COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP245-CR **Cir. Ct. No. 2010CF509**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIANE C. PARKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Diane Parker appeals a circuit court judgment convicting her of operating with a prohibited alcohol concentration, third offense,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-2010). All references to the Wisconsin Statutes are to the 2009-2010 version unless otherwise noted.

in violation of WIS. STAT. § 346.63(1)(b). Parker contends that the circuit court erred in denying her motion to suppress evidence of her blood alcohol concentration. Specifically, she argues that the arresting officer did not have reasonable suspicion to approach and question her, leading to her arrest and subsequent blood test showing a blood alcohol concentration above the legal limit. This court agrees with the circuit court that reasonable suspicion existed to justify this encounter. Accordingly, the judgment is affirmed.

BACKGROUND

¶2 The arresting officer was the only witness at the hearing on the motion to suppress. A sheriff's deputy, he testified as follows.[2]

¶3 The deputy was patrolling in his squad car when, at 3:02 a.m., he observed Parker's car enter the parking lot of a closed tire repair shop. This shop is located in a small village in Wood County. The village has only two businesses, the tire repair shop and a gas station, and both businesses were closed at the time.

¶4 When he saw Parker's car enter the tire repair shop lot, the deputy did not observe any traffic violations by Parker or any unusual driving behavior, although he was located some distance away.

¶5 The deputy was initially suspicious because it was the middle of the night and because he knew that the tire repair shop was closed. While the deputy

[2] The parties agreed at the suppression hearing that they would rely, in part, on the deputy's preliminary hearing testimony. Similarly, Parker in her appellate briefing references both the deputy's preliminary hearing testimony and his suppression hearing testimony. Consistent with this approach, this court considers the deputy's preliminary hearing testimony together with his suppression hearing testimony.

acknowledged that he would not consider it unusual for someone to drop off a vehicle for repair at such a business while it was closed, he testified that it was "out of place," "unusual," and "odd" to see a vehicle pull into the tire repair shop at approximately 3:00 a.m.

¶6 To investigate his suspicions, the deputy pulled his squad car into the tire repair shop parking lot. Upon entering the lot, he observed that the car he had seen enter the lot was no longer occupied, that Parker was in the driver's seat of a pickup truck, that the door of the truck was open, and that no one else was present.

¶7 The deputy exited his vehicle and approached Parker. He began questioning her. The focus of this case is the moment at which the deputy approached and began speaking with Parker. Subsequent details regarding the encounter that led to her arrest and the taking of her blood are irrelevant to the issues as presented by the parties.

¶8 Parker moved to suppress, on Fourth Amendment grounds, all evidence collected as a result of her contact with the deputy. She argued that the deputy lacked reasonable suspicion to approach and question her in what the parties characterized as a police stop. The circuit court denied the motion, concluding that the deputy had reasonable suspicion that Parker was stealing something from the truck or the truck itself. After the motion was denied, Parker was found guilty of operating with a prohibited alcohol concentration.

DISCUSSION

¶9 The only issue in this appeal is whether the deputy had reasonable suspicion to approach and question Parker in an encounter characterized for

purposes of this appeal as an investigatory stop.[3] As a general matter, there is long-standing and extensive federal and state precedent addressing reasonable suspicion by police officers sufficient to justify temporary detention of a suspect, although the parties do not cite authority involving facts that closely match the facts of this case.

¶10 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. A brief investigatory stop made by an officer of a citizen is considered a type of seizure, and the limited seizure is reasonable if the officer has reasonable suspicion that the person stopped has committed, is committing, or is about to commit a crime. ***Terry v. Ohio***, 392 U.S. 1, 30 (1968); ***State v. Jackson***, 147 Wis. 2d 824, 829-30, 434 N.W.2d 386 (1989). This constitutional standard is given statutory expression in WIS. STAT. § 968.24, which is interpreted in light of the body of case law following ***Terry***. ***Jackson***, 147 Wis. 2d at 831.

¶11 In the context of an investigatory stop, "reasonable suspicion" means there must be specific and articulable facts that would give rise to a suspicion of criminal activity. ***Id.*** at 834. These facts are interpreted in light of the totality of

[3] Based on this court's reading of the record, it is unclear at what point, if ever, the deputy's encounter with Parker actually became an investigatory stop requiring reasonable suspicion. For example, this would not have occurred if the deputy developed probable cause to arrest Parker, before ever attempting to stop or detain her, based on his interactions with and observations of her while she interacted with him on a voluntary, consensual basis. *See* ***Florida v. Bostick***, 501 U.S. 429, 439 (1991). Or, in the alternative, the deputy might have developed reasonable suspicion to detain her during the course of what began as a voluntary, consensual discussion, justifying her temporary detention only after the two interacted for a time. However, the parties assumed before the circuit court and assume on appeal that a stop requiring reasonable suspicion occurred by or at the time the deputy approached Parker and engaged her in conversation. Accordingly, this court assumes, without deciding, that the deputy initiated a stop by or at the time of that encounter, and evaluates only whether the assumed stop was reasonable based on the totality of the circumstances at that time.

the circumstances, and thus multiple facts which are not suspicious individually may be considered suspicious when taken together, if their combination suggests criminal activity. ***State v. Morgan***, 197 Wis. 2d 200, 216, 539 N.W.2d 887 (1995) (Geske, J., concurring) (citing ***United States v. Sokolow***, 490 U.S. 1, 9-10 (1989)). Notably, ***Terry*** does not require that the officer be able to rule out innocent explanations for the suspicious conduct. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

¶12 The reasonable suspicion standard is a common-sense test, and presents a lower burden to the State than the probable cause necessary to justify an arrest or the issuance of a search warrant. ***Waldner***, 206 Wis. 2d at 56, 59. Situations involving reasonable suspicion are often ambiguous, presenting both plausible innocent explanations and plausible criminal explanations for the suspicious activity. ***Id.*** at 60. Permitting a temporary detention in such a situation allows the officer to quickly resolve which category the situation appears to fall into based on information obtained or observed during the temporary detention. ***Id.***

¶13 Applying these standards to the facts here, this court agrees with the circuit court that the deputy reasonably suspected Parker of criminal activity. In particular, this court focuses on the following facts as supporting reasonable suspicion: Parker's vehicle pulled into a closed tire repair shop in the middle of the night; the deputy testified that it was "out of place," "unusual," and "odd" for someone to pull into the parking lot of the particular shop in question at 3:00 in the morning; the deputy then observed Parker in the driver's seat of a different vehicle (the truck) with the door open; and the deputy did not observe anyone else with Parker who might have been privileged to enter or operate the truck if she was not.

¶14 Taken together, the totality of these facts supplies a reasonable suspicion of a potential theft from a vehicle or theft of a vehicle. First, while pulling one's vehicle into a closed business during the middle of the night, in itself, may not ordinarily constitute reasonable suspicion of criminal activity, here there was specific testimony from a patrol deputy that this was "out of place," "odd," and "unusual" for a vehicle to pull into the parking lot of the tire repair shop at such an hour. *See* 4 LaFave, SEARCH AND SEIZURE § 9.4(c), at 161–65 (4th ed. 1996) (discussing reasonable suspicion as it relates to certain premises and times of day). Second, the deputy observed that the single person who had pulled into this lot had then entered a second vehicle, which would not square with such innocent scenarios as one person dropping off another so that the second person could retrieve his or her vehicle, as might occur in connection with a very late or very early work shift. That is, common sense would seem to suggest that, if Parker had been picking up or dropping off a vehicle, someone else would have accompanied her to drive one of the vehicles while she drove the other. Even if the deputy's initial concerns raised by Parker pulling into the parking lot of a relatively isolated, closed business at approximately 3:00 a.m. were only an "inarticulate hunch" that is insufficient for a temporary detention under ***Terry***, the suspicion of a possible theft in progress became specific and articulable when he observed Parker, apparently by herself, inside the truck with the door open.

¶15 The uncontested fact that the deputy was some distance from Parker when he saw her enter the parking lot supports an incriminating inference to the extent that a reasonable officer might have concluded that Parker was not aware of his presence in the area when she got out of her car and approached the truck.

¶16 Parker makes essentially three arguments as to why these facts did not give rise to reasonable suspicion, but as explained below none of her arguments is persuasive.

¶17 First, Parker argues that the evidence suggests an innocent explanation for what the deputy observed, namely that a late-shift worker in the area could have been dropping off or picking up a vehicle at the tire repair shop. However, as stated in ***Waldner***, reasonable suspicion does not mean the absence of any plausible innocent explanations, but the presence of suspicious explanations that create an ambiguous situation. Here, as stated above, it was reasonable to infer that what the deputy observed suggested that criminal activity was afoot.[4]

¶18 Second, Parker argues that, contrary to the circuit court's conclusion, the deputy never testified that he thought there might be a theft in progress, nor did the deputy otherwise articulate what type of criminal activity he suspected was afoot. These arguments are misdirected because they go to the deputy's subjective beliefs. That is not the test. As already explained, the test is what a reasonable person in the deputy's position would have reasonably suspected, ***Terry***, 392 U.S. at 21-22, and this court agrees with the circuit court that the deputy would have reasonably suspected that Parker was stealing something from the truck or the truck itself, given all facts known to the deputy.

[4] Prior to making contact with Parker, the deputy did not know that the truck was hers. The inference that she was stealing the truck or from it and the inference that she had lawful access to the truck's interior or to operate the truck were both plausible alternatives, given what the deputy had observed and knew at the time of the stop, and this is the type of ambiguity that the ***Terry*** standard is intended to allow officers to quickly resolve. *See* ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989).

¶19 Finally, Parker argues that reasonable suspicion was lacking because there was no evidence of any complaint about burglary or theft at the tire repair shop, no evidence that the deputy observed her engaged in any furtive behavior, and no physical evidence that she had broken into the truck. This court is not persuaded, however, that the absence of such evidence is sufficient to undermine the suspicious factors that were present. Even though facts on these topics increasing the level of suspicion could contribute to reasonable suspicion, none of them is required. Reasonable suspicion is not based on a predetermined list of factors, but on what an officer would reasonably suspect under the totality of circumstances present in the particular case. Under the totality of the circumstances here, it was reasonable for an officer in the position of the deputy to suspect that Parker was committing or about to commit a crime, and therefore reasonable to conduct a stop.

CONCLUSION

¶20 For these reasons, the circuit court did not err in denying Parker's motion to suppress evidence. The judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

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