COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP913 **Cir. Ct. No. 2015CT113**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIE A. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: T. CHRISTOPHER DEE and PAUL J. RIFELJ, Judges. *Affirmed*.

¶1 BRENNAN, P.J.[1] Marie Martin appeals the trial court's order denying her motion to suppress and the judgment of conviction[2] for OWI-4th

[1] This is a one-judge appeal pursuant to WIS. STAT. §§ 752.31(2)(f) and (3).

offense. Because we conclude that the record shows sufficient reasonable, articulable suspicions under ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), that Martin was committing or was about to commit a crime, we affirm.

BACKGROUND

¶2 City of Franklin Police officer Anne Aide testified to the following facts at the suppression hearing in this case. She was the only witness at the hearing. On December 18, 2014, at approximately, 2:00 a.m. Officer Aide was on duty in a marked squad and saw a Honda two door stop in the George Webb's parking lot at South 76th Street and West Rawson Avenue in the City of Franklin. She saw two female passengers exit the Honda. One entered an SUV and left the scene. The other female passenger, later identified as Martin, entered a black Chevy Lumina. Aide continued her patrol of the parking lot and did a records check on the Chevy Lumina as she was exiting the parking lot. She saw that the Chevy was registered to Martin and that the registration was suspended. Aide was about a block and a half east of the parking lot when the registration came back. She pulled over and saw that Martin's driving privileges were revoked and that she had an occupational driver's license that restricted the times she could drive. Martin was outside of her permitted occupational license hours at that time.

¶3 Aide drove back to the George Webb parking lot and saw Martin was still there in her car, which she thought was odd given that approximately five to ten minutes had passed from when Martin entered her car—enough time to warm it up. Aide testified that she had observed that the SUV had left and the

[2] Judge T. Christopher Dee denied Martin's motion to suppress, and Judge Paul J. Rifelj entered the judgment of conviction.

passenger from the SUV who got into the Honda had left. Aide observed that Martin's car was running because she saw smoke coming out of the exhaust and the headlights were on. Aide pulled her squad in back of Martin's rear driver's side but did not block its exit. She did not activate her lights. As Aide approached Martin's driver's side window, she heard the car turn off. She saw Martin place the car keys on the passenger side seat.

¶4 Aide spoke to Martin, telling her that her purpose in contacting her was to check on her welfare. Aide asked Martin why she was still there. Martin said she was warming up her car. Immediately upon making contact with Martin, Aide noticed an odor of intoxication, glassy and bloodshot eyes, and slurred speech at times. Aide asked her how much she had to drink this evening, and Martin said "not a lot." Despite Aide's requests, Martin refused to extinguish her cigarette or produce her I.D. Eventually she told Aide that she was the owner of the vehicle and refused Aide's request that she step out of the vehicle.

¶5 Aide later testified at the suppression motion hearing that Martin was free to leave until the point in time when Aide smelled the odor of intoxicants on her breath and observed the condition of her eyes and speech. At that point Aide believed Martin was under the influence of intoxicants. Martin was subsequently charged with Operating a Motor Vehicle While Intoxicated-4th offense.

¶6 At the hearing on Martin's motion to suppress on October 6, 2015, after Aide's testimony, the State argued that the stop was justified as a welfare check under the community caretaker exception. Martin argued that there was no apparent emergency or signs of distress to warrant a welfare check and alternatively there was no reasonable suspicion of criminal activity as required by

Terry, 392 U.S. at 22, because Martin had done nothing wrong, and she could not have been arrested for operating after revocation in a parking lot.

¶7 The trial court deferred a decision, invited briefing and rendered an oral decision on the motion November 6, 2015, denying the motion on different grounds than the State had argued. The trial court found the stop and seizure justified, not under the community caretaker exception, but under ***Terry's*** reasonable suspicion analysis because the officer knew Martin was revoked, her car was running, its headlights were on, and her companions had driven away. It concluded it was reasonable for the officer to conclude that Martin intended to drive away and would have to drive on city streets after exiting the parking lot, which was a crime given her revoked status.

¶8 Following the denial of her motion, Martin entered a plea, and a judgment of conviction was entered.

¶9 Martin appeals the judgment of conviction and the trial court's denial of her motion pursuant to WIS. STAT. § 971.31(10) (order denying a motion to suppress evidence may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty to the criminal complaint).

STANDARD OF REVIEW

¶10 We review the denial of a motion to suppress under a mixed standard. We review the trial court's determination of the historical facts under the clearly erroneous standard and the application of those historical facts to constitutional principles *de novo*. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d

86, 700 N. W. 899. *See also* ***State v. Turner***, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987).

DISCUSSION

¶11 Relying on ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634 (2007), and ***Terry***, 392 U.S. at 22, Martin contends that there were no specific and articulable facts for a reasonable suspicion that Martin was about to commit a crime when the officer approached Martin in her car. *See* ***Post***, 301 Wis. 2d 1, ¶13. *See also* ***Terry***, 392 U.S. at 22. Both sides agree on appeal that the point of seizure was when the officer approached Martin's driver's side window. Accordingly, the only issue before this court is a narrow one: Was the officer's seizure of Martin as she was sitting in her running car in a public parking lot unlawful, necessitating the suppression of the evidence derived from that seizure?

¶12 The State argued at the suppression motion below that the stop and seizure were lawful under the community caretaker exception. The trial court rejected that analysis and found that objective, specific and articulable facts in the record supported the seizure under a different analysis—namely that Martin was about to drive on a city street, a crime given her revoked status. On appeal Martin argues that the trial court erred because Aide's testimony of her *subjective* reason for the seizure was a welfare check, not to prevent her from committing the crime of driving after revocation. Martin's argument fails because Aide's subjective reason for the seizure is not the proper measure of the lawfulness of the seizure.

¶13 It is well established that the proper test for the reasonableness of a ***Terry*** stop and seizure is an *objective* one. The actual motivation of a police officer bears no weight on the constitutional reasonableness of traffic stops.

United States v. Smith, 668 F.3d 427, 430 (7th Cir. 2012). It is immaterial what the officer's subjective reason was "as long as there were objective facts that would have supported a correct legal theory to be applied and as long as there existed articulable facts fitting the traffic law violation." *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987). *See also* ***State v. Sykes***, 2005 WI 48, ¶29, 279 Wis. 2d 742, 695 N.W.2d 277.

¶14 Accordingly, we determine whether the objective facts as observed by and testified to by the officer constitute "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." ***Post***, 301 Wis. 2d 1, ¶10 (citation omitted). If those facts "would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime[,]" then the stop is supported by reasonable suspicion. ***Id.***, ¶13.

¶15 Applying those legal principles here, we conclude that the record shows facts that objectively create reasonable suspicion that Martin was about to commit a crime. The officer knew that Martin had been dropped off with another person who had entered her car and left the parking lot. The officer knew that it was 2:00 a.m., and Martin was seated in the driver's seat of her running vehicle, with the headlights on, for approximately ten minutes by the time the officer approached her. The officer knew Martin's vehicle registration was suspended, her driving license privileges were revoked, and her occupational license was ineffective at that hour of day. The officer knew that the only way out of the parking lot was to exit onto city streets where driving after revocation was a crime. There was nowhere else for Martin to drive her already-running vehicle to. Thus,

at the point that the officer approached Martin in her car to talk to her, when the seizure was made, the officer had reasonable suspicion under ***Post*** and ***Terry***.

¶16 Therefore, the officer's subsequent observations of intoxication were constitutionally lawful, and Martin is not entitled to have that evidence suppressed.

By the Court.—Judgment and order affirmed.

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