COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1957 **Cir. Ct. No. 2009CV1167**

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

IN THE MATTER OF THE REFUSAL OF ELIZABETH R. TOWER:

CITY OF KENOSHA,

PLAINTIFF-RESPONDENT,

V.

ELIZABETH R. TOWER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Reversed*.

¶1 ANDERSON, J.[1] Elizabeth Tower appeals from a circuit court order revoking her driving privileges based on her improper refusal to provide a breath sample. Because the arresting officers did not have reasonable suspicion for an investigatory stop, we reverse the order of the circuit court.

¶2 Officer Mark Anderson testified that at approximately 1:50 a.m. on June 27, 2008, he and his partner, Officer Dillhoff, were on bike patrol when he observed what appeared to be a van "parked in—just east of 20th Avenue in the 1900-block of 61st Street. It was parked on the south side of the road. That is a one-way street and it's clearly posted with a 'no parking' sign on that side of the road." Anderson said initially he was probably "several hundred feet away" and could not determine whether or not the van was running. However, as they "got a little bit closer," Anderson said he could tell the van was running because he could hear it running, he noticed the brake lights on and could see the reverse lights come on as they got closer. He said that he and his partner approached the vehicle and, immediately after making contact with the driver, he instructed her to "put the vehicle in 'park.'" Anderson identified the driver as Tower by her driver's license. While speaking to Tower, Anderson said he detected an odor of intoxicants coming from Tower, her speech was slightly slurred, and her eyes had a glassy appearance to them. Anderson further testified that he asked Tower why she was parked on the wrong side of the road, and "she advised me that she was dropping off a friend." Anderson said that while he was talking to Tower, Dillhoff spotted an open alcohol container in the center console of the vehicle.

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

¶3 Based on his contact with Tower and his observations, Anderson requested that Tower step out of the vehicle and perform a series of field sobriety tests, which Tower did not perform to Anderson's satisfaction. Afterward, the officers arrested Tower and brought her to the Kenosha police department, where she refused to provide a breath sample.

¶4 Pursuant to WIS. STAT. § 343.305(9)(a), failure to provide a breath sample is grounds for revocation of Tower's license. After Tower was issued a citation and notified that her operating privileges would be revoked, she filed a demand for a refusal hearing before the municipal court. Following this hearing, the municipal court ruled in favor of Tower. The City of Kenosha then appealed that ruling to the circuit court.

¶5 Following a de novo refusal hearing, the circuit court ruled in favor of the City and issued the order revoking Tower's driving privileges for one year. Tower appeals.

¶6 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). Under ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), a police officer may, in the appropriate circumstances, approach an individual for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. ***State v. Powers***, 2004 WI App 143, ¶7, 275 Wis. 2d 456, 685 N.W.2d 869. 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. ***Id.*** The standard is reasonable suspicion, a particularized and objective basis for suspecting the person of criminal activity. ***Id.*** When determining if the standard of reasonable suspicion was met, those facts

known to the officer must be considered together as a totality of the circumstances. ***Id.***

¶7 Because the City argues this was a valid ***Terry*** stop, on appeal we need only address whether the facts known to the officers, considered together as a totality of the circumstances, provided them the requisite reasonable suspicion to justify stopping Tower.

¶8 The determination of reasonable suspicion for an investigatory stop is a question of constitutional fact. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We apply a two-step standard of review to questions of constitutional fact. ***Id.*** First, we review the circuit court's findings of historical fact and uphold them unless they are clearly erroneous. ***Id.*** Second, we review the determination of reasonable suspicion de novo. ***Id.***

¶9 The City contends that this case is similar to ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), where a police officer noticed a passing Camaro had a "loud exhaust" and, concluding that the Camaro's exhaust system was in violation of the law, the officer pulled the Camaro over. ***Id.*** at 296. The ***Renz*** court upheld the stop as reasonable and stated that an officer may make an investigatory stop if he or she reasonably suspects that a person is violating a noncriminal traffic law. ***Id.*** at 310.

¶10 The City argues that like the officers in ***Renz***, Anderson had the requisite reasonable suspicion to make an investigatory stop. We disagree. While "illegal parking" may have been Anderson's suspicion, under the facts of this case that suspicion was not *reasonable* and thus does not meet the ***Terry*** stop requirements. Anderson's own testimony reveals the unreasonableness of his suspicion: he knew Tower's vehicle was running, he saw its brake lights on and

the reverse lights illuminated, his first instruction to Tower was to "put the vehicle in 'park,'" and Tower told him she was "dropping off" a friend.[2]

¶11 Based on Anderson's testimony, we conclude that Tower's vehicle was standing, not parking or parked, and therefore a reasonable officer would not have concluded that Tower was about to commit or committing the crime of illegal parking. We therefore reject the circuit court's determination that there was reasonable suspicion for the officers to stop Tower. The facts here do not add up to a particularized and objective basis for suspecting Tower of illegal activity. *See* ***Powers***, 275 Wis. 2d 456, ¶7.

¶12 Lacking the requisite justification to stop Tower, her subsequent refusal to provide a breath sample is irrelevant.

By the Court.—Order reversed.

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

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[2] WISCONSIN STAT. § 346.53 provides in pertinent part:

> No person shall stop or leave any vehicle standing in any of the following places *except temporarily for the purpose of* and while actually engaged in loading or unloading or in receiving or *discharging passengers* and while the vehicle is attended by a licensed operator so that it may promptly be moved in case of an emergency or to avoid obstruction of traffic:
>
> ….
>
> **(6)** Upon any portion of a highway where and at the time when parking is prohibited, limited or restricted by official traffic signs. (Emphasis added.)