COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 02-0895-CR & 02-0896-CR

Cir. Ct. Nos. 01CM715 & 01CM717

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 02-0895-CR
CIR. CT. NO. 01CM715

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RICARDO MIRAMONTES-SANTOS,

DEFENDANT-RESPONDENT.

NO. 02-0896-CR
CIR. CT. NO. 01CM717

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MIGUEL ROCHA-CASTRO,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

¶1 CURLEY, J.[1] The State of Wisconsin appeals from the trial court's orders suppressing evidence and dismissing charges of entry into a locked vehicle and theft of movable property, party to a crime, contrary to WIS. STAT. §§ 943.11, 943.20(1)(a) and 939.05 (1999-2000),[2] against Miguel Rocha-Castro and Ricardo Miramontes-Santos.[3] The State contends that the trial court erred in concluding that the police lacked the requisite reasonable suspicion to stop and detain the defendants. We disagree with the State and affirm.

I. BACKGROUND.

¶2 On January 20, 2001, at approximately 4:00 a.m., South Milwaukee Police Officer James McLean was patrolling the 2700 block of South Chicago Avenue in a marked squad car. As he drove southbound on South Chicago, he observed two men running from the vicinity of the back of the Hickory Inn, which is located at 2703 South Chicago. The two men crossed a side street and ran into an alley, where an automobile was parked with its lights off and engine running. The two men jumped in the automobile and it pulled away. However, Officer Mclean later testified that he had not seen either man touching or carrying any property or tools.

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

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] The defendants' cases, numbers 01CM000717 and 01CM000715, were consolidated for the purposes of this appeal.

¶3 Officer McLean, following the path of the two men, went around the block and entered the alley, where he saw the automobile slowly pull away. He followed the automobile for nine blocks. Officer McLean stated that he thought the vehicle was driving "very cautiously." He then stopped the vehicle because the situation "seemed suspicious."

¶4 While interviewing the three individuals in the vehicle, Officer McLean received information from another police officer that there had been a break-in to a vehicle parked behind the Hickory Inn. Officer McLean then arrested the three individuals. The vehicle was driven by Miramontes-Santos. Rocha-Castro was a passenger.[4] Search of Miramontes-Santos' vehicle revealed two car stereos, one portable compact disc player, ten compact discs, two thirty-two megabyte memory chips, a 56K modem, one flashlight, and six screwdrivers.

¶5 The defendants were charged with entry into a locked vehicle and theft of movable property, as parties to the crime. The defendants brought a motion challenging the sufficiency of the stop and seeking to suppress the evidence obtained from the vehicle. At the hearing, Officer Mclean testified regarding his suspicion:

> At four o'clock in the morning all businesses are closed. It was cold out. It didn't seem right that someone would be in that area at that time – it's a side street like I said – running into a parked car in an alleyway. Just didn't seem right.

[4] The third suspect is not a party to this appeal.

¶6 The trial court granted the motion, commenting:

> It's really not sufficient information that a reasonable person would think that a crime was committed [because] two people were crossing the street on a cold night and running across the street in a residential area…. It might well be that we will come to … [a] place that people are stopped when they're just walking from one place to another on the street at 4:00 in the morning just because it's 4:00 in the morning, but I am frightened of that time.

II. ANALYSIS.

¶7 On review of a trial court's decision regarding a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Williamson***, 113 Wis. 2d 389, 401, 335 N.W.2d 814 (1983). 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. Guzman***, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992); *see also* ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶8 "The Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution both protect against unreasonable searches and seizures." ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). For purposes of investigating possible criminal behavior, a police officer does not need probable cause to stop and detain a person. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). However, stopping an automobile and detaining its occupants does constitute a "seizure" within the meaning of the Fourth Amendment, even if the purpose of the stop is limited and the resulting detention quite brief. ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). Therefore, under the Fourth Amendment, an officer who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has

committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke suspicion. ***Id.*** at 439.

¶9 In Wisconsin, the reasonable suspicion standard has been codified in WIS. STAT. § 968.24, which states:

> **Temporary questioning without arrest.**
>
> 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.

¶10 Thus, 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.*** The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, would a reasonable police officer reasonably suspect that criminal activity is afoot in light of his or her training and experience? *See* ***State v Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989). However, reasonable suspicion cannot be based merely on an "inchoate and unparticularized suspicion or hunch." ***Terry***, 392 U.S. at 27.

¶11 Our supreme court has also stressed that police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***State v. Fields***, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. Because suspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶12 The State contends that the following behavior on behalf of the defendants forms the basis of reasonable suspicion of criminal activity: running to a parked automobile with its lights off and motor running; and cautiously driving away. The attendant circumstances include: (1) it was the middle of January and the weather was cold; (2) the men ran from an area where the back entrance to the Hickory Inn was located; (3) the automobile was located in an alley; (4) a McDonalds restaurant and some local housing was also located in the area; (5) none of the men were observed coming from the building; and (6) none of the men were seen carrying anything; *i.e.*, stolen merchandise or burglary tools. We cannot conclude that such behavior, even excluding possible innocent explanations, rises to level of reasonable suspicion. Rather, we conclude that Officer McLean was acting on a hunch when he stopped the vehicle in question and detained the defendants.

¶13 Addressing the defendants' running and the potential issue of flight from police, evasion of the police may indicate a guilty mind and may, by itself, raise sufficient reasonable suspicion to justify a brief investigative detention. ***State v. Amos***, 220 Wis. 2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998); *see also*

Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (recognizing that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion). However, avoidance of the police and refusal to cooperate may also be founded in wholly innocent intentions and, without more, does not create reasonable suspicion. *See* ***Florida v. Bostick***, 501 U.S. 429, 437 (1991). Further, a perquisite to flight as a basis of reasonable suspicion is the suspect's recognition of police presence. *See generally* ***Anderson***, 155 Wis. 2d at 80-88 (stating that flight *at the sight of police* is undeniably suspicious behavior). Here, however, there is no evidence that the defendants had been alerted to Officer McLean's presence as they ran across the street and down the alley. Our review of the record indicates that the defendants were first alerted to Officer McLean's presence as their automobile pulled out of the alley.

¶14 Additionally, with respect to apparently overly cautious driving due to police presence, the supreme court has stated:

> [T]he "hesitancy of a car to pass a police cruiser and a glance at the police by a passenger," a "startled look at the sight of a police officer," appearing nervous when a police car passed, looking away from police activity in the vicinity, pointing toward police, driving off at a normal speed or quickening one's pace upon seeing the police are not, standing alone, sufficient bases for an investigative stop. By contrast, such stops have been upheld when the individual made repeated efforts to avoid police contact, when he engaged in a combination of several different possibly furtive actions, and when the person engaged in a rather extreme means of avoidance such as high-speed flight.

State v. Fields, 2000 WI App 218 at ¶19 (citations omitted).

¶15 Often, innocent people reduce their speed or avoid eye contact with police officers. Thus, we conclude that the defendants' running before

recognizing police presence, combined with the cautious driving subsequent to their recognition of Officer McLean's presence, does not have the necessary indicia of flight or police avoidance necessary to rise to the level of reasonable suspicion. Further, taking into consideration the totality of the circumstances, we cannot conclude that running in the middle of winter from an area where both businesses and residential housing are located, jumping into a parked vehicle, and cautiously driving away, creates a reasonable inference of wrongful conduct.

¶16 Thus, the investigative stop was made contrary to the Fourth Amendment's protection against unreasonable searches and seizures. Accordingly, the trial court's suppression of the stolen evidence discovered as a result of the stop is affirmed. *See* ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963) (holding that evidence seized during an unlawful search cannot constitute proof against the victim of such a search, and exclusionary prohibition extends to indirect as well as to direct products of such invasions).

By the Court.—Orders affirmed.

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