COURT OF APPEALS
DECISION
DATED AND FILED

December 1 , 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1412-CR **Cir. Ct. No. 2008CT172**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY G. WHITFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County: D.T. EHLERS, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Timothy Whitford appeals a judgment of conviction for operating a motor vehicle while under the influence of an

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

intoxicant, fourth offense. Whitford argues the traffic stop was unlawful. We affirm.

BACKGROUND

¶2 On September 26, 2008, Officer Chad Mielke was on routine patrol driving behind Whitford's vehicle. He ran a computer check on the license plate and learned Whitford was the owner. Mielke then ran a license check on Whitford. When the check reported Whitford's operator's license was revoked, Mielke stopped the vehicle. As Mielke exited his squad car, he heard a ping from his computer indicating more information on his check had been transmitted. Had he looked at it, he would have learned Whitford had an occupational license and was driving within the time of day he was permitted to drive. Mielke, however, did not look at the computer but instead walked to Whitford's vehicle. Mielke determined Whitford was under the influence and placed him under arrest. A blood-draw confirmed Whitford's blood alcohol content was .102.

¶3 Whitford moved to suppress all evidence obtained from the stop, arguing Mielke lacked reasonable suspicion to stop him. The court found Mielke did have reasonable suspicion based on the information that Whitford's license was revoked. But it concluded the stop violated Whitford's Fourth Amendment rights because Whitford was in fact legally operating on an occupational license. Nevertheless, the circuit court denied Whitford's motion because it concluded Mielke acted in good faith, citing ***Herring v. United States***, 129 S.Ct. 695 (2009).

DISCUSSION

¶4 The only issue on appeal is whether the evidence Mielke obtained after stopping Whitford should be suppressed. When reviewing a circuit court's ruling whether to suppress evidence, we uphold the circuit court's findings of fact unless clearly erroneous. ***State v. Vorburger***, 2002 WI 105, ¶¶32, 35, 255 Wis. 2d 537, 648 N.W.2d 829. The application of those facts to constitutional principles, however, is a question of law we decide independently. ***Id.***, ¶32.

¶5 Whitford's argument on appeal is essentially that Mielke made a mistake by not correctly ascertaining whether it was lawful for Whitford to be operating a motor vehicle, and that this mistake is not excusable under the good-faith exception to the exclusionary rule. The State counters that there was reasonable suspicion to stop Whitford and the circuit court correctly applied the good-faith analysis articulated in ***Herring***.

¶6 A police officer may initiate an investigatory traffic stop if "a police officer reasonably suspect[s] … that some kind of criminal activity has taken or is taking place." ***State v. Allen***, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999). By definition reasonable suspicion does not require absolute certainty criminal activity is taking or has taken place. *See* ***State v. Newer***, 2007 WI App 236, ¶7, 306 Wis. 2d 193, 742 N.W.2d 923. Indeed, the purpose of an investigatory stop is to confirm or dispel an officer's suspicion criminal activity is occurring or has occurred. Therefore, reasonable suspicion is not negated simply because information the officer does not know would dispel his or her suspicion. If Mielke had reasonable suspicion to initiate the stop, then, the seizure was lawful and the ***Herring*** analysis is inapplicable.

¶7 In ***Herring***, police officers arrested the defendant after the county's warrant clerk informed them there was an outstanding warrant for her arrest. In fact, there was no outstanding warrant, because the warrant had been recalled five months earlier but the county records had not been updated. The court observed that "[w]hen a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation." ***Herring***, 129 S.Ct. at 699. Generally, the exclusionary rule provides that "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." ***United States v. Calandra***, 414 U.S. 338, 347 (1974). But there is an exception to this rule where, as the Court found was the case in ***Herring***, the officers acted in good faith. Good faith, however, is only an issue if the stop is illegal.

¶8 Here, Mielke ascertained that Whitford owned the vehicle Mielke was following and that Whitford's license was revoked. We have held that an officer's knowledge that a vehicle owner's license is suspended provides reasonable suspicion to stop the vehicle as long as there are no other facts that suggest the owner is not the driver. ***Newer***, 306 Wis. 2d 193, ¶¶7-9. Unlike in ***Herring***, the information that Whitford's license was revoked was correct. It was simply incomplete. Therefore, the information initially transmitted to Mielke about Whitford's license status provided him with reasonable suspicion to initiate

a traffic stop. Accordingly, the stop was lawful and it was unnecessary to proceed to the "good-faith" analysis discussed in ***Herring***.[2]

¶9 The only question that remains, then, is whether Mielke was required, once he commenced the stop, to investigate further before proceeding to Whitford's car. We conclude he was not.

¶10 The trial court here was satisfied Mielke did not ignore information he was required to consult:

> He sought information on the Defendant's driving record … on his squad's computer. The initial information he received was that the Defendant's current license status was revoked. That information was accurate. Based upon that reasonable suspicion, he initiated a stop of the Defendant's vehicle.

It also found the information about Whitford's occupational license was not transmitted until after Mielke lawfully initiated the traffic stop and was exiting his squad car. Whitford does not dispute the accuracy of these findings, and we also conclude they are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Mielke certainly could have re-entered his car to read the additional information when it was transmitted. But he was not required to do so because the information he had was sufficient to support his suspicion that Whitford was operating while revoked. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) ("police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop"). Therefore, the traffic stop was lawful.

[2] We note, however, that even if we were to address good faith, we would agree with the circuit court's conclusion. The court found Mielke did not act recklessly or negligently, Mielke had no way to know whether or when more information would be transmitted, and Mielke reasonably relied on the information that was available to him. These findings are not clearly erroneous, and they support the court's conclusion Mielke acted in good faith.

By the Court.—Judgment affirmed.

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