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COURT OF APPEALS
DISTRICT IV

11-15-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016-AP-001133 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRIANNA L FLAHAVAN,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 2, THE HONORABLE JOSANN M. REYNOLDS, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts of this case.

STATEMENT OF THE ISSUE

Did the police officers have reasonable suspicion to conduct a *Terry* stop of Flahavan? The trial court ruled that there was reasonable suspicion.

STATEMENT OF THE CASE

Flahavan was charged with Possession with Intent to Deliver THC as a Party to the Crime, contrary to Wis. Stat. § 961.41(1m)(h)2 and § 939.05; Possession of THC, contrary to Wis. Stat. § 961.41(3g)(e); and Possession of Drug Paraphernalia, contrary to Wis. Stat. § 961.573(1). On January 10, 2014, Flahavan filed a Notice of Motion and Motion to Suppress Evidence alleging that law enforcement officers lacked reasonable suspicion to stop Flahavan's vehicle. A hearing on the motion was held on January 30, 2014, before the Honorable Maryann Sumi at which time Officer Templeton, Officer Finnegan, Lieutenant Freedman (formerly Sergeant Freedman), and Detective Wagner testified to the above facts.

Judge Sumi denied Flahavan's Motion to Suppress. (Tr. 80:17-18). Judge Sumi held that Officers' Templeton and Finnegan's stop of Flahavan was a *Terry* stop, *see Terry v. Ohio*, 392 U.S. 1 (1968). (Tr. 78:3-5). Judge Sumi found that the stop was a lawful *Terry* stop based on reasonable suspicion arising from the following facts: the known association of the Herndon residence with previous drug trafficking; the involvement of both the Trailblazer and

the Avalanche with previous drug trafficking by Lehr; Flahavan's ownership of the Trailblazer; the proximity in time of the controlled buy taking place and Flahavan leaving the Herndon residence; the fact that Flahavan lived at the Herndon residence; and the presence of video surveillance cameras at the Femrite business along with the reasonable inference that the buy and bust at the Femrite business was being observed by someone at the Herndon residence. (Tr. 79:13-80:10).

STATEMENT OF THE FACTS

On February 28, 2013, Dane County Sheriff's Office Detective Joel Wagner, working with the Dane County Narcotics Task Force, lead an investigation involving a controlled drug transaction between a confidential informant and the target of the operation, Jordan Lehr. (Tr. 50:16-20). Prior to the controlled drug transaction, Detective Wagner lead a briefing for participating officers at approximately 4:00 pm. (Tr. 31:25-32:5). Present at that meeting were City of Madison police officers Scott Templeton and Thomas Finnegan as well as Sergeant (Lieutenant at the time of the motion hearing) Jason

Freedman of the Dane County Narcotics Task Force. (Tr. 6:16-19, 16:2-5, 31:6-9). During the briefing, information was provided about Lehr and his drug dealing practices, past and present. This information included the following:

- Lehr resided at 809 Herndon with his girlfriend and associate, Flahavan. (Tr. 32:17-18, 41:22, 42:18-25).
- Lehr operated the business D Mobile Media out of 4510 Femrite Drive. (Tr. 34:1-7).
- Lehr was known to conduct drug deals at both the Herndon residence and the Femrite business. (Tr. 51:18-25, 52:13-16).
- Lehr was associated with two vehicles: a black Chevrolet Avalanche and a white Chevrolet Trailblazer. (Tr. 42:11-14).
- The Trailblazer was registered to Flahavan. (Tr. 17:18-21).
- Lehr was known to conduct drug deals out of the Avalanche. (Tr. 45:8-11).

Also known to Detective Wagner through the course of his investigation prior to the controlled drug transaction were several anonymous complaints regarding drug sales by Lehr. (Tr. 52:13-16). One such complaint specified that Lehr was selling Oxycontin to the complainant's son out of

the Herndon residence. (Tr. 52:16-19). This complainant also identified a white Trailblazer. (Tr. 52:19-21).

Additionally, Detective Wagner had learned from the confidential informant (who participated in the controlled buy in this case) that Lehr had active video surveillance cameras mounted to the Femrite business. (Tr. 55:22-56:3). Detective Wagner observed these cameras himself in driving over to the Femrite business on February 28, 2013. (Tr. 56:14-16). Detective Wagner knew that it was not uncommon for persons to monitor those kinds of cameras from remote locations and that if such remote monitoring was happening, that destructible evidence at the remote location was susceptible to removal without law enforcement's knowledge. (Tr. 57:11-23).

At approximately 5:00 pm on February 28, 2013, the confidential informant successfully purchased about one pound of marijuana from Lehr for \$3600 of prerecorded currency. (Tr. 59:1-13, 19). This deal took place at the Femrite business, in a garage in which the Avalanche was parked. Lehr retrieved the marijuana from a cargo box on the Avalanche. (Tr. 59:1-9).

At approximately 5:10 pm, Sergeant Freedman directed officers to arrest Lehr in the parking lot of the Femrite

business. (Tr. 40:1-12). Around this time, Sergeant Freedman also directed officers to tail and stop the Trailblazer if it left the Herndon residence. (Tr. 40:13-16, 43:12-16). Sergeant Freedman had been a City of Madison police officer for over fifteen years and a specialized drug officer with the Dane County Narcotics Task Force for five years. (Tr. 44:5-18). Based on this training and experience, Sergeant Freedman decided to have the Trailblazer stopped because he knew that the presence of drugs at the Femrite business meant that there might be drugs at the Herndon residence. (Tr. 43:17-23). Based on his training and experience, Sergeant Freedman also believed that because the drugs from the controlled buy had been in one vehicle, they reasonably might be in the other vehicle. (Tr. 43:24-44:4). Sergeant Freedman further testified to the inherent transportability, concealability, and destructibility of controlled substances, and the tendency of suspects to attempt to destroy controlled substances when they believe they are about to be caught by law enforcement. (Tr. 44:21-45:4).

At approximately 5:45 pm, undercover officers surveilling the Herndon residence reported observing the Trailblazer leaving the residence. (Tr. 18:13-19, 28:10-

12). This information was relayed to Officers Templeton and Finnegan, who subsequently caught up to the Trailblazer and pulled it over per Sergeant Freedman's orders. (Tr. 9:4-9, 19:22-20:5). The officers identified Flahavan as the driver of the Trailblazer. (Tr. 10:2-4). During the officers' contact with Flahavan, she admitted to the presence of marijuana in the vehicle. (Tr. 22:7-12). Flahavan admitted she had been watching the events of the investigation at the Herndon residence via the surveillance cameras mounted on the Femrite business, and that she had then collected the marijuana in the residence, put it in the Trailblazer, and left. Marijuana and paraphernalia were found in the vehicle. (Tr. 22:22-23:7).

ARGUMENT

I. STANDARD OF REVIEW.

When reviewing the circuit court's denial of a motion to suppress evidence, this Court will uphold the circuit court's factual findings unless clearly erroneous, but reviews its application of the facts to constitutional principles de novo. See *State v. Stout*, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474.

II. THE TOTALITY OF THE CIRCUMSTANCES SUPPORTS THE TRIAL COURT'S FINDING THAT REASONABLE SUSPICION EXISTED TO CONDUCT A TERRY STOP OF FLAHAVAN.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. An investigatory, or *Terry*, stop typically involves temporary questioning of an individual. *Id.* ¶20; see also *Terry v. Ohio*, 392 U.S. 1 (1968). Such a stop is constitutional if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Id.* Accordingly, an investigatory stop permits police to briefly detain a person in order to ascertain the

presence of possible criminal behavior, even though there is no probable cause supporting an arrest. *Id.*

Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Id.*

¶21. "[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996); see also Wis. Stat. § 968.24. "Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *State v. Waldner*, 206 Wis. 2d at 60. It is sufficient that "a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn." *Id.* The question ultimately is, "what would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386, 390 (1989).

The record in this matter clearly supports Judge Sumi's findings that the officers involved in this case had reasonable suspicion to temporarily seize Flahavan based upon the officer's knowledge of the Herndon residence, her association with known drug dealer Lehr, her ownership of a vehicle known to be involved in drug deals, the executed buy bust with Lehr, and the temporal proximity of the buy bust with Flahavan's flight from the Herndon residence. Based upon their observations, the officers suspected a degree of involvement on Flahavan's part with Lehr's drug trafficking; for example, as Detective Wagner testified, he had seen many times wives or associates assisting drug dealers by destroying evidence for them. (Tr. 66:19-24).

In context of all of the information before them, Sergeant Freedman and Detective Wagner - the decision-making officers in this case - believed that criminal activity on Flahavan's part may be afoot. They made the decision to order Officer's Templeton and Finnegan to stop the Trailblazer leaving the Herndon residence in order to freeze the scene and preserve evidence of controlled substances and/or controlled substance trafficking that Flahavan may have been transporting out of the residence in an effort to destroy. They inferred this based upon their

vast knowledge and experience as dedicated drug law enforcement officers with the Dane County Narcotics Task Force. In this way, their suspicions about Flahavan were completely reasonable. The test is not what citizens or lawyers or inexperienced patrol officers would reasonably suspect; the test is what would a reasonable police officer reasonably suspect *in light of his or her training and experience*. Sergeant Freedman's and Detective Wagner's experience as Narcotics Task Force officers told them that a reasonable inference about what was transpiring was that Flahavan was involved in Lehr's drug trade and was removing drugs from the Herndon residence.

III. THE STOP OF FLAHAVAN IS SUPPORTED BY ANALOGOUS CASE
STATE V. LIMON, 2008 WI App 77, 312 Wis. 2d 174, 751
N.W.2d 877.

In *State v. Limon*, the Court of Appeals upheld the trial court's denial of Limon's suppression motion, finding that the totality of the circumstances before the police officer provided sufficient justification for the investigative, Terry stop of Limon. 2008 WI App 77, ¶ 2, 312 Wis. 2d 174, 751 N.W.2d 877. In *Limon*, two police officers saw two men and Limon on the porch of a residence in a high crime area.

Id. ¶¶5,7. The officers approached and asked the three individuals if they lived at the residence and learned they did not. *Id.* ¶6. One officer asked one of the men to stand up; when that man stood, the officers observed a marijuana blunt nearby the individuals. *Id.* The two men were patted down for weapons; Limon was not because police department policy mandated that female suspects be patted down by female officers. *Id.* ¶¶7-8. Instead, one of the officers told Limon, "Let me see your purse," in order to look for weapons possibly concealed within the purse. *Id.* ¶8. Limon handed over her purse, and the officer observed crack cocaine within it. *Id.* ¶8-9. The court found this to constitute a lawful *Terry* stop under the totality of the circumstances. *Id.* ¶2. In doing so, the court relied on the following facts:

1. One of the police officers making the *Terry* stop had been informed, in person, by an anonymous citizen found reliable by that officer, that drug loitering was occurring at the residence. *Id.* ¶¶15, 25.
2. Limon was not merely walking in front of the residence suspected of drug loitering; rather, she was on the porch and in the presence of a marijuana blunt. *Id.* ¶25.

We can glean from these facts that the court was concerned with whether the citizen tip about drugs at the residence had indicia of reliability, whether there was evidence tending to corroborate the citizen tip that there was drugs at the residence, and whether Limon simply happened to be around the residence or whether she was actually at the residence.

The facts of Flahavan's case are similar to *Limon* and support a finding of reasonable suspicion. First, Detective Wagner had information from a citizen informant that he found credible regarding drug dealing by Lehr at the Herndon residence.

This was not the only information he had, though. Detective Wagner had further, credible and corroborative information that caused him to reasonably suspect drugs were at the Herndon residence: Detective Wagner had information from Luis Gonzalez who informed that he had done drug deals at the Herndon residence with Lehr; Detective Wagner had information about drug dealing from the confidential informant, which was then further corroborated by the results of the successful controlled buy conducted on February 28, 2013.

Finally, Flahavan leaving the Herndon residence, where she was known to reside, in a vehicle previously identified as associated with Lehr's drug dealing, less than 45 minutes after Lehr was arrested, shows that Flahavan was not merely near the Herndon residence - she was at it, and was coincidentally and conveniently leaving it near when her significant other was being "busted" with drugs. The Court of Appeals in *Limon* found that the officers' suspicion that some kind of criminal activity had taken or was taking place on the porch at the residence was reasonable, and so to should this Court in this case.

CONCLUSION

For the reasons stated above, and upon the record in this matter, the State respectfully requests that this Court affirm Judge Sumi's decision.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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inch margin on left side and 1
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Dated: _____.

Signed,

Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of November, 2016.

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Assistant District Attorney
Dane County, Wisconsin

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of November, 2016.

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APPENDIX