

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

No. 01-0584-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE J. LEMKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.¹ Dale J. Lemke appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

STAT. § 346.63(1)(a). Lemke contends that the investigative stop of his vehicle was illegal under *Terry v. Ohio*, 392 U.S. 1 (1968), and WIS. STAT. § 968.24.

FACTS

¶2 The relevant facts are not in dispute. On May 20, 1999, at approximately 2:10 a.m., Calumet County Deputy Sheriff Patrick Childs was monitoring traffic while parked in a field entrance on the north side of County Highway X. The Outdoor Sportsman's Club is located on the other side of the highway and was closed at the time. No other buildings or businesses are located in the area.

¶3 While monitoring traffic, Childs observed an eastbound motor vehicle slow down and turn into the driveway leading to the club. The vehicle stopped for about ten to fifteen seconds at an open gate located at the front of the driveway and then resumed traveling towards the building, which is located 75 to 100 yards from the entrance off the highway. Once the vehicle reached the building, it turned around and traveled back towards the entrance. Approximately thirty yards from the gate, the vehicle stopped and the driver extinguished the headlights and parking lights.

¶4 These observations made Childs suspicious so he made contact with the driver of the vehicle who proved to be Lemke. Further investigation resulted in Lemke's arrest for OWI.

¶5 The State charged Lemke with OWI.² Lemke brought a motion to suppress, challenging the stop of his vehicle pursuant to *Terry* and WIS. STAT. § 968.24.³ Following an evidentiary hearing at which Childs was the only witness, the trial court denied the motion to suppress. The parties then stipulated to the facts for purposes of a bench trial, and the trial court found Lemke guilty of OWI.⁴ Lemke appeals.

STANDARD OF REVIEW

¶6 When we review a trial court's ruling on a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law that we decide de novo without deference to the trial court's decision. *State v. Fields*, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. Nonetheless, we value a trial court's decision on such a question. See *Scheunemann v. City of West Bend*, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

² The State also charged Lemke with operating a motor vehicle with a prohibited alcohol concentration pursuant to WIS. STAT. § 346.63(1)(b).

³ WISCONSIN STAT. § 968.24 states:

Temporary questioning without arrest. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

⁴ The companion charge of operating with a prohibited alcohol concentration was dismissed.

DISCUSSION

¶7 WISCONSIN STAT. § 968.24 is a codification of the rule announced by the United States Supreme Court in *Terry. Fields*, 2000 WI App 218 at ¶10. The statute provides, in relevant part, that “a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime” Sec. 968.24.

¶8 To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of illegal activity has taken or is taking place. The question of whether the officer’s suspicion was reasonable is a commonsense test: was the suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual was committing a crime? An inchoate and unparticularized suspicion or hunch will not suffice. However, the officer is not required to rule out the possibility of innocent behavior. *Fields*, 2000 WI App 218 at ¶10.

¶9 In *Adams v. Williams*, 407 U.S. 143 (1972), the United States Supreme Court stated:

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams, 407 U.S. at 145-46 (citations omitted).

¶10 In *State v. Jackson*, 147 Wis. 2d 824, 434 N.W.2d 386 (1989), our supreme court said:

Doubtless, many innocent explanations for Jackson'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.

Id. at 835.

¶11 Applying this law to the facts of this case, we affirm the trial court's ruling that Childs harbored a reasonable suspicion sufficient to justify his temporary detention of Lemke. Lemke entered the club driveway at 2:10 a.m. The club was closed and located in a rural area without surrounding buildings or businesses. Lemke stopped at the gate near the entrance and waited about ten to fifteen seconds before continuing onto the property. After arriving at the building, Lemke turned around and headed back towards the gate, only to stop his vehicle and douse the headlights and parking lights. The trial court took particular note of this latter fact and so do we.

¶12 We fully accept that Lemke's driving conduct could reasonably suggest a driver who was lost, confused or otherwise in distress. But the conduct also reasonably suggested someone with possible criminal motives. As noted, the law does not require that the officer first rule out the possibility of innocent behavior. *Fields*, 2000 WI App 218 at ¶10. Confronted with these competing inferences, Childs saw, in the words of *Jackson*, a commonsense need to temporarily freeze the situation by stopping the vehicle in order to resolve the

ambiguity. *Jackson*, 147 Wis. 2d at 835. Childs was not required to simply shrug his shoulders and allow a possible crime to occur or a likely offender to escape. *Adams*, 407 U.S. at 145. We conclude that Childs properly maintained the status quo by briefly stopping Lemke's vehicle to resolve the ambiguity presented by Lemke's driving conduct. *See id.* at 145-46.

CONCLUSION

¶13 We hold that the totality of circumstances observed by Childs constituted reasonable suspicion under WIS. STAT. § 968.24. As such, Childs' temporary detention of Lemke was valid, and the evidence obtained as a result thereof was admissible. We uphold the trial court's ruling denying the motion to suppress, and we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)4.

