts that a crime was committed, is being committed, or that a crime is about to be committed. *Young*, 294 Wis. 2d 1, ¶¶20-21. A reasonable suspicion determination is based on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶18.

While reasonable suspicion to conduct an investigatory stop is a low bar, a mere hunch is insufficient. *State v. Genous*, 2021 WI 50, ¶8, 397 Wis. 2d 293, 961 N.W.2d 41; *see also State v. Eason*, 2001 WI 98, ¶19, 245 Wis. 2d 206, 629 N.W.2d 625. However, “officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). “[S]uspicious conduct by its very nature is ambiguous,” and “[t]herefore, 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.”

² *Terry v. Ohio*, 392 U.S. 1 (1968).

Id. The question is, “What would a reasonable police officer reasonably suspect in light of his or her training and experience?” *Id.* at 83-84.

Capanu argues that Hoefler only stopped the Honda because a witness reported that it was occupied by two white males, matching a general description of skimmers in the area, and they were at an ATM. Capanu contends this information was not enough to provide reasonable suspicion because “literally any vehicle stopped at an ATM ‘could be connected’ to unlawful conduct.” He asserts that the proper question to consider is not what “could be” happening, but rather whether the officer reasonably suspects that an individual is engaged in criminal activity, which was lacking in his case. *See State v. Limon*, 2008 WI App 77, ¶14, 312 Wis. 2d 174, 751 N.W.2d 877. We reject this argument, as Capanu is looking at the situation in a vacuum rather than the totality of the circumstances.

Contrary to Capanu’s limited characterization of the facts, as the circuit court found, the information provided by the 911 caller was not the “sole reason that the officer made the stop.” Hoefler testified that he decided to make contact with the blue Honda in which Capanu was a passenger to conduct an investigatory stop for a number of reasons. First, there was the 911 call reporting two white males in a blue Honda Accord engaging in suspicious behavior at a local ATM, including “information [from the caller] that this vehicle had been there for quite some time, trying to punch in numbers, and then left and came back and punched more numbers” into the ATM. Hoefler was aware that there was a skimming operation going on in the area for at least the past ten days and had also been informed that the skimming suspects were two white

males. This matched the information that he was given by dispatch, which included the location and description of the vehicle and its license plate information.³

Moreover, before Hoefler was even able to initiate the stop, the two men “abruptly left” when Hoefler rounded the corner of the building in his marked squad car and became visible to the occupants of the Honda, which Hoefler indicated further suggested to him that the vehicle’s occupants may be engaged in criminal activity. 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

³ We reject Capuano’s argument that it is significant to the reasonable suspicion inquiry that the caller did not report witnessing the men using a credit card skimmer. Hoefler testified at the suppression hearing that skimming operations run a credit or debit card through a skimming device to obtain card information, and that information can be retrieved and later be used at ATMs or banks to withdraw funds from the account. Thus, it would have been reasonable for Hoefler to suspect that this incident at the ATM involved the men using information obtained from prior use of a skimming device.

We further conclude that the temporary license plate number discrepancy (the plate reported by the caller was one digit off from the actual plate number) does not undercut that Hoefler’s observations corroborated the described vehicle with two white male occupants shortly after the 911 call. Hoefler testified that when he came to the bank, he saw the vehicle occupied by two white males at the ATM and was able to match the license plate (save the one number discrepancy) and vehicle with the description from the caller.

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 Anderson*, 155 Wis. 2d at 79 (actual flight after it was clear the defendant observed the police supported reasonable suspicion for a traffic stop); *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).

Here, Hoefer testified that the blue Honda immediately left the scene when his marked squad car came into sight. Hoefer did not have his lights or sirens on when the driver began to flee. This apparent evasion, combined with the description of the suspicious behavior, the vehicle, its location, and its occupants given by dispatch, we conclude that it was reasonable given the totality of the circumstances for Hoefer to make an investigatory stop. Thus, the motion to suppress the evidence gathered after the stop was properly denied by the circuit court.⁴

Upon the foregoing reasons,

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

⁴ Based on our conclusion that the circuit court did not err in denying the motion to suppress, we need not address the parties’ arguments as to whether the evidence collected after the stop would still be admissible even if we were to conclude that the circuit court should have granted the motion to suppress. *See Lake Delavan Prop. Co. v. City of Delavan*, 2014 WI App 35, ¶14, 353 Wis. 2d 173, 844 N.W.2d 632 (when one issue is dispositive on appeal, we need not address other issues).

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

Sheila T. Reiff
Clerk of Court of Appeals