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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP2059

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SARA ANN PONFIL,

Defendant-Appellant.

On Notice of Appeal from a Judgment
Entered in the Brown County Circuit Court,
the Honorable Timothy A. Hinkfuss, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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971.31(10) 1

ISSUE PRESENTED

Ms. Ponfil was seized after an officer noticed her vehicle and another parked together in the rear parking lot of an open tavern. When the officer shined his spotlight on the two vehicles and approached on foot, he noted a change in the occupants' demeanor and also saw that the other car (not Ms. Ponfil's) contained a person known to be in a gang. One of the passengers in the other car also asked the officer why they were being stopped. Did the officer have reasonable suspicion to detain Ms. Ponfil by ordering her back into her vehicle, which resulted in the discovery of cocaine?

The circuit court found reasonable suspicion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a misdemeanor appeal decided by one judge, so it will not be published. Ms. Ponfil does not request oral argument, as the issue can be adequately developed in briefing.

STATEMENT OF THE CASE AND FACTS

Sara Ponfil pled no contest to possession of cocaine and was placed on probation. (23:1). She appeals the pre-plea denial of her suppression motion pursuant to Wis. Stat. § 971.31(10).

A patrolling Green Bay police officer pulled his squad into the parking lot of Nic's Bar. It was about 1:45 on a Sunday morning in July; the bar is open until about 2:15. Per the officer's testimony the bar's overflow parking area is dimly lit and secluded, and sometimes used for illegal

activity. Asked about gang activity, the officer testified he was “aware of the clientele that was at Nic’s Bar, but my primary focus on the night of this investigation was alcohol enforcement, open intoxicants, and public disturbances” which were a problem at Nic’s. (35:5-8, 10; App. 109-112, 114). He also testified about a “pretty substantial fight” that had previously occurred in the parking lot, after which a handgun had been found. (35:50-51; App. 132-33). Various people had also informed the officer that Nic’s was a “cocaine bar” where the drug was sold and used. (35:52; App. 134).

There were a few cars in the lot; the officer noticed two parked together in the unlit northeast corner. Both cars were occupied and the occupants did not immediately make moves either to enter the bar or to drive off. The cars were positioned so that the driver’s doors were adjacent; per the officer this is “common with people that are familiar with each other and talking in the parking lot.” The officer could not see whether the occupants were communicating, however. (35:9; App. 113).

He parked his squad. He did not turn on his red and blue lights but did turn on his spotlight and pointed it at the cars. (35:20; App. 124). About a minute after he first pulled into the lot, the officer began to walk toward the cars, with his gun and Taser holstered but his flashlight in hand. (35:17-18, 20-21; App. 121-22, 124-25). He testified that when the vehicles’ six occupants noticed him,

they changed their demeanor from a calm and kind of hanging-out demeanor to a hurried, panicked. Everyone was sitting up. It appeared they were straightening up, kind of like, that moment—I don’t know exactly how to describe it—that startled moment where you’re—I guess you could say you were caught by an authority and you

did not want to get caught doing whatever it was that you were doing.

(35:10,48; App. 114, 130). The officer then decided that he would not let the vehicles' occupants leave. (35:16; App. 120).

The officer spoke to the driver of one of the cars, who said they were just preparing to leave the lot. (35:10-11; App. 114-15). The passenger in that car started giving the officer "some grief about why they were being stopped, what was the reasoning for it, and it was a little excessive for basically just me walking up to a vehicle." (35:12; App. 116). The officer testified that this reaction caused him to have a "heightened awareness." (35:15; App. 119). The officer also recognized one of the passengers in this car as a Latin King. (35:30). Ms. Ponfil was in the driver's seat of the other vehicle; no one in her car was acting hostile toward the officer. (35:24; App. 128).

At this point Ms. Ponfil, after looking over her shoulder at the officer, began to get out of her car as if to head back into the bar. (35:11; App. 115). The passenger in Ms. Ponfil's car got out and began to walk away. (35:13; App. 117). The officer ordered Ms. Ponfil to remain in her car. (35:12; App. 116). Ms. Ponfil was a "little hesitant at first" but sat back in the driver's seat with her legs out of the car. (35:12; App. 116). The officer "had her bring her feet back into the vehicle" at which point he noticed a plastic baggie on the ground with a white powder inside of it. (35:13-14; App. 117-18). It was a windy evening, leading the officer to believe that the bag had recently been dropped. (35:25; App. 129). Eventually, the officer picked up the bag, which contained cocaine. (35:14; App. 118).

Ms. Ponfil moved to suppress the cocaine on the ground that it was the fruit of a detention without reasonable suspicion. The court held an evidentiary hearing at which the above facts were developed. (10; 35). After briefing, the court issued a written decision concluding the facts showed reasonable suspicion and denying suppression. (13; 14; 16; App. 101-04).

ARGUMENT

The cocaine must be suppressed as the fruit of an unlawful seizure.

A. Standard of review and summary of argument.

The facts here are undisputed; this court decides *de novo* whether they establish reasonable suspicion. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394.

Ms. Ponfil was seated in the driver's seat of her car at the rear of the parking lot of an open tavern. After sitting for about a minute, she was seized and prevented from walking away. The totality of the officer's observations by this point—the reputation of the tavern, the fact that a gang member was in a nearby car, the “sitting up” of the cars' occupants, and the fact that one of the other car's occupants gave the officer “some grief” about being stopped—did not amount to “reasonable, individualized suspicion” that Ms. Ponfil was committing any crime. *Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990). As such, the evidence discovered as a result of her seizure must be suppressed.

B. Ms. Ponfil was seized without reasonable suspicion; the cocaine discovered by way of the seizure must therefore be suppressed.

First, it is undisputed that Ms. Ponfil was seized when she attempted to get out of the car, was “ordered” to remain there, and complied. *State v. Young*, 2006 WI 98, ¶39, 294 Wis. 2d 1, 717 N.W.2d 729 (seizure occurs where person “submits to a show of authority”).

It is also undisputed that the officer discovered the cocaine after he ordered Ms. Ponfil to move her feet, which had been concealing it—that is, the discovery of the cocaine was the fruit of the seizure. (35:13-14).

Whether the cocaine is admissible thus depends upon whether the “specific, articulable facts” known to the officer, together with “reasonable inferences from those facts” created a reasonable suspicion that Ms. Ponfil was committing a crime. *State v. Fields*, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. While the court must consider all the relevant facts taken together—the “totality of the circumstances”—it is not possible to analyze the significance of the officer’s knowledge without considering each individual piece of information. Thus:

1. Nic’s bar as a high-crime area

In its decision, the circuit court relied heavily on two portions of the officer’s testimony: first, that Nic’s, besides having issues with fights and alcohol-related nuisances, had been described to him as a “cocaine bar” where the drug was sold and consumed; and second, that gang members frequented “the area” around the bar. (16:2-3; 35:15; App. 102-03, 119).

The circuit court found the officer credible, so this court must accept that he had, in fact, been told what he said he was told. But what he was told (by unknown persons)—that at some unknown time, some unknown number of the bar’s customers used or trafficked in drugs—is slim grounds indeed to accuse any given Nic’s patron of criminality.

In general, presence in a so-called “high-crime area,” while a legally proper factor for consideration, is not enough for reasonable suspicion. *Buie*, 494 U.S. 334 n.2 (even in high-crime area, “reasonable, *individualized* suspicion” is required (emphasis added)). It is *particularly* weak grounds, however, to suspect a person acting so unremarkably as Ms. Ponfil: a woman sitting in her car for one minute on a warm July night in the parking lot of an open bar, apparently conversing with the occupants of a car next to her.

“The spectrum of legitimate human behavior occurs every day in so-called high crime areas.” *State v. Morgan*, 197 Wis. 2d 200, 212, 539 N.W.2d 887 (1995). Even accepting that some Nic’s patrons break the law, a drinking-age adult socializing with other adults on the premises of an open tavern is among the most common scenes one might encounter on a weekend night in Green Bay. *See State v. Gordon*, 2014 WI App 44, ¶12, 353 Wis. 2d 468, 846 N.W.2d 483 (even in high-crime area, “circumstances must not be so general that they risk sweeping into valid law-enforcement concerns persons on whom the requisite individualized suspicion has not focused”).

2. *The behavior of the car’s occupants*

The decision below next relies on the vehicles’ occupants’ change in demeanor when the officer approached. The officer ascribed great significance to this change, testifying that it triggered his decision to detain. His specific

observations were that the occupants “changed their demeanor from a calm and kind of hanging-out demeanor to a hurried, panicked. Everyone was sitting up. It appeared they were straightening up.” (35:10; App. 114). He also said that one of the occupants of the car Ms. Ponfil was *not* in gave him “some grief” about being stopped. (35:12; App. 116).

Going from relaxed and social to startled and attentive—from “hanging-out” to “sitting up ... straightening up”—is an utterly natural response to having a spotlight shined into one’s vehicle. The officer’s remaining testimony—that the occupants appeared “panicked” and “hurried,” and looked like they had been “caught by an authority and you did not want to get caught doing whatever it was that you were doing”—are statements of *the officer’s* subjective beliefs, not observations of objective facts. (35:10; App. 114). See *Brown v. Texas*, 443 U.S. 47, 52 (1979) (officer’s testimony that two men in alley frequented by drug users “looked suspicious” did not support reasonable suspicion).

As for the passenger who “gave [the officer] grief,” the officer believed it was not “proportionate for the circumstances” because he had not turned on his emergency lights or drawn a weapon. (35:12, 14-15). He had, however, shined a spotlight into these darkened vehicles and was now approaching them with his flashlight. Though the officer may have regarded his own actions as routine, it was not unreasonable or suspicious for his startled detainees to ask “why they were being stopped, what was the reasoning for it.” (35:12).

The officer also testified that the rear area of the parking lot, farther from the main doors of the bar, was “[o]verflow parking”; when he arrived there were “a few

vehicles that were parked in the more lit area” and in the overflow area “it was more sporadic” with “a couple” vehicles besides the ones that he approached. (35:7-8; App. 121-22). The court viewed this, as well as the positioning of the two vehicles so their drivers were adjacent, as additional grounds for reasonable suspicion. (16:3; App. 103).

Like socializing on the premises of an open tavern, parking in the less-well-lit, less-full, somewhat-farther-from-the-door part of a tavern parking lot is just not unusual or suspicious behavior. There were two other cars parked in the rear (or eastern) portion of the lot; though the lot was apparently not full at 1:45 a.m., there is no reason to believe it had not been full earlier on a Saturday night. While an officer need not rule out the possibility of innocent behavior before a seizure, *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990), Ms. Ponfil’s choice of a parking spot was “far too common to support the requisite individualized suspicion.” *Gordon*, 353 Wis. 2d 468, ¶17.

3. *The presence of a gang member in the other car*

The trial court also found significant that the *other car* contained a Latin King, because the officer had testified that “the way they were parked led me to believe that they were familiar with each other.” (16:2-3; App. 102-03). But familiarity with criminals is paltry evidence of criminality. Surely this alleged gang member meets and speaks with a great many non-criminals as he goes about his life; a person’s momentary conversation with him does not make that person suspicious. “Presumptions of guilt are not lightly to be indulged from mere meetings,” *United States v. Di Re*, 332 U.S. 581, 593 (1948). *See also Sibron v. N.Y.*, 392 U.S. 40, 62–63 (1968) (“The inference that persons who talk to

narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security"); *Smith v. United States*, 558 A.2d 312, 314-15 (D.C. 1989) (citing cases "rejecting articulable suspicion arguments based upon guilt by association").

In sum, the situation the officer encountered in the parking lot of Nic's—a group of people lingering for a minute in the parking lot of an open tavern, who reacted with concern to being spotlighted and approached by the police—was not sufficiently suggestive of crime to justify seizing six people, including Ms. Ponfil. The stop was unlawful and its fruits must be suppressed.

CONCLUSION

For the foregoing reasons, Ms. Ponfil respectfully requests that this court vacate her conviction and sentence and remand with directions that the cocaine be suppressed.

Dated this 9th day of January, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,227 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of January, 2017.

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

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