

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1206

Cir. Ct. No. 2012CV4502

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF SUN PRAIRIE,

PLAINTIFF-RESPONDENT,

V.

BRENT D. CURRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
NICHOLAS McNAMARA, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Brent Curry appeals his judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration. Curry

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

argues that the circuit court erred in denying his motion to suppress the evidence that supported his conviction.² Curry argues that the officer lacked reasonable suspicion for the *Terry* stop that led to his arrest. I agree with the circuit court that the officer had reasonable suspicion to stop Curry for a theft-of-property-related crime, and I further conclude that the officer had reasonable suspicion to stop Curry for intoxicated driving. I affirm.

Background

¶2 The sole witness at the suppression hearing was the police officer who stopped and arrested Curry. I rely on that testimony for background.

¶3 The officer was on patrol in his squad car in a residential neighborhood. He explained that part of the reason he was patrolling the neighborhood was because there had been a lot of thefts from vehicles in that area.

¶4 At about 3:40 a.m., the officer noticed a vehicle that seemed to be in the middle of a road with its brake lights on. The officer drove toward the vehicle, but lost sight of it for about 30 seconds because of a hill in the road. As the officer came over the top of the hill, he saw a vehicle performing a Y-turn on a dead-end road. The officer did not see any other vehicles around, but was not entirely certain whether the brake-light vehicle and the Y-turn vehicle were the same vehicle.

¶5 The vehicle making the Y-turn finished turning around and drove past the officer, accelerating at a high rate of speed. The officer believed the

² Curry had review in the circuit court on the suppression issue after first being convicted in municipal court.

vehicle was exceeding the 25 mile per hour speed limit. The officer turned around and followed the vehicle. The vehicle made a turn at a high rate of speed, then pulled into the driveway of a residence.

¶6 The officer stopped his squad nearby and observed the vehicle for a couple of minutes. No one exited the vehicle during that time. The officer repositioned his squad and was able to see that someone remained in the vehicle and was also able to see the vehicle's license plate number. He ran a check on the plate and discovered that it was registered to Brent Curry at a Middleton address.

¶7 The officer exited his squad, and, as he headed toward the vehicle, the driver exited the vehicle and began walking up the driveway toward the house. The officer observed the driver walk toward the residence's garage doors. The officer then observed the driver walk along the front of the garage, away from the front door of the residence.

¶8 At that point, the officer "asked" the driver to "come speak with" him, or said "hey, can you come talk to me." The driver identified himself as Curry and, in response to questioning, Curry admitted that he had been drinking. The officer's subsequent investigation produced additional evidence of intoxication, leading to Curry's arrest.

¶9 The circuit court concluded that the officer possessed reasonable suspicion of criminal activity justifying a *Terry* stop at the time that the officer initiated verbal contact with Curry. The circuit court appeared to conclude that the officer had reasonable suspicion that Curry was trespassing or was engaged in some other type of theft-of-property-related crime.

Discussion

¶10 In reviewing a suppression decision, this court upholds a circuit court's findings of fact unless those findings are against the great weight and clear preponderance of the evidence. *State v. Guzy*, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987). The legality of an investigative stop, however, is a question of law for de novo review. *Id.*

¶11 As a preliminary matter, I note that the City has not argued that the officer's initial questioning of Curry was a voluntary police-citizen encounter instead of a *Terry* stop. Rather, the City asserts that the officer initiated a *Terry* stop when the officer made verbal contact with Curry. I will assume, without deciding, that the officer initiated a *Terry* stop when he made verbal contact with Curry. The only dispute on appeal is whether the officer possessed reasonable suspicion of criminal activity at that time.

¶12 “The question whether the officer's suspicion was reasonable is a common sense test: was the suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual was committing a crime.” *State v. Fields*, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. “An inchoate and unparticularized suspicion or hunch will not suffice.” *Id.* “However, the officer is not required to rule out the possibility of innocent behavior.” *Id.*

¶13 Curry's argument consists mostly of the generalized assertion that the officer's stop was based on nothing more than an “inchoate and unparticularized hunch.” Curry asserts that the officer could not “conclusively” say that Curry was speeding or was guilty of any other wrongdoing.

¶14 I disagree with Curry that the officer had only an inchoate hunch that Curry was engaged in illegal activity. As to whether the officer could “conclusively” say that Curry was engaged in wrongdoing, that is not the standard.

¶15 I agree with the circuit court that the officer could have reasonably suspected that Curry was engaged in some type of theft-of-property-related crime based on the following facts: the time of night, Curry’s lingering in the vehicle, the license plate check showing Curry probably lived at a different address, Curry’s odd action consisting of sitting in the car for a time and then walking to and along the front of the garage and away from the front door of the house, and the officer’s knowledge of problems with thefts of property from vehicles in the neighborhood.

¶16 In addition, I conclude that the officer could have reasonably suspected that Curry was driving while intoxicated based on the following circumstances: the time of night, Curry’s series of unusual driving behaviors, including fast acceleration, Curry’s lingering in the vehicle, and Curry’s behavior after he exited the vehicle. As to the unusual driving behaviors, the officer could have reasonably inferred that the vehicle the officer saw with its brake lights on in the middle of the road was Curry’s vehicle because it was 3:40 a.m. and because the officer saw no other vehicles in what the officer described as a residential area. The fact that the officer could not say for certain whether the brake-light vehicle was Curry’s vehicle does not make it unreasonable to infer that they were the same vehicle.

Conclusion

¶17 For the reasons stated, I affirm.

By the Court.—Judgment affirmed.

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

