COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2206-CR **Cir. Ct. No. 02-CT-203**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KRIS A. WESTBERG,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Reversed and cause remanded.*

¶1 ANDERSON, J.[1] The State of Wisconsin appeals from the circuit court's suppression order finding that the arresting officer lacked "the requisite reasonable suspicion of a violation under the circumstances to stop the vehicle."

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

While we agree with the circuit court that the weather conditions provide an innocent explanation for Kris A. Westberg's erratic driving, we reverse because a police officer does not have to rule out innocent explanations for a defendant's conduct before conducting a traffic stop.

¶2 Westberg was charged with his third offense of operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration. He filed a motion seeking to suppress all evidence because of a lack of reasonable suspicion to support his initial stop and detention. The circuit court granted the motion and after it denied a motion to reconsider, the State brought this appeal under the provisions of WIS. STAT. § 974.05(1)(d)2.

¶3 On appeal, the State asserts that Westberg's erratic driving, including accelerating through a turn on a snow-covered road, fishtailing twice, which caused the rear end of his mini-van to swing into the oncoming lane and back to the curb, and spinning his rear wheels are specific and articulable facts which warrant a reasonable suspicion of unlawful conduct.

¶4 This appeal involves the application of constitutional standards to undisputed facts, a question of law which we review de novo. ***State v. Foust***, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997). The temporary detention of a citizen constitutes a seizure within the meaning of the Fourth Amendment and triggers Fourth Amendment protections. ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). In the appropriate circumstances, a police officer may approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). When police make an investigative stop of a person, it is not an arrest and the standard for the stop is less than probable cause. ***State v. Allen***, 226 Wis. 2d

66, 70-71, 593 N.W.2d 504 (Ct. App. 1999). The standard is reasonable suspicion, "a particularized and objective basis" for suspecting the person stopped of criminal activity. ***United States v. Cortez***, 449 U.S. 411, 417-18 (1981). When determining if the standard of reasonable suspicion was met, those facts known to the officer must be considered together as a totality of circumstances. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Where the evidence supports two competing inferences, the circuit court and the appellate court are entitled to rely upon the inference supporting a reasonable suspicion to conduct an investigative stop. *See* ***State v. Tompkins***, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988) ("[W]here there is evidence that would lead a reasonable person to conclude that the evidence sought is likely to be in a particular location—although there may be other evidence that could lead a reasonable person to conclude that the evidence may instead be in another location—there is probable cause for a search of the first location.").

¶5 In ***State v. Anderson***, 155 Wis. 2d 77, 454 N.W.2d 763 (1990), the supreme court addressed the policy considerations at work in a case involving a ***Terry*** stop. The court said that the focus of the Fourth Amendment and WIS. STAT. § 968.24 is reasonableness. ***Anderson***, 155 Wis. 2d at 83. This contemplates a commonsense balancing between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibilities. ***Id.*** at 87. The court noted that suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. ***Id.*** at 84. Consequently, the court held that police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***Id.*** However, the court has also said that an "inchoate and

unparticularized suspicion or 'hunch' … will not suffice." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted).

¶6 Nevertheless, conduct that has innocent explanations may also give rise to a reasonable suspicion of criminal activity. *See* ***id.*** at 61. "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[s] which could be drawn." ***State v. Young***, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997). It is also true that a series of acts, each of which is innocent in itself, taken together, may give rise to a reasonable suspicion of criminal conduct. ***Id.*** But the test in any case is whether all the facts—including those which individually are consistent with innocent behavior—taken together are indicative of criminal behavior. *See* ***United States v. Sokolow***, 490 U.S. 1, 9-10 (1989).

¶7 In ***Waldner***, 206 Wis. 2d at 60, the supreme court concluded that lawful, but unusual, driving may be the basis of an officer's reasonable suspicion if a "reasonable inference of unlawful conduct can be objectively discerned." In that case, the officer observed a vehicle at 12:30 a.m. driving slowly, stopping at a corner without a stop sign, accelerating quickly, and then legally parking on the road and pouring some liquid on the street. The court held that the totality of the circumstances coalesced to form the basis for a reasonable suspicion. ***Id.*** at 53.

¶8 The only testimony at the suppression hearing was from City of Waukesha Police Officer Mark Howard, an eight-year veteran.[2] Howard testified

[2] Kris A. Westberg did testify at the same hearing, but his testimony was limited to events that occurred after he was transported to a local hospital.

that he was on patrol at approximately 1:46 a.m. on January 31, 2002, when he first saw a dark red mini-van traveling westbound on East Moreland Boulevard. The officer testified that there was one to two inches of fresh snow on the roadways. He observed the mini-van make a right turn, the driver accelerated as the vehicle made the right turn and it began to fishtail—the rear end swung to the left into the vacant oncoming lane of traffic. Howard related that to compensate for fishtailing, the driver continued to accelerate causing the vehicle's rear wheels to spin and then the vehicle fishtailed to the right and the rear end nearly struck the curb. Although the driver straightened out the vehicle, Howard decided to stop the vehicle because he had suspicions about possible unlawful conduct. When he stopped the mini-van, the officer identified Westberg as the driver. The officer also testified that in his experience, Westberg's operation of the vehicle on a roadway blanketed with fresh snow was not typical.

¶9 Based upon these undisputed facts, the circuit court concluded that Westberg's operation of the vehicle was not unusual under the circumstances. In denying the State's motion to reconsider, the court stated:

> However, under the circumstances of snow conditions, the court believes that that was not an unusual circumstance to accept. In reviewing the circumstances of what occurred on a common sense basis and applying reasonable logic to what the officer saw, it's in fact unreasonable to conclude that the vehicle violated a traffic law under that set of circumstances.

At the suppression hearing, the court observed that Westberg's driving did not rise to the level of a traffic violation and commented, "Had the officer followed the vehicle further, the officer may have seen other conduct that justified a stop."

¶10 We are not bound by the circuit court's application of constitutional principles to the facts in this appeal. *See* ***State v. Goebel***, 103 Wis. 2d 203, 209,

307 N.W.2d 915 (1981). We consider de novo whether the traffic stop passes constitutional muster, ***Richardson***, 156 Wis. 2d at 137-38; and in our review, we are entitled to rely upon the reasonable inferences that support the officer's reasonable suspicion to conduct an investigatory stop. *See* ***Tompkins***, 144 Wis. 2d at 125.

¶11 Westberg asserts that this case is indistinguishable from ***State v. Fields***, 2000 WI App 218, ¶¶13-16, 239 Wis. 2d 38, 619 N.W.2d 279, where we held that an isolated incident does not constitute a reasonable suspicion. Howard did not initiate an investigative stop after a single incident; rather, he initiated the investigative stop after an accumulation of incidents in a very short time. The record establishes that at 1:46 a.m.—coincidentally very close to bar closing time—Westberg, in making a right turn, accelerated on newly fallen snow and his vehicle fishtailed so severely that the rear end swung over the centerline. To correct the problem, Westberg continued to accelerate, spinning his tires on the newly fallen snow and fishtailing so far in the other direction that he almost hit the curb.

¶12 One reasonable inference might be the innocent explanation that Westberg's driving was caused by the road conditions. An equally reasonable inference is that on an evening when weather conditions mandated prudent driving, Westberg's imprudent right turn was evidence that he was operating the vehicle while impaired. "[I]f 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." ***Anderson***, 155 Wis. 2d at 84. Reasonable suspicion need only be one reasonable interpretation of the facts. It does not have to be more likely than not.

¶13 Both parties debate the circuit court's conclusion that Westberg's driving did not constitute a traffic violation. Reasonable suspicion does not require that the officer have grounds to issue a traffic citation in order to make a traffic stop nor does it require that the officer have grounds to believe that the weaving is caused by intoxication rather than drowsiness or some other more "innocent" cause before the stop. ***Waldner***, 206 Wis. 2d at 59. As the ***Waldner*** court observed, "[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." ***Id.*** at 60.

¶14 Because the trial court erroneously applied the wrong legal standards to the facts and mistakenly analyzed the facts, we reverse and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

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