COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP306-CR **Cir. Ct. No. 2008CT81**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH V. NICHOLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Joseph Nicholson appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(OWI) in violation of WIS. STAT. § 346.63. He argues that the State violated his right to be free from unreasonable seizures under the Fourth Amendment to the United States Constitution by detaining him without reasonable suspicion, and therefore the evidence obtained after the detention must be suppressed. We conclude that Nicholson's detention was based upon reasonable suspicion that Nicholson had committed or was committing an offense. Accordingly, we affirm.

FACTS

¶2 On May 25, 2008, at approximately 12:30 a.m., Deputy Alan Erickson of the Iowa County Sheriff's Department was traveling southbound on County I when he observed Nicholson's vehicle travelling southbound on Tower Road. Erickson turned his vehicle southbound onto Tower Road in order to investigate. He knew from his experience that there had been many instances of underage drinking in that area. Erickson testified that these "back roads" are frequently used by underage drinkers to avoid main highways. Erickson then observed the vehicle's headlights make a sweeping motion consistent with a vehicle turning around. The vehicle, now travelling northbound, passed Erickson. Erickson turned his vehicle around and subsequently observed Nicholson's vehicle parked, with its headlights off, in a driveway facing a locked gate leading to a private quarry. Erickson testified that it was unusual for a vehicle to be parked in front of the quarry's driveway.

¶3 Erickson pulled in behind Nicholson's vehicle and activated his emergency lights. Erickson acknowledged that it would have been difficult for Nicholson to maneuver his vehicle out of the driveway without Erickson moving his vehicle. Erickson notified dispatch and approached the vehicle to talk with Nicholson. Erickson observed a strong odor of intoxicants when he spoke with

Nicholson, and noted that Nicholson's eyes were glassy and bloodshot. Erickson also observed that Nicholson's speech was slurred. Erickson had Nicholson exit the car and perform field sobriety tests. Erickson observed indications of intoxication such as Nicholson's failure to maintain balance and failure to complete the tests according to Erickson's instructions. Based on Nicholson's performance of the field sobriety tests, Erickson arrested Nicholson for operating a motor vehicle while intoxicated.

¶4 Nicholson filed a motion to suppress all evidence obtained as a consequence of his detention, arguing that Erickson did not have an objectively reasonable suspicion to stop him. The trial court denied the motion, concluding that under the totality of the circumstances, Erickson had reasonable suspicion to detain Nicholson. Nicholson then pleaded no contest to the charge of operating while intoxicated. Nicholson appeals.

STANDARD OF REVIEW

¶5 "In reviewing a motion to suppress, we accept the circuit court's findings of fact unless they are clearly erroneous; the correct application of constitutional principles to those facts presents a question of law, which we review de novo." ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. We look to the totality of the circumstances to see if a reasonable police officer, in light of his or her training, would reasonably suspect that the individual had committed or was about to commit a crime. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

FOURTH AMENDMENT STANDARDS

¶6 "The Fourth Amendment to the United States Constitution … protect[s] citizens from unreasonable searches and seizures." ***State v. Pallone***, 2000 WI 77, ¶28, 236 Wis. 2d 162, 613 N.W.2d 568. A temporary detention of an individual "during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure'" of that person within the meaning of the Fourth Amendment. ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). A person has been seized only if, under the totality of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. ***United States v. Mendenhall***, 446 U.S. 544, 553-54 (1980). Generally, a police officer may temporarily stop an individual when, at the time of the stop, the officer possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot. ***Waldner***, 206 Wis. 2d at 55-56. "The question of what constitutes reasonableness is a common sense test." ***Id.*** at 56. Under the totality of the circumstances, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***Id.*** A driver's actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion. *See* ***id.*** at 59. However, inchoate and unparticularized suspicion will not support an investigatory stop. ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987).

DISCUSSION

¶7 Nicholson argues that his detention[2] was not based upon an objectively reasonable suspicion that he had committed or was committing a crime. He contends that Erickson began his pursuit based solely on a hunch, or perhaps even less than a hunch, which is not permitted by ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968). Nicholson asserts that his decision to turn around and park at the entrance of the quarry does not bring to mind a specific offense or crime, and that notwithstanding the deputy's subjective belief, there was no articulable reasonable suspicion to justify the seizure.[3] Nicholson argues that the inference of illegality from his actions is weaker than in cases where reasonable suspicion was found, such as ***Waldner*** and ***Terry***.

¶8 First, Nicholson argues that his behavior is distinguishable from ***Waldner*** because it was not as clearly suspicious. In ***Waldner***, 206 Wis. 2d at 53, a police officer observed Waldner driving at a slow rate of speed. Waldner's car stopped briefly at an intersection where there was no stop sign or light, then turned right and accelerated at a high rate of speed. ***Id.*** The officer then saw the car pull into a legal streetside parking space. ***Id.*** Waldner opened the door and poured out what the officer described as a "mixture of liquid and ice" onto the road. ***Id.*** The officer pulled behind Waldner's car as Waldner exited the vehicle and began to

[2] It is undisputed that Erickson seized Nicholson when he parked his squad car with its emergency lights flashing behind Nicholson's car so that it could not easily exit the quarry driveway.

[3] Nicholson also argues that his detention was not justified by the community caretaker exception to the warrant requirement because Erickson's detention of Nicholson was primarily based on his desire to investigate and not to render aid. The State concedes that the stop of Nicholson could not be justified under the community caretaker doctrine.

walk away from the officer. ***Id.*** The officer stopped Waldner, suspecting that he had been operating a vehicle while under the influence of intoxicants. ***Id.*** at 53-54. The supreme court said that "[a]ny one of [the] facts, standing alone, might not add up to reasonable suspicion. But … [these facts] do coalesce to add up to a reasonable suspicion." ***Id.*** at 61.

¶9 Nicholson is correct that, unlike Waldner, Nicholson was not driving erratically. However, Nicholson did park his vehicle in a more unusual place than Waldner; a closed rock quarry driveway instead of a parking space on the side of the road. Furthermore, Nicholson parked his car in an area where many instances of underage drinking had taken place.[4] Like Waldner, Nicholson suspiciously parked his vehicle moments after crossing paths with an officer late at night.

¶10 Next, Nicholson argues that his behavior was less suspicious than the behavior of the defendants in ***Terry***. In ***Terry***, the officer observed Terry and another man each walk down a road past a number of stores between five and six times apiece. ***Terry***, 392 U.S. at 5-6. After each trip, Terry and the other man would confer with each other. ***Id.*** at 6. A third man then approached them and engaged them in conversation. ***Id.*** The third man left and Terry and the other man continued to pace back and forth in front of the stores for ten to twelve minutes. ***Id.*** Terry and the other man walked in front of the store and conferred with each other roughly twenty-four times in total. ***Id.*** at 23. The officer stopped Terry and

[4] Nicholson argues that underage drinking is not a crime in Wisconsin. While Nicholson is correct that alcohol consumption by minors is not a criminal offense, it is nonetheless prohibited by WIS. STAT. § 125.07(4), and punishable by a forfeiture. If Nicholson means to assert that an officer may not base a detention on reasonable suspicion of underage drinking, we disagree. *See* ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991) ("[W]hen a person's activity can constitute either a civil forfeiture or a crime, a police officer may validly perform an investigative stop.").

the other man after they joined the third man down the street. ***Id.*** at 6-7. The Supreme Court concluded that the officer had reasonable suspicion to stop the three men to investigate a potential armed robbery. ***Id.*** at 30. The Court reasoned that although Terry's actions were legal, the officer, based on the circumstances and his experience, had a reasonable suspicion that the three men were engaging in or about to engage in criminal activity. ***Id.*** at 22-24.

¶11 We reject Nicholson's argument that his behavior was less suspicious than the behavior of the defendants in ***Terry***. Like the actions in ***Terry***, Nicholson's actions were not illegal. However, Erickson's detention of Nicholson was justified based upon Erickson's knowledge of past instances of underage drinking in the area, and the fact that it was highly unusual that Nicholson parked in a private quarry driveway after he had just passed Erickson on the road. Similarly, the detention in ***Terry*** was justified based upon Terry walking back and forth in front of a few shops over twenty-four times, each time conferring with his partner. As in ***Terry***, Erickson's knowledge and training supports a finding of reasonable suspicion to investigate this unusual and suspicious behavior.

¶12 Finally, an individual's presence in an area known for certain prohibited conduct is a permissible factor to take into account in determining whether reasonable suspicion existed. *See* ***Young***, 212 Wis. 2d 417, 427, 569 N.W.2d 84 (Ct. App. 1997). However, where particular conduct in an area of high crime would also describe the conduct of presumably innocent travelers, we have found an absence of reasonable suspicion. ***Id.*** at 430. In ***Young***, a police officer stopped Young in a "high drug trafficking" area at 1:15 p.m. after getting information from another officer that Young had made "short term contact" with another subject in the area. ***Id.*** at 420-21. We concluded that the stop was unlawful because the officer did not have a reasonable suspicion that the defendant

was involved in criminal conduct. ***Id.*** at 433. We reasoned that "[Young's] presence in a high drug-trafficking area[,] … brief meeting with another individual on a sidewalk in the early afternoon[,] and … the officer's experience that drug transactions in this neighborhood take place on the street and involve brief meetings" were not enough "particularized information concerning Young's conduct" to give the officer reasonable suspicion to stop Young. ***Id.*** Furthermore, the fact that Young's conduct could describe the conduct of a large amount of innocent travelers was important to our conclusion. ***Id.***

¶13 Like ***Young***, Nicholson was stopped in an area known for prohibited conduct: underage drinking. Unlike ***Young***, Nicholson's conduct could not describe the conduct of a large amount of travelers. Nicholson parked his vehicle in a closed rock quarry driveway late at night, whereas Young met another person on a neighborhood street corner in the middle of the afternoon.

¶14 Based on the totality of circumstances in this case, we conclude that there was reasonable suspicion that Nicholson had committed or was about to commit a crime or ordinance violation. First, Nicholson was driving late at night down a stretch of road drivers use when "avoiding" main highways. He reversed his car's direction after Erickson began to follow him to investigate. He parked his vehicle in an area where many instances of underage drinking had occurred, and his conduct could not describe the conduct of a large number of innocent travelers. A reasonable police officer could determine that Nicholson parked his car in the quarry driveway in order to avoid an investigation by the police officer. Therefore, we conclude that there was reasonable suspicion that Nicholson had committed or was about to commit a crime or ordinance violation, and his detention was therefore valid. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.