COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2116 **Cir. Ct. Nos. 2011TR8029**
2011TR8030

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

VILLAGE OF DEFOREST,

PLAINTIFF-APPELLANT,

V.

LYNN J. BRAUN,

DEFENDANT-RESPONDENT.

APPEALS from judgments of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] The Village of DeForest appeals judgments of the circuit court dismissing charges against Lynn Braun, one for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

§ 346.63(1)(a), and one for operating a motor vehicle with a prohibited alcohol content, contrary to § 346.63(1)(b), following the entry of orders suppressing evidence obtained from the traffic stop of Lynn Braun's vehicle. DeForest contends that reasonable suspicion existed to stop Braun's vehicle and, therefore, the circuit court erred in granting Braun's motion to suppress. I affirm.

BACKGROUND

¶2 On the evening of March 19, 2011 Shawn Schaefer, a police officer with the Village of DeForest Police Department, was dispatched to a residence located at 703 Hilltop Drive in DeForest in response to a "verbal domestic between parents and child." Officer Schaefer testified that on his way to the residence, he was advised by dispatch that the incident had turned physical and that the father had left in a vehicle and "had been drinking."[2]

¶3 Officer Schaefer testified that after he arrived at the residence, he parked his vehicle in front of the house and was let inside by Sarah Cutrano, Braun's adult daughter, who "appeared to be upset." A transcript of an audio recording taken from a recording device attached to Officer Schaefer's uniform reveals the following discourse took place:

> THE OFFICER: Hey, what happened? Where is your dad at?
>
> THE DAUGHTER: I don't know. He left. He's drinking.
>
> THE OFFICER: What car did he drive?
>
> THE DAUGHTER: He's got a black (indistinguishable).

[2] The parties agreed that it appeared from the audio recording that the dispatcher informed Officer Schaefer that Braun was "intoxicated."

> THE OFFICER: A what? He's got a black what?
>
> THE DAUGHTER: She's trying to get me in trouble. She was hitting me.
>
> THE OFFICER: Where's your father?
>
> THE DAUGHTER: I don't know. He just drove by.
>
> THE OFFICER: He just drove by?
>
> THE DISPATCHER: 38, can you give us a description?
>
> THE OFFICER: He just drove by the house. I'm going to go stop him. He's in that white Explorer.
>
> THE DISPATCHER: All right, (indistinguishable).

¶4 Officer Schaefer testified that after Sarah indicated that her father had driven by, he turned around and observed a vehicle, which he knew from his prior interactions with the family belonged to someone living at the house, pass by the residence. Officer Schaefer testified that he left the residence at that point to stop Braun's vehicle because he did not know if Braun had been involved in the domestic disturbance and because he was concerned that Braun was a threat to public safety because he was possibly driving while impaired.

¶5 After Braun's vehicle was stopped by Officer Schaefer, Braun was issued citations for operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration. Braun moved the circuit court to suppress evidence obtained from the traffic stop on the basis that Officer Schaefer lacked reasonable suspicion for the stop. The circuit court agreed that Officer Schaefer lacked reasonable suspicion and granted Braun's motion. Following the entry of the orders of suppression, the court dismissed Braun's traffic citations. DeForest appeals.

DISCUSSION

¶6 In order to conduct an investigative stop consistent with the Fourth Amendment prohibition against unreasonable search and seizures, a law enforcement officer needs at least reasonable suspicion, in light of his or her experience and training, to believe that some kind of criminal activity has taken, is taking, or is about to take place. ***State v. Post***, 2007 WI 60, ¶¶10, 13, 301 Wis. 2d 1, 733 N.W.2d 634. The test for reasonable suspicion is an objective one, taking into consideration the totality of the circumstance. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56-57, 556 N.W.2d 681 (1996). The suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion" of the stop. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). An "inchoate and unparticularized suspicion or 'hunch'" will not suffice. ***Id.*** at 27. "[W]hat constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶7 On review of a circuit court's order denying or granting a motion to suppress evidence, an appellate court will uphold the court's factual findings unless they are clearly erroneous. ***State v. Martwick***, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. Whether the facts meet the constitutional requirement of reasonableness under the Fourth Amendment is a question of law which we review independently. *See* ***id.***

¶8 Deforest contends that Officer Schaefer had reasonable suspicion to stop Braun's vehicle in light of the following: (1) Officer Schaefer received information from the dispatcher that a verbal dispute was taking place between

parents and their daughter; (2) Officer Schaefer received information from the dispatcher that the altercation had turned physical, and that the father had left the residence and was intoxicated; (3) Officer Schaefer observed that Sarah appeared visibly upset and had indicated that she had been hit by a "she," presumably her mother Cindy; (4) and Officer Schaefer observed Braun drive by his residence without stopping. DeForest argues that from this information, Officer Schaefer could reasonably suspect that there had been a physical disturbance involving Braun, Cindy and their daughter, and that Braun had left the residence while "possibly intoxicated." DeForest also argues that it was reasonable for Officer Schaefer to believe "that Braun's decision to not stop under these circumstances … showed consciousness of guilt, either of being intoxicated and driving, or of being involved in a possible disorderly conduct violation involving himself and his daughter." DeForest argues that either of these justified the stop of Braun's vehicle.

¶9 I disagree. The record contains insufficient facts from which Officer Schaefer could reasonably conclude that Braun had either been involved in a domestic dispute with this daughter, or was driving under the influence of an intoxicant.

¶10 The information Officer Schaefer received from dispatch indicated only that a verbal domestic disturbance was taking place between parents and their child, which then turned physical. There was no indication as to who was involved in the physical altercation. When Officer Schaefer arrived at Braun's residence, Braun's daughter informed Officer Schaefer that "[s]he's trying to get me in trouble. She was hitting me." These statements suggest only that Sarah's mother was involved in the physical disturbance. There were simply no facts

which could lead Officer Schaefer, or another law enforcement officer in his place, to reasonably believe that Braun was involved in a physical altercation with Sarah.

¶11 I likewise conclude that there were insufficient facts before Officer Schaefer which could lead him to reasonably suspect that Braun was driving a motor vehicle under the influence of an intoxicant. The question here is whether, considering the totality of the circumstances, Officer Schaefer could reasonably suspect that Braun was driving impaired. The only facts before Officer Schaefer indicating that Braun was driving impaired was the statement by the dispatcher that Braun was "intoxicated" and the statement by Sarah that Braun had been drinking.

¶12 The record does not indicate from whom the dispatcher received the information that Braun was intoxicated. The supreme court has held that anonymous tips, not suitably corroborated, do not exhibit "'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'" ***Florida v. J.L.***, 529 U.S. 266, 270 (2000) (citation omitted). As to Sarah's statement that Braun had been drinking, drinking and driving in and of itself is not a crime; there must be something more, for example, an indication of impairment or a prohibited alcohol concentration. Officer Schaefer did not observe Braun commit any traffic violations or criminal activity. What he did observe was Braun driving by the residence without stopping. While doing so may be unusual, I conclude that a reasonable inference of criminal activity, in particular, driving while intoxicated, cannot be drawn from that perfectly legal behavior. In short, the articulable facts, and the reasonable inferences which could be drawn from those facts, were insufficient to provide Officer Schaefer with reasonable suspicion to stop Braun's vehicle for driving while impaired. Accordingly, I

conclude that suppression of evidence obtained from the stop of Braun's vehicle was proper.

CONCLUSION

¶13 For the reasons discussed above, I affirm.

By the Court.—Judgments affirmed.

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