COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-0331
03-0332

Cir. Ct. Nos. 01CV001011
02CV000873

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

CITY OF NEW BERLIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS BARKER,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Dennis Barker appeals from a forfeiture judgment of conviction for operating a motor vehicle while intoxicated (OWI)

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

contrary to a City of New Berlin ordinance in conformity with WIS. STAT. § 346.63(1)(a). Barker argues that the circuit court erred when reversing a municipal court ruling granting his motion to dismiss based on a lack of probable cause or reasonable suspicion to stop his vehicle. The circuit court concluded that the municipal court applied an incorrect standard in reviewing the evidence and that the arresting officer did have reasonable suspicion or probable cause to stop Barker's vehicle.

¶2 While no case law has ever established the standard of proof in a motion to suppress proceeding, we need not decide that intriguing issue in this case since the City of New Berlin established reasonable suspicion under any applicable standard. Therefore, we affirm the judgment.

FACTS

¶3 On March 5, 2000, at approximately 2:00 a.m., Officer Paul Godec of the City of New Berlin Police Department conducted a traffic stop of Barker's vehicle. Based on this stop, Godec arrested Barker for OWI and later issued citations for OWI and operating with a prohibited alcohol content (PAC). In the municipal court, Barker filed a motion to dismiss for lack of probable cause.

¶4 Godec, the only witness to testify at the hearing, testified as follows. On March 5, 2000, at approximately 2:00 a.m., he observed a vehicle approaching a stop sign on Lawnsdale Road and Racine Avenue. Godec thought the vehicle "was approaching the intersection too fast, and then he did eventually stop at the stop sign, but that initially drew [his] attention." Godec followed the vehicle eastbound on Lawnsdale Road when he observed the vehicle drift to the right, touching the shoulder line, and then drift back to the left. Despite these deviations, the vehicle remained in its lane of traffic. Later, the vehicle again

drifted to the left, crossing the center line by approximately one foot, and then returned to the proper lane of traffic. Upon approaching Rolling Meadow, the vehicle again drifted to the left, touching the center line. As the vehicle approached Fairview it drifted to the right, touching the shoulder, and upon entering a curve drifted over to the left, touching the center line. Based upon these observations, Godec believed that the operator of the vehicle was probably intoxicated. Therefore, Godec initiated and completed a traffic stop and determined that Barker was the operator.

¶5 On cross-examination, Godec acknowledged that Barker had stopped at the stop sign, was not speeding and that touching the shoulder or center line is not a traffic offense. Godec also conceded that one of the reasons for his stop of the vehicle was "because that's the time bars close."

¶6 At the close of the hearing, the municipal court issued an oral decision granting Barker's motion to dismiss. The municipal court stated:

> It really boils down to a judgment by the officer, and ultimately, a judgment by the court, as to whether the defendant's actions in the meandering between the two lanes was sufficient to give the officer reasonable, probable cause to stop him. And I'm always inclined to consider all of the circumstances, including the time when this happens.

¶7 The municipal court then took judicial notice of the fact that Lawnsdale Road is a "country road, one lane in the other direction, it's not freshly paved, and it has a narrow shoulder." The court went on to note that it would consider the "totality of the circumstances" and that while it did not think that "meandering between the center line and shoulder line is probably sufficient cause," it had "to consider the fact that on one instance the defendant did, in fact, go over the center line by about a foot." The court further stated:

> I think the bottom line over here is the court is not certain … whether the officer had or didn't have the right to stop with reasonable probable cause, reasonable cause. And then I have to consider the fact that the City has a responsibility of proving its case by clear, convincing, and satisfactory evidence, and as soon as I start talking myself in circles, not being sure what the end result is … then I have to infer from that that the clear, convincing, and satisfactory evidence is there.
>
> So although I may be inclined to think that … the totality of two o'clock in the morning, the officer may have been right…. If I looked at it from a strictly legal standpoint, from a constitutional standpoint, and look at it from the standpoint of what the burden of proof is on the City … I'm inclined to make a finding to the effect that … the burden of proof has not been met and, therefore, the court grants the defendant's motion to … dismiss for lack of probable cause.

¶8 Pursuant to WIS. STAT. § 800.14, the City appealed the municipal court's dismissal of the action to the circuit court. While originally seeking a full de novo hearing, the City later agreed that the circuit court review should be limited to a review of the transcript of the municipal court proceeding pursuant to § 800.14(5). *See* ***Village of Menomonee Falls v. Meyer***, 229 Wis. 2d 811, 817, 601 N.W.2d 666 (Ct. App. 1999).

¶9 In its brief to the circuit court, the City argued that the municipal court had incorrectly applied the "clear, convincing and satisfactory" burden of proof standard in this suppression of evidence setting. The City also argued that the trial court had incorrectly applied the test of probable cause, rather than the reasonable suspicion test. The City contended that the evidence in the record supported a finding of reasonable suspicion.

¶10 In his response brief, Barker conceded that the municipal court had "perhaps not [utilized] the correct legal phraseology" but had nonetheless correctly applied the proper burden and made findings that were not erroneous.

¶11 In a bench decision, the circuit court determined that the municipal court had erred by applying an incorrect burden of proof and by failing to apply the reasonable suspicion standard. Applying the reasonable suspicion standard, the circuit court further concluded that the "erratic driving" observed by Godec provided reasonable suspicion "based on the totality of the circumstances, that Mr. Barker may be violating traffic laws or in fact was committing an offense." The circuit court reversed the municipal court ruling and remanded the action to the municipal court for further proceedings.[2]

¶12 Because Barker's defense counsel had since assumed the bench as New Berlin municipal court judge, the matter was transferred to the Muskego municipal court which found Barker guilty. Barker appealed to the circuit court and, following a trial, was convicted.[3]

¶13 Barker appeals.

DISCUSSION

¶14 While it is the circuit court's ruling which triggers this appeal, we review the same municipal court transcript reviewed by the circuit court. Thus, we apply the same standard of review as the circuit court. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 361-62, 369 N.W.2d 186 (Ct. App. 1985).

[2] Having concluded that the municipal court erred in its application of the law, the circuit court might have remanded the matter to the municipal court to apply the appropriate standard to the facts. However, neither party requested the circuit court to do so. Therefore, the circuit court understandably went the further step and decided the reasonable suspicion question on the merits.

[3] Upon appeal to the Muskego circuit court, Barker's action was assigned a new case number. By order dated February 18, 2003, this court consolidated these cases for purposes of appeal.

Therefore, we will not set aside the municipal court's findings of fact unless clearly erroneous and we must give due regard to the opportunity of the municipal court to judge the credibility of the witnesses. ***Id***. We search the record for facts to support the municipal court's findings of fact. ***Id***. at 362. However, we review questions of law de novo. *See* ***id***. at 360.

¶15 We begin by observing that the facts of this case are not in dispute and that Barker does not challenge Godec's testimony or the municipal court's finding that he was "meandering between the center line and the shoulder line." The circuit court did not set aside any of the municipal court's findings of fact on its review, and we, likewise, do not disturb those findings.

¶16 Therefore, the question narrows to whether the undisputed facts constituted reasonable suspicion to allow Godec to stop Barker's vehicle. The application of those facts to the standard of reasonable suspicion presents a question of law that we review de novo. *See* ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279 (the application of constitutional principles to the facts is a question of law we decide without deference to the circuit court's decision).

¶17 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV, § 4. The detention of a motorist by a law enforcement officer constitutes a "seizure" within the context of the Fourth Amendment. ***Berkemer v. McCarty***, 468 U.S. 420, 436 (1984). If a detention is illegal and violative of the Fourth Amendment, all statements given during this detention are inadmissible. ***Florida v. Royer***, 460 U.S. 491, 501 (1983). An investigative detention is not unreasonable if it is brief in nature and justified by a

reasonable suspicion that the motorist has committed or is about to commit a crime. ***Berkemer***, 468 U.S. at 439; WIS. STAT. § 968.24.

¶18 According to ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be premised on specific facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be in the works and that action is appropriate. "The question of what constitutes reasonable suspicion is a commonsense test. Under all facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). This test is designed to balance the personal intrusion into a suspect's privacy generated by the stop against the societal interests in solving crime and bringing offenders to justice. ***State v. Guzy***, 139 Wis. 2d 663, 680, 407 N.W.2d 548 (1987).

¶19 We first address the City's argument that the municipal court erred by applying the middle burden of proof, "clear and convincing evidence," to this motion to suppress proceeding. Our research has revealed no case that has addressed this question.[4] The City's argument and the circuit court's ruling seem to contend the "reasonable suspicion" test for a ***Terry*** detention is the burden of proof in this type of proceeding. We disagree. While reasonable suspicion is the

[4] This raises the threshold question of whether any burden of proof applies in a motion to suppress proceeding challenging reasonable suspicion under ***Terry***. We think the answer must be "yes." Black's Law Dictionary defines "burden of proof," in part, as "The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." BLACK'S LAW DICTIONARY 196 (6th ed. 1990). Without a burden of proof, the factfinder is left at sea as to the requisite level of certainty that the evidence must demonstrate.

test for a valid ***Terry*** detention, it is not a burden of proof. The law knows only three burdens of proof: (1) preponderance of the evidence; (2) clear, satisfactory and convincing; and (3) beyond a reasonable doubt. *See* ***State v. Kramsvogel***, 124 Wis. 2d 101, 123 n.23, 369 N.W.2d 145 (1985). We suspect that the appropriate burden to assign in this setting is the middle burden that requires evidence that is "clear, satisfactory and convincing." We say this because this burden has been applied in other Fourth Amendment settings. In ***State v. Kieffer***, 217 Wis. 2d 531, 577 N.W.2d 352 (1998), our supreme court held that the State was obligated to prove consent to a search under the middle burden of proof. ***Id***. at 542.[5] In so holding, the court spoke in very broad terms: "The State has the burden to prove that a warrantless search was reasonable and in compliance with the Fourth Amendment." ***Id***. at 541 (footnote omitted).

¶20 However, we need not answer this tempting and intriguing question because we, regardless, hold that the undisputed facts established reasonable suspicion under any applicable burden of proof. Here, Godec first observed Barker's vehicle in the early morning hours as Barker approached a stop sign in a manner that led Godec to believe Barker was not going to stop. Godec then followed Barker as he drifted back and forth between the shoulder and center line several times during a half mile distance—touching the shoulder and center line twice, and crossing the center line by a foot on one occasion. Based on his experience and Barker's driving, Godec believed it probable that Barker was intoxicated.

[5] *See also* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 222 (1973), and ***State v. Tomlinson***, 2002 WI 91, ¶21, 254 Wis. 2d 502, 648 N.W.2d 367.

¶21 Barker contends that the municipal court's independent observations regarding the condition of the road and its comment that "meandering between the center line and the shoulder line … happens regularly" support the court's finding that the City did not establish reasonable suspicion. However, the possibility that Barker was simply having trouble negotiating a country road does not defeat a finding of reasonable suspicion.

> The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. The law of investigative stops allow police officers to stop a person when they have less than probable cause. Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.

State v. Waldner, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Although Godec did not observe a discrete driving violation, the fact remains that the erratic driving pattern demonstrated a dangerous situation not only to the operator of the vehicle but also to other users of the roadway. These observations reasonably suggest that the operator might be impaired and permitted Godec to intervene and resolve the ambiguity. *See* ***id***. at 60-61.

CONCLUSION

¶22 We conclude that the evidence introduced before the municipal court supports a finding of reasonable suspicion under any applicable burden of proof. We uphold the circuit court's denial of Barker's motion to suppress evidence, and we affirm the forfeiture judgment of conviction.

By the Court.—Judgment affirmed.

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