COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1072-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD E. TOLLIVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded.*

SCHUDSON, J.[1] Edward E. Tolliver appeals from the judgment of conviction, following his guilty plea, for carrying a concealed weapon. He argues that the trial court erred in denying his motion to suppress evidence. He contends

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

that the police did not have reasonable suspicion justifying the stop. Tolliver is correct and, therefore, this court reverses.

The essential facts are undisputed. At the evidentiary hearing, City of Milwaukee Police Officers David Dalland and Brian Blumenberg testified that on the evening of April 28, 1996, they were in an unmarked squad car on plain clothes gang crimes patrol, accompanied by one of their confidential informants. They received information from the informant "that drug dealing consistently occurred at the address of 3030 North Palmer Street." Officer Dalland testified: "In fact when I had driven my CI past that location the CI had stated, Look, they are out there right now." Officer Dalland testified that the informant "pointed towards several individuals that were in front of 3030 North Palmer," but that he (Dalland) was not sure whether Tolliver was one of them. Officer Blumenberg, however, testified that the informant told them "that the two people standing in front of the address are involved," and that, subsequently, he (Blumenberg) determined that one of them was Tolliver.

The officers then dropped off their informant and returned to 3030 North Palmer. They observed Tolliver and another man, later identified as Tolliver's nephew, standing on private property within five feet of the front porch of the residence.[2] Officer Dalland said that "[e]ach had an open can of beer in their hands," and that he believed the "open intoxicants" or "public drinking" violated a city ordinance, though he could not remember the ordinance number or

[2] Officer Dalland testified that Tolliver and his nephew were "maybe 5 feet off that porch." Officer Blumenberg testified that Tolliver and his nephew were "at the base of the four steps" of the porch. Tolliver testified that he was on the porch steps. The trial court did not make a factual finding resolving these differences. This court's decision, however, does not hinge on Tolliver's exact location, as long as he was on private property.

its exact wording. Nevertheless, his "understanding of the law" was that, "even if you are drinking on private property … you can't drink in public view." He explained, "I have been informed that the ordinance had changed recently, and that it was in fact basically [drinking] in the public eye is a violation."

The officers entered the front yard, approached Tolliver and his nephew, and Officer Dalland asked, "Do you have any weapons on you?" Tolliver answered, "Yes, I got a pistol in my waistband." Officer Dalland then "calmly and carefully" handcuffed Tolliver and recovered a loaded .357 revolver while Tolliver fully cooperated.

The officers testified that they approached Tolliver and his nephew for two reasons: to question them about the public drinking, and to question them about the informant's allegation of drug dealing. They also testified that, before approaching Tolliver and his nephew, they observed no drug dealing or other suspicious behavior except for "standing in front of the house." Officer Dalland explained:

> Well, I would say that standing in front of the house, although that in and of itself isn't particularly indicative of drug dealing, but to me it raises a suspicion when people are just standing in front of a house doing nothing, drinking beer. That is very common thing you will see drug dealers standing there in between deals.

The State did not introduce any evidence of or ask the trial court to take judicial notice of any city ordinance.[3] The State argued to the trial court,

[3] On appeal, the State offers nothing that would counter Tolliver's assertion: "City of Milwaukee Ordinance 106-1-8 makes it unlawful to drink alcohol on public property, such as a public road or park. The law does not prohibit drinking on private property. The law does not prohibit drinking in public view."

however, that even if Officer Dalland's "interpretation is incorrect, the good faith of the police officers" allowed for the stop. Officer Dalland, the State maintained, "merely approached the defendant to conduct a field investigation or field interview, at which point the defendant surrendered his weapon. There is nothing to indicate that the police officers as they approached the defendant lacked probable cause or reasonable suspicion."[4]

The trial court denied Tolliver's motion to suppress, explaining, in part:

> I think under the circumstances here, even though I can tell you that I think that you are wrong about – I have a right to have a beer and sit on my front porch and have it, that is not public intoxicants situation, I think that the issue becomes is whether or not based on that and based on officers' safety you have a right to make an inquiry based on the CI statement which you believed in the past to be correct, even though that in and by itself would not be sufficient, the fact that he ID'd two black male[s] on a location. If you have two black males at the location and now they are drinking, even though I don't think that in itself is a violation of law, I think that the totality of the circumstances combined together here would allow for further investigation by the police to allow at least a ***Terry*** stop and then the basically admission by this defendant, even though it is a damning admission, would effectively be allowable under the circumstances here, even though I think that we are getting precariously close to a violation of the expectation of privacy concept that we have.

A trial court's legal determination of whether essentially undisputed facts form the basis for a constitutional investigative stop is subject to *de novo*

[4] Thus, in the trial court, the assistant district attorney clearly argued that the police had reasonable suspicion justifying their stop of Tolliver before he told them about the gun, but also intimated that perhaps no stop occurred until after Tolliver told police he had a gun. On appeal, however, the State does not argue the latter theory and, accordingly, this court assumes that the police approach constituted a stop and addresses whether police had reasonable suspicion to stop Tolliver prior to his disclosure about the gun.

review. *See* ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990). In ***Richardson***, the Wisconsin Supreme Court reiterated the standards governing our evaluation of the police conduct:

> To execute a valid investigatory stop, ***Terry*** [***v. Ohio***, 392 U.S. 1 (1968)] and its progeny require that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place.[5] Such reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." These facts must be judged against an "objective standard: would the facts available to the officer at the moment of seizure … 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" This test applies to the stopping of a vehicle and detention of its occupants.
>
> The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of circumstances:
>
> > It is a common sense question, which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions. The essential question is whether the action of the law enforcement officer

[5] We note that numerous published Wisconsin appellate decisions offer summaries similar to the one quoted above. In doing so, however, they fail to acknowledge a third basis justifying an investigatory stop. As codified in Wisconsin:

> 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.

Section 968.24, STATS., (emphasis added).

> was reasonable under all the facts and circumstances present.

Id. at 139-40, 456 N.W.2d at 834 (citations omitted).

First, focusing on "reasonableness," this court agrees with Tolliver's argument that "[t]he officer's supposed belief that drinking on private property in public view was illegal … borders on the ridiculous." Particularly in Milwaukee, it is inconceivable that a reasonable police officer would believe that a city ordinance prohibits one of the city's most cherished pastimes–sipping a beer on the front porch in full and friendly view of the neighbors. Were it otherwise, bar-b-ques would stop, block parties would cease, the product that made Milwaukee famous would never see sunlight, and many of our friends, not to mention our police officers and judges, would be subject to frequent arrest.

Thus, if the police stop of Tolliver was based on reasonable suspicion, the suspicion could have arisen only from the information offered by the informant. Recently, in ***State v. Young***, 97-0034-CR (Wis. Ct. App. Jul. 17, 1997, ordered published Aug. 26, 1997), this court evaluated a similar case and addressed somewhat the same issue. Consistent with the reasoning of ***Young***, this court concludes that the police had no reasonable suspicion justifying their stop of Tolliver.

In ***Young***:

> At about 1:15 p.m. on February 24, 1996, Trooper Tennessen was involved in a surveillance operation with a number of other law enforcement personnel in an attempt to purchase narcotics in an area … Trooper Tennessen knew … to be a high drug-trafficking area. A confidential informant and an undercover officer in an unmarked vehicle were driving through the area attempting to purchase crack cocaine….

> Trooper Tennessen was contacted on his radio by Detective Gerfen, who was also part of the surveillance. Detective Gerfen told Trooper Tennessen that there was "a black male subject in the … area that had just made a short-term contact with another subject in that area." Detective Gerfen described the black male [and the suspect's location]….
>
> Trooper Tennessen … saw a person who met the description and who Trooper Tennessen later identified as Young. Trooper Tennessen pulled his car up alongside Young, and he and his partner got out of the car and asked Young for identification. Young asked if there was a problem and Trooper Tennessen responded something to the effect of, "we saw you sell some drugs or buy some drugs" or that "a transaction took place." Young was cooperative, identified himself and, when Trooper Tennessen asked him if he had anything illegal on his person, Young responded that he had a marijuana pipe. Trooper Tennessen asked Young if he could search him for anything else illegal, and Young agreed. The trooper then did a pat down search and emptied Young's pockets. He found a small amount of marijuana and a marijuana pipe….
>
> Trooper Tennessen acknowledged that he stopped Young based solely on what Detective Gerfen told him, not based on anything he personally observed.

Id., slip op. at 3-4. Despite the informant's apparent involvement, and despite the fact that police observed Young's short-term contact in a high drug-trafficking area, this court declared:

> We give full weight to the training and experience of Trooper Tennessen and Detective Gerfen and to the knowledge they acquired thereby that in this neighborhood drug transactions occur on the street and involve very short contacts between individuals. However, we cannot agree with the trial court that this is sufficient to give rise to a reasonable suspicion that two individuals who meet briefly on the sidewalk in this neighborhood in the daytime are engaging in a drug transaction.
>
> We recognize, as the State emphasizes, that conduct which has innocent explanations may also give rise to a reasonable suspicion of criminal activity. If a reasonable inference of unlawful conduct can be objectively discerned, the officers may temporarily detain the individual to investigate, notwithstanding the existence of innocent inference which could be drawn. But the inference of

> unlawful conduct must be a reasonable one. It is also true that a series of acts, each of which are [sic] innocent in themselves may, taken together, give rise to a reasonable suspicion of criminal conduct. However, here we do not have a series of acts by Young but only *one act which describes the conduct of large numbers of law-abiding citizens in a residential neighborhood, even in a residential neighborhood that has a high incidence of drug trafficking*.

Id., slip op. at 11-12 (emphasis added; citations omitted).

In the instant case, the police had even less basis for suspicion. Their testimony did not even establish that Tolliver was a drug dealer identified by their informant. Tolliver had not even engaged in a "short-term contact" or any other behavior that in any way resembled a drug transaction.

This is not to say that the police had no reason to be suspicious. Of course they did. But forming first suspicions on the basis of an informant's information is not the same as having reasonable suspicion to stop a citizen. As one court recently explained, "the police were not powerless to act" based on the tip they received and, quite lawfully, could have conducted surveillance to determine whether a stop would be warranted. ***United States v. Roberson***, 90 F.3rd 75, 81 (3rd Cir. 1996), *cited with approval* in ***Young***, slip op. at 13. Indeed, particularly in cases of drug dealing,[6] excellent police work consists, in part, of surveillance leading not only to solid evidence against a suspect but also to additional arrests of those the police observe engaging in drug transactions with the suspect.

[6] Like the court in ***Roberson***, this court limits the analysis to the facts of the instant case– a case in which the initial tip was about drug dealing. "We do not address whether a tip is sufficient to create reasonable suspicion when the tip involves an allegation that the defendant was carrying a gun rather than dealing drugs." ***United States v. Roberson***, 90 F.3rd 75, 81, n.4 (1996).

Thus, in reaching this conclusion, this court does not require the slightest retreat from excellent police efforts to apprehend drug dealers, and this court certainly does not discourage vigilant police work based on valuable tips from confidential informants. This court does, however, reaffirm that the Fourth Amendment, drawing the critical line between a citizen's liberty and the government's intrusion, promotes police work that is truly excellent and constitutional.

By the Court.–Judgment and order reversed and cause remanded.

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