COURT OF APPEALS
DECISION
DATED AND RELEASED

January 31, 1996

NOTICE

No. 95-0229-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN L. PAARMANN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Brian L. Paarmann appeals from a judgment convicting him of burglary, possession of burglarious tools, obstructing and possession of drug paraphernalia. Paarmann defines the issue on appeal as whether an initially valid "community caretaker" stop escalated into an invalid seizure when he was stopped from walking away from a sheriff deputy and searched. We reject Paarmann's contention that a second stop occurred after the justification for the community caretaker stop evaporated. This was one continuous stop, and under the totality of the circumstances the pat-down search was valid. We affirm the judgment.

At 3:18 a.m. on January 11, 1994, Sheboygan County Sheriff Deputy Corey Norlander was alerted that a pedestrian had been seen walking along a certain state highway. Norlander drove to the area, observed the pedestrian, stopped his vehicle, activated his squad lights and got out of his car. As he was exiting, Norlander received a radio call from another officer asking him to detain the pedestrian. The other officer was investigating a car in a ditch about five miles from Norlander's location, and he wanted Norlander to determine if the pedestrian was the driver of that car.

The pedestrian was Paarmann, and he turned and walked toward the squad car. Norlander inquired of Paarmann's identity, where he had been and where he was going. Paarmann indicated that he did not have a driver's license or any form of identification. He verbally identified himself as "David Paarmann" and explained that he had received a ride to a location just east of his current location and that he was walking to a residence just south of the highway. Norlander informed Paarmann that he would be detained and that he would be patted down. Paarmann began to walk away from Norlander. Norlander caught up with Paarmann, ordered him to stop and frisked him. A crowbar was discovered in Paarmann's pants pocket. Paarmann was placed in the squad car and informed that he was under arrest for carrying a concealed weapon.

In reviewing an order regarding the suppression of evidence, this court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Richardson***, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). Whether a search or seizure passes constitutional muster, however, is a question of law subject to de novo review. ***Id.*** at 137-38, 456 N.W.2d at 833.

Paarmann concedes that under the doctrine of community caretaker, the stop was valid to start with to ascertain whether he was all right as a lone pedestrian in a rural area in the middle of a cold night. *See, e.g.*, ***State v. Goebel***, 103 Wis.2d 203, 208, 307 N.W.2d 915, 917 (1981). He argues that because he identified himself, answered the deputy's questions and was not requesting assistance, the first stop ended. He contends that there was no

reason to hold him, and therefore, his seizure when he tried to walk away can only be valid if found to be a reasonable community caretaker stop as well.[1]

Paarmann's claim ignores the radio call Norlander received asking him to detain the pedestrian. Therefore, our review is not limited to the factors constituting the reasonable parameters of a community caretaker stop. *See* ***State v. Anderson***, 142 Wis.2d 162, 169-70, 417 N.W.2d 411, 414 (Ct. App. 1987) (listing various findings to be made when a community caretaker function is asserted as justification for a seizure of the person), *rev'd on other grounds*, 155 Wis.2d 77, 454 N.W.2d 763 (1990). Rather, the test applicable to Paarmann's detention is whether the facts available to Norlander would warrant a person of reasonable caution in the belief that the action taken was appropriate. *See* ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834. We look to whether a reasonable suspicion exists that some kind of criminal activity has taken or is taking place, such suspicion to be based on "`specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" ***Id.*** (quoting ***Terry v. Ohio***, 392 U.S. 1, 21 (1968)). The determination of reasonableness depends on the totality of the circumstances. ***Richardson***, 156 Wis.2d at 139-40, 456 N.W.2d at 834.

We conclude that under the totality of the circumstances, Paarmann's continued detention was reasonable. Norlander had come across a pedestrian on a public highway in the middle of a winter night. Norlander had been informed that there was a car in the ditch in the vicinity and that the unknown pedestrian was possibly the operator of that vehicle. Thus, Norlander already had reason to have a reasonable suspicion of potential criminal conduct as he first approached Paarmann. Even though Paarmann identified himself, he indicated that he did not possess a driver's license. The facts give rise to a reasonable suspicion that if Paarmann was the operator of the vehicle, a crime such as operating while intoxicated, after revocation or without the owner's consent had been committed. Even if Norlander was required to accept Paarmann's explanation for his presence on the roadway, that explanation included a reference to having obtained a ride to a nearby location. Paarmann

[1] In stating this position, Paarmann asserts that "the state conceded at the trial level that there was no articulable suspicion of criminal activity in this case to justify the stop and frisk when Mr. Paarmann began to walk away." At the suppression hearing the prosecutor stated: "There's no articulable suspicion in this case of criminal activity." However, we do not read the statement to be the broad concession that Paarmann does.

could have been connected to the possible crimes relating to the car in the ditch. Thus, Norlander had reason to conduct further investigation and inquiry about Paarmann's presence on the highway. *See* ***State v. Ellenbecker***, 159 Wis.2d 91, 97, 464 N.W.2d 427, 430 (Ct. App. 1990) (even seemingly innocent activity could later turn out to have criminal implications).

We next consider whether the pat-down search was reasonable.[2] The State asks that we adopt a "bright-line" rule that it is always constitutionally reasonable for police to pat-down an individual whom they lawfully plan to place in a squad car even if they lack a reasonable suspicion that the person is armed and dangerous. The State suggests that such an exception to the ***Terry*** rule of reasonable suspicion is justified for the safety and protection of the officers.

Recently our supreme court determined that it was not necessary to adopt a bright-line rule. ***State v. Morgan***, ___ Wis.2d ___, 539 N.W.2d 887, 894 (1995). In ***Morgan***, the totality of the circumstances test was considered sufficient to address the legality of a pat-down search. ***Id.*** at ___, 539 N.W.2d at 891. Because we find the search here to be valid under the totality of the circumstances, we decline to adopt the rule submitted by the State.

The test is whether the officer has a reasonable suspicion that a suspect may be armed. ***Id***. Here, the circumstances justifying Paarmann's continued detention also justified the pat-down. Paarmann was encountered in the middle of the night. ***Morgan*** recognizes that the time at which the stop occurred is a relevant factor. ***Id.*** at ___, 539 N.W.2d at 892. Further, Paarmann was alone in an isolated setting, making it likely that he carried some means of self-protection. Additionally, Paarmann started to walk away when informed that he would be detained and patted-down. Given the cold conditions and remote location, Paarmann's reaction gives rise to an inference that he indeed had something to hide. *See* ***State v. Jackson***, 147 Wis.2d 824, 833, 434 N.W.2d

[2] Paarmann's brief-in-chief focused on the alleged lack of justification for what he characterized as a second community caretaker stop. Not until his reply brief does Paarmann argue that there were no grounds to subject him to a pat-down search because the deputy did not have a reasonable belief that Paarmann was armed and dangerous.

386, 390 (1989) ("flight from the police can, dependent on the totality of circumstances present, justify a warrantless investigative stop").[3]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] We recognize that Norlander intended to frisk Paarmann as a matter of police routine and that Paarmann's attempted flight did not enter into his subjective decision to act. However, such conduct, occurring before the actual pat-down, is appropriately considered under the totality of the circumstances test.