COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1523-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RONALD D. HULL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Reversed and cause remanded with directions.*

¶1 VERGERONT, J.[1] The State of Wisconsin appeals an order of the trial court granting Ronald Hull's motion to suppress all evidence obtained as the result of a stop of his vehicle. The State contends the trial court erroneously

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f).

concluded that the police officer did not have the requisite reasonable suspicion for the stop. We agree with the State and therefore reverse.

¶2 Hull was charged with operating a motor vehicle while intoxicated, second offense, and operating a motor vehicle while having a prohibited alcohol concentration, second offense, in violation of WIS. STAT. § 346.63(1)(a) and (b), respectively. The circumstances giving rise to the charges occurred on February 27, 2000, when the vehicle Hull was driving was stopped by City of Middleton Police Officer Darrin Zimmerman. Hull moved to suppress all evidence obtained as a result of the stop on the ground that Officer Zimmerman did not have a reasonable suspicion for the stop.

¶3 The only witness to testify at the hearing on the motion was Officer Zimmerman, and his testimony was as follows. He had been a police officer for three and one-half years. On the early morning of February 27, 2000, Officer Zimmerman was on duty in his squad car, driving on University Avenue in the City of Middleton. This area is primarily a business district of stores and small strip malls. At this time, approximately 1:00 a.m., none of the businesses were open.

¶4 Officer Zimmerman observed a vehicle in the parking lot of Big Mike's Super Subs, parked between that business and University Avenue. The lights were on, the vehicle was running, and there were people inside the vehicle. Hull was later identified as the driver. Officer Zimmerman generally works the night shift and he does not often see a vehicle running at a late hour in the parking lot of a business that is closed. Because of recent break-ins, he thought he should investigate. There had been two break-ins about a week or two apart at the Jiffy Lube, a block or two down the road; one of those break-ins was a week or two

prior to this stop. Also, a month before there had been a break-in at Subway, about three-quarters of a mile from Big Mike's. Officer Zimmerman had taken between ten and twenty burglary complaints in his career as a police officer and all of them occurred in the nighttime hours.

¶5 Officer Zimmerman pulled into the lot behind the vehicle and observed that it had Indiana license plates. When he pulled up behind the vehicle, the vehicle "immediately started pulling away from [Officer Zimmerman]" and pulled out of the lot onto the road. When Hull's vehicle left the lot, Officer Zimmerman was still in his vehicle and was approximately five-to-ten feet behind Hull's vehicle. Based on Officer Zimmerman's experience, it was possible for the occupant of the vehicle to see someone ten feet behind the occupant. Officer Zimmerman viewed it as unusual that the vehicle left when his vehicle was in such close proximity; that is not behavior he commonly experiences when he approaches citizens. As the vehicle started pulling away, Officer Zimmerman activated his emergency lights, and the stop subsequently occurred.

¶6 On cross-examination Officer Zimmerman acknowledged there was no parking on University Avenue in front of the strip mall in which Big Mike's is located so that if one wanted to get off the road, it would be unsafe to pull over on the road. He also acknowledged the following. There were no trespassing signs in the parking lot. University Avenue is fairly well lit at that point with street lights. The vehicle broke no traffic laws before Officer Zimmerman activated his flashing lights, and it did not pull out of the parking lot in an unsafe manner. Officer Zimmerman made no observations concerning what the people inside the vehicle were doing before activating his lights nor did he know whether there were more than one person in the vehicle. At that time there had been no complaints about

Big Mike's having been broken into or suspicious activity there or at other stores in the strip mall in which Big Mike's was located.

¶7 On recross Officer Zimmerman testified that there had been complaints about people parking their vehicles in Big Mike's parking lot and walking down to the apartment complexes behind those businesses in the early evening hours.

¶8 The trial court found Officer Zimmerman's testimony to be credible and accepted it as accurately describing the circumstances surrounding the stop. Based on that testimony, the trial court concluded that Officer Zimmerman did not have a reasonable suspicion that Hull was committing or was about to commit a crime. The court determined there was no "flight" because the officer's emergency lights were not activated. The court then stated, "There's certainly an inference that he would have seen—that Mr. Hull would have seen the officer pull up behind him, but I don't think that's sufficient to establish flight in this case which could provide suspicion of illegal conduct…." The court concluded that a vehicle pulling off the road at that spot even at 1:00 a.m., with its engine running and its lights on, does not rise to the level of reasonable suspicion.

DISCUSSION

¶9 An officer may stop a vehicle consistent with the Fourth Amendment protection against unreasonable searches and seizures when the officer has a reasonable suspicion that the occupants have engaged in or are engaging in criminal activity. *See* ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968). Reasonable suspicion must be based on specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion.

See ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Reasonableness is measured against an objective standard taking into consideration the totality of the circumstances. *See* ***id.*** at 139. The question of what 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. *See* ***State v. Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989).

¶10 We uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Guzy***, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987), *cert. denied*, ***Guzy v. Wisconsin***, 484 U.S. 979 (1987). However, whether the facts as found by the trial court, or the undisputed facts, are sufficient to fulfill the constitutional standard is a question of law, which we review de novo. *See* ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶11 The State contends that the following facts and the reasonable inferences drawn from them provide a sufficient basis for a lawful stop. The vehicle was in the parking lot of a closed business and all the businesses around were closed. It was late at night when most burglaries occur. Based on the officer's experience, it was unusual for running cars to be in the parking lot of closed businesses at that hour. There had been recent burglaries in the area. Big Mike's parking lot had been the scene of frequent complaints to the police regarding "suspicious behavior related to criminal wrongdoing."

¶12 However, the State continues, the additional fact of Hull's flight upon seeing Officer Zimmerman is itself sufficient under ***State v. Anderson***, 155 Wis. 2d 77, 88, 454 N.W.2d 763 (1990), to constitute reasonable suspicion and, in combination with the other factors, provides a more than sufficient basis for

reasonable suspicion. The State acknowledges that the trial court determined there was no flight, but, the State contends, that is based on an error of law because the activation of emergency lights are not necessary in order that leaving the scene constitutes flight for purposes of reasonable suspicion. Flight for this purpose, the State contends, does not require that the person "act in response to a police officer's show of authority, [but, rather] it requires that the person act in a manner that gives the police a reason to believe that the person is acting in an evasive manner in response to the officer's presence." According to the State, Officer Zimmerman's testimony shows that is what happened here.

¶13 Hull makes the following responses in support of affirming the trial court's decision. First, he contends that the trial court made "a specific finding of fact that Mr. Hull did not flee the scene," and nothing in the record supports the inference that Hull observed Officer Zimmerman enter the parking lot because the record is silent as to where Officer Zimmerman was located when he observed Hull, and whether the officer's vehicle was marked so as to be recognizable as a police vehicle, and the evidence was that Hull drove out of the lot in a safe manner. Second, he contends that the record does not support the State's assertion that the prior complaints concerning Big Mike's parking lot were related to criminal activity. Third, he contends that his car was readily observable to the officer and had its lights on. Fourth, he suggests many lawful reasons for a driver to be in that parking lot at that time.

¶14 We first address the issue of whether Hull was "fleeing" when he drove out of the lot. We agree with the State that when the court stated there was no flight because the officer's emergency lights were not activated, at the same time stating that there was "certainly an inference" that "Hull would have seen the officer pull up behind him," the court was concluding, as a matter of law, that a

finding of flight from an officer in a vehicle for purposes of reasonable suspicion requires a finding that the emergency lights of the officer's vehicle were activated. We also agree with the State that this legal conclusion is not supported by the case law.

¶15 We have not found a case, and Hull has cited none, which holds or suggests that a police officer must first activate emergency lights or otherwise display the authority necessary to obligate a person to stop before a person's action in walking or driving away from the officer is considered a pertinent factor for the purposes of reasonable suspicion. Moreover, such a proposition is inconsistent with the facts in ***State v. Anderson***, 155 Wis. 2d 77, 454 N.W.2d 763 (1990), in which the court held that a suspect's conduct constituted flight, and also held that flight from a police officer alone constituted reasonable suspicion. The facts in ***Anderson***, as recited by the court, indicate the police officer had not activated the emergency lights when it pulled over in an alley to allow the approaching vehicle, whose driver the officer wished to question, to park in its usual space behind a restaurant. *See* ***id.*** at 80. The officer testified that "it appeared to me that he [the driver] was coming through to park for the evening, but when he saw the squad, it appeared like he was taking off." ***Id.*** at 85. The court summarizes the subsequent events: "[W]hen Anderson sighted the squad car containing the two officers, he turned south into an adjoining alley, attaining a speed of approximately ten to fifteen miles per hour. He then turned onto city streets, attaining a speed of approximately thirty miles per hour. The officers followed and activated their flashing lights." ***Id.*** at 80.

¶16 As the State points out, if a person fails to stop or drives away after a police officer has activated the emergency lights of his or her vehicle, that may, depending on the circumstances, constitute a violation of one or more statutes.

See, e.g., WIS. STAT. § 346.04 "Obedience to traffic officers, signs and signals, fleeing from officer." In contrast, the flight that the court held sufficient in ***Anderson*** to justify reasonable suspicion is not itself illegal, but is nevertheless sufficient to constitute reasonable suspicion if it is behavior that "evinces in the mind of a reasonable police officer an intent to flee from the police." 155 Wis. 2d at 88. This is in keeping with the long line of cases establishing that evasive behavior is a pertinent factor in determining reasonable suspicion. *See* ***Illinois v. Wardlow***, 120 S. Ct. 673, 676 (2000).

¶17 Since the trial court's determination that there was no flight rested on an incorrect legal proposition, we do not accept that either as a factual finding or a legal conclusion. We turn next to the court's statement that "there certainly is an inference that … Hull would have seen the officer pull up behind him."[2] This determination is supported by the record—by Officer Zimmerman's testimony of the distance he was from Hull's vehicle and his opinion that it was possible for an occupant in the vehicle to see someone ten feet behind the occupant.

¶18 The next question is whether it was reasonable for Officer Zimmerman to infer from Hull's leaving the parking lot that Hull was attempting to flee or evade a police officer. The court did not specifically address this point. However, the court did find Officer Zimmerman's testimony to be a credible and accurate account of what occurred, and his testimony was that Hull's vehicle

[2] Since the test of reasonable suspicion is based on what the officer saw and knew and the rational inferences to be drawn from those facts, the critical question is not whether Hull saw the police officer, but, rather, whether it was rational for the officer to infer that Hull did see him. The court's statement on the inference may perhaps be understood as answering either question in the affirmative. However, this ambiguity is not important in this context: if the court means that, as a fact finder, it is drawing the inference that Hull did see the officer, then it follows in this case based on this record that it was reasonable for the officer to draw that inference.

"immediately" pulled away from him and out of the lot when he pulled in behind Hull's vehicle. Accepting the trial court's finding that it was reasonable to infer that Hull saw Officer Zimmerman, and crediting the officer's testimony, as the trial court did, that Hull drove away "immediately" upon the officer pulling in behind his vehicle, we conclude that a reasonable officer could infer that Hull was driving away to avoid contact with the officer.

¶19 Turning to the other factors the State relies on, we agree with Hull that Officer Zimmerman's knowledge about complaints concerning cars in Big Mike's parking lot is not a fact which would lead a reasonable officer to believe that a vehicle observed there at 1:00 a.m. on this morning was engaged in or about to engage in criminal activity. Those complaints concerned people parking their cars in the lot in early evening hours, then walking down to the apartment complexes below. Officer Zimmerman did not indicate that these prior complaints were a factor in his decision to investigate Hull's vehicle. Although we are not bound by the motivations of the particular officer, *see* ***State v. Baudhuin***, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987), we can see no rational inferences from those complaints that would contribute to the reasonable suspicion necessary for this challenged stop.

¶20 However, we conclude the other facts the State mentions do contribute to a reasonable suspicion that justifies the stop: the prior burglaries of businesses within the area; the fact that this vehicle was in the parking lot of a closed business at 1:00 a.m., when the surrounding businesses were also closed; and Officer Zimmerman's experience that burglaries occur at night and that the presence of the vehicle in that place at that time is unusual. We conclude that these facts, together with the fact of Hull driving away immediately upon Officer Zimmerman pulling up behind his vehicle, and the rational inferences to be drawn

from all these facts, would lead a reasonable officer to suspect that criminal activity has occurred or is about to occur.[3]

¶21 Hull's contention that the visibility of his vehicle from the road makes it unlikely he was engaged in a burglary does not alter our conclusion. The vehicle could have just driven into the lot, or be just about to leave—either of which scenarios could explain why the lights were on. The vehicle's visibility does not negate the reasonable inferences of unlawful conduct. The same is true of Hull's contention that there are many lawful explanations for a vehicle to be in that location at that time. If any reasonable inference of unlawful conduct may be drawn, the officer has the right to temporarily detain the person, notwithstanding the existence of other innocent inferences. *See* ***Anderson***, 155 Wis. 2d at 84.

¶22 In summary, we conclude that it was not necessary that Officer Zimmerman have activated his emergency lights before Hull's vehicle pulled away from him and drove out of the parking lot in order for Hull's behavior to evince an intent in the mind of a reasonable police officer that Hull intended to flee from the police. We also conclude the evidence of Hull's behavior was such that a reasonable officer could draw the inference that he intended to flee the officer. Finally, we conclude that that rational inference together with the other relevant facts and rational inferences we have identified are sufficient to permit a reasonable officer to reasonably suspect, in light of his or her training and experience, that the vehicle was engaged in or about to be engaged in criminal

[3] Because there are other facts contributing to reasonable suspicion besides the fact of Hull driving away immediately upon Officer Zimmerman pulling up behind his vehicle, we do not address the State's argument that this fact alone is sufficient under ***State v. Anderson***, 155 Wis. 2d 77, 454 N.W.2d 763, 768 (1990).

activity. We therefore reverse and remand to the trial court for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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