COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1002-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH SCARO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JOESPH E. WIMMER, Judge. *Affirmed.*

¶1 NETTESHEIM, J. Joseph Scaro appeals from a judgment of conviction for operating a motor vehicle while intoxicated pursuant to § 346.63(1)(a), STATS. Scaro pled guilty to the charge after the trial court denied his motion to suppress based upon his claim of an illegal stop of his motor vehicle pursuant to ***Terry v. Ohio***, 392 U.S. 1 (1968). On appeal, Scaro challenges the trial court's suppression ruling.

FACTS

¶2 The facts are not in dispute. On August 18, 1997, at approximately 1:15 a.m., Officer Daniel Streit of the Village of Mukwonago Police Department was patrolling in the area of Bay View Road and Highway ES. In this area, Bay View Road ends in a cul-de-sac where business structures are located. Streit testified that this area of the village experiences "a lot of burglaries…. It's not a high crime area, but that is the area that gets hit more frequently than any other area in the village as far as nighttime business burglaries."

¶3 While on patrol, Streit observed a pickup truck leaving one of the business parking lots on the cul-de-sac and traveling southbound on Highway ES. Streit considered this suspicious because all the businesses were closed at that hour of the morning. Streit followed the vehicle and observed it weaving within its own lane of traffic. However, the vehicle did not touch either the center line or the fog line. Streit then activated his emergency lights and, later, his siren. Eventually, the vehicle pulled over. Streit established that Scaro was the driver. Further investigation resulted in Scaro's arrest for OWI.

¶4 Scaro challenged the validity of Streit's stop of his vehicle. He argued that Streit did not have a legitimate reasonable suspicion of criminal activity within the meaning of ***Terry*** and § 968.24, STATS., the statutory codification of ***Terry***. The trial court rejected Scaro's argument. The court held that Streit's observation of Scaro's vehicle leaving the business parking lot justified the stop.[1]

[1] The trial court also ruled that the erratic driving, coupled with Streit's prior observation of the vehicle leaving the parking lot, created a reasonable suspicion that the operator might be intoxicated. The court additionally stated that if the stop had been based solely on Scaro's driving conduct, the stop would not have been valid.

¶5 Following this ruling, Scaro pled guilty to the OWI charge.[2] Scaro appeals pursuant to § 971.31(10), STATS., challenging the trial court's ruling denying his motion to suppress.

DISCUSSION

¶6 The court of appeals will uphold the factual findings of a trial court unless they are clearly erroneous. *See* ***State v. Young***, 212 Wis.2d 417, 424, 569 N.W.2d 84, 88 (Ct. App. 1997). However, whether the facts satisfy a constitutional requirement is a question of law that this court reviews de novo. *See* ***id***. Here, the relevant facts are not in dispute. Therefore, the question before us is whether those facts satisfied the constitutional standards set out in ***Terry*** and related case law.

¶7 An investigative stop of a vehicle is appropriate when an officer possesses specific and articulable facts which would warrant a reasonable suspicion that the occupants have committed or may commit a crime. *See* ***Terry***, 392 U.S. at 21; ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554 (1987). "Reasonable suspicion" is a test of common sense. *See* ***State v. Anderson***, 155 Wis.2d 77, 83, 454 N.W.2d 763, 766 (1990). This test envisions that we balance the need to search or seize against the invasion which the search or seizure entails. *See* ***Terry***, 392 U.S. at 21.

¶8 Scaro contends that Streit was operating on the "inchoate and unparticularized suspicion or hunch" which ***Terry*** condemns. *See* ***id***. at 27. He argues that his conduct was "innocent and commonplace" and, if this conduct

[2] A companion charge of operating a motor vehicle with a prohibited alcohol concentration pursuant to § 346.63(1)(b), STATS., was dismissed.

provides a basis for a ***Terry*** stop, "a substantial portion of the public would be subject each day to an invasion of their privacy." ***United States v. Lyons***, 7 F.3d 973, 976 (10th Cir. 1993).

¶9 We disagree. Here, prior burglaries had occurred in the area. Although Streit did not describe the area as "high crime," he did represent that the area experienced more nighttime burglaries than any other area in the village. Streit observed Scaro's vehicle exiting a business parking lot during the early morning hours when all the businesses in the area were closed. Under those circumstances, we hold that Streit's suspicion that criminal activity might be afoot was reasonable.

¶10 We acknowledge that "conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in residential neighborhoods where drug trafficking occurs," cannot form the basis for a ***Terry*** stop. *See* ***Young***, 212 Wis.2d at 429-30, 569 N.W.2d at 91. In ***Young***, the conduct occurred on a public sidewalk in a residential neighborhood in the light of day and consisted of two persons merely contacting each other. *See* ***id***. at 424, 569 N.W.2d at 88. Here, however, the conduct occurred under the cover of night in an area of closed businesses that had experienced burglaries in the past.

¶11 In ***Brown v. Texas***, 443 U.S. 47 (1979), the Supreme Court held that a ***Terry*** stop was invalid where the officer had testified that the alley in question "looked suspicious" but was unable to point to any facts supporting that conclusion. *See* ***id***. at 52. Here, Streit was able to point to the burglary history of the area. The ***Brown*** Court also noted that there was nothing to indicate that it would be unusual for people to be in the alley during the afternoon hours. *See* ***id***.

Here, the area in question was a private business parking lot and the time of day was the early morning hours when all businesses were closed.

¶12 While Scaro's act of driving from the parking lot ultimately proved to be innocent, the fact remains that it was unusual and suspicious conduct given the time of day, the area in question and the history of criminal activity associated with the businesses in the area. Unlike the conduct in ***Young*** and ***Brown***, this was not conduct that much of the public would engage in on a regular basis. The law requires that the inference of unlawful conduct be reasonable. *See* ***Young***, 212 Wis.2d at 430, 569 N.W.2d at 91. We hold that this test is satisfied under the facts of this case.

¶13 Scaro points to cases from other jurisdictions in support of his argument.[3] While these cases are of interest, we echo the words of the court in ***Young***: "Because the determination of reasonable suspicion is fact sensitive and the possible factors vary, we do not look to other cases with the expectation that one will be factually identical and resolve the issue in this case." ***Id***. at 432, 569 N.W.2d at 91-92.

CONCLUSION

¶14 We hold that the events observed by Streit created a reasonable suspicion that the operator of the vehicle might be engaged in criminal activity. We uphold the trial court's similar ruling. We affirm the judgment of conviction.[4]

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[3] Scaro cites to ***State v. Robertsdahl***, 512 N.W.2d 427 (N.D. 1994); ***State v. Haviland***, 532 N.W.2d 767 (Iowa 1995); ***State v. Sarhegyi***, 492 N.W.2d 284 (N.D. 1992); ***Illinois v. Deppert***, 403 N.E.2d 1279 (Ill. App. Ct. 1980); and ***Michigan v. Freeman***, 320 N.W.2d 878 (Mich. 1982).

[4] In light of our holding, we need not address the other grounds urged by the State in support of the trial court's ruling.

By the Court.—Judgment and order affirmed.

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