

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT NUMBER III

RECEIVED

03-09-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

No. 2016AP2059
(Brown County Case No. 2015CM1047)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SARA ANN PONFIL,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from a Judgment
Entered in the Brown County Circuit Court,
The Hon. Timothy A. Hinkfuss, Presiding

Beau G. Liegeois
Assistant District Attorney
State Bar No. 1066186

Brown County District Attorney's Office
Law Enforcement Center
300 East Walnut Street
P.O.Box 23600
Green Bay, WI 54305-3600
(920)448-4190

Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. THERE WAS REASONABLE SUSPICION IN THIS CASE.....	1
A. Reasonable suspicion is a lower standard than probable cause.....	1
B. A high crime area and the officer’s officer’s training and experience may be considered as factors in the reasonable suspicion analysis.....	2
C. There was elevated tension because of the occupant's movements and there was a known gang member in the vehicle.....	3
CONCLUSION.....	4
CERTIFICATIONS.....	6

TABLE OF AUTHORITIES

Cases

<i>Illinois v. Wardlow</i> , 528 U.S. 119, 123 (2000).....	1, 2
<i>State v. Morgan</i> , 197 Wis.2d 200, 211 (1995).....	2, 4
<i>State v. Waldner</i> , 206 Wis.2d 51, 58-59 (1996).....	1
<i>State v. Young</i> , 294 Wis.2d 1 (Ct.App. 1997).....	4
<i>U.S. v. Arvizu</i> , 122 S.Ct. 744, 750 (2002).....	1, 2
<i>U.S. v. Sokolow</i> , 490 U.S. 1, 7 (1989).....	1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a misdemeanor appeal, so the State does not request oral argument or publication.

ARGUMENT

I. THERE WAS REASONABLE SUSPICION IN THIS CASE

A. Reasonable suspicion is a lower standard than probable cause.

Reasonable suspicion is a lower standard than probable cause. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Reasonable suspicion also requires less than a preponderance of the evidence standard, but still must be more than a mere hunch. *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989). When considering a reasonable suspicion analysis, the totality of circumstances in each case must be considered to determine if the police officer had a particularized and objective basis to suspect that criminal activity was afoot. *U.S. v. Arvizu*, 122 S.Ct. 744, 750 (2002).

Reasonable suspicion may rise from behavior that was not illegal and could have had an innocent explanation. *State v. Waldner*, 206 Wis.2d 51, 58-59 (1996). In *Waldner*, the Wisconsin Supreme Court upheld the officer's reasonable suspicion to stop a motorist, who was later determined to be operating while intoxicated, based on observations of driving that were not illegal, when standing alone. *Waldner* stated that "a point is reached where the sum of the whole is greater than the sum of its individual parts." *Id.* *Waldner* also explains that a police officer actually observing unlawful conduct is probable cause to arrest, a higher standard than reasonable suspicion requires. *Id.* The law does not require the police officer to have a precise level of information, and allows police officers to stop persons when they have less than probable cause. *Id.*

- B. A high crime area and the officer's training and experience may be considered as factors in the reasonable suspicion analysis.

Police officers may “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.” *U.S. v. Arvizu* at 750. Knowledge of a high crime area, based on the officer's training and experience, is a relevant consideration of the entire context of a stop. *Illinois v. Wardlow* at 124. This case law precedent holds that weight should be given to an officer's training and experience when analyzing reasonable suspicion.

A high crime area alone cannot be used as the basis for reasonable suspicion, but it can be considered as one factor in an analysis based on the totality of circumstances. *State v. Morgan*, 197 Wis.2d 200, 211 (1995), and *Illinois v. Wardlow* at 124. In *Morgan*, the police officer testified that the stop was in a “fairly high-crime-rate area,” there was not a lot of traffic in the area at 4 AM, the vehicle drove in and out of an alley, and the vehicle made several turns within a few city blocks. The police officer stopped the vehicle for expired license plates and observed that the driver appeared nervous while searching for his driver's license. *Morgan* at 204. The Wisconsin Supreme Court upheld these facts as reasonable suspicion.

In Ms. Ponfil's case, Officer Brann provided extensive testimony about this area. Officer Brann testified about Nick's Bar's reputation as a cocaine bar, that is based on information provided by individuals he has talked to who have familiarity with the establishment. Motion Hearing, November 19, 2015, Transcript 52:9-23. Officer Brann further testified about specific instances of conduct at Nick's Bar that he personally experienced. He testified about observing individuals coming and going from Nick's Bar with open intoxicants and publicly urinating outside the bar. Tr. 7:20-8:1, and 30:24-31:8. He testified about a specific incident that he himself experienced, that involved a fighting disturbance and a firearm. He had personal knowledge of a prior violent incident taking place in that area. Tr. 50:21-51:18. Officer Brann not only knew Nick's Bar's reputation as being in a high crime area and a cocaine bar, but also

observed particularized instances that corroborated the bar's reputation.

Judge Hinkfuss ruled that "the State did indeed prove that the area was high crime." Decision and Order, dated January 20, 2016, p. 2, para. 1. Considerable weight was properly given to Officer Brann's training and personal experience with Nick's Bar as a high crime area.

At the motion hearing, the defense presented Defense Exhibit #1 "Calls for Service Report by Address." Tr. 32:15. This document should be given very little weight in this analysis for two reasons. First, the comparison between Nick's Bar and the nearby McDonald's restaurant is a completely faulty comparison. These are two totally different kinds of establishments based on the testimony that was presented. McDonald's is open 24 hours. Tr. 50:5. Nick's Bar has traffic primarily between 11 PM and 3 AM. Tr. 33:23. McDonald's is a fast food restaurant that appeals to everyone, while Nick's Bar is a tavern that appeals to adults only. Officer Brann testified that McDonald's and its customers are more likely to call police if there is a incident, whereas taverns try to avoid calling police because it can negatively impact their business. Tr. 50:5-20. Comparing a McDonald's restaurant to Nick's Bar is like comparing apples to zebras.

The second reason that Defense Exhibit #1 should be given little weight is because of the exhibit's characterization of the incident in this case. The entry in the document for this incident, dated "7/12/15" in the document, describes it as a "Suspicious vehicle." Exh. #1, page 9 of 13. There is no mention of this being an incident involving cocaine, even though cocaine was discovered during this case. The "Incident Types" are such general descriptions that they offer very limited value.

- C. There was elevated tension because of the occupant's movements and there was a known gang member in the vehicle.

Officer Brann testified that Nick's Bar is in a high crime area that includes gang activity, and that gang activity is commonly associated with criminal activity. Tr. 16:1-2. Officer Brann further testified that as he approached the vehicles, he recognized one of the occupants as a known gang

member, which heightened his awareness. Tr. 15:19-16:2. He knew the gang members name and gang affiliation. Tr. 30:14. He was in full uniform, did not have his firearm drawn and was using his flashlight. Tr. 14:24-25.

As he approached the vehicles, he observed movement among the occupants of both vehicles. Officer Brann testified that the movement did not fit the circumstance of him approaching the vehicles on foot with his emergency lights off. Officer Brann testified that he has dozens of contacts per night, and the occupants' response to him was disproportionate to the situation. The occupants "aggressive actions" toward him, gave him a "heightened awareness." Tr. 14:1-24.

Officer Brann stated that his only motion at that point was walking up to the vehicles, and the occupants starting opening doors and moving around a lot, including the Defendant, who was driving one of the vehicles. Officer Brann testified that it was not until after he made these observations, while he was approaching the vehicles on foot, that he would not have let anyone leave. Tr. 16:8-19. These additional observations are significantly different than what the officer observed in *Young*. The cocaine at issue in this case was observed by Officer Brann on the ground outside the vehicle, shortly after the point of seizure.

As in *Morgan*, none of these activities individually are incriminating. But when considered in the entire context of the incident, they give rise to reasonable suspicion.

These additional observations are significantly different than what the officer observed in *Young*. *State v. Young*, 294 Wis,2d 1 (Ct.App. 1997). In *Young*, the police officer makes a pedestrian stop based on information from other officers, in a high-crime area, and *Young* himself is fairly cooperative with the contact. The officer had no particularized observations of the area as a high-crime area, as Officer Brann does in Ms. Ponfil's case. Furthermore, there was no behavior in *Young* that would have heightened the awareness of the situation and raised tension.

CONCLUSION

Officer Brann's testimony established a particularized and objective basis for the investigatory stop of the defendant that was beyond a mere hunch. There was reasonable

suspicion based on 1) Officer Brann's knowledge of the area's high crime reputation, corroborated by his own personal observations and experiences in that area, 2) the "aggressive actions" of the occupants, one of whom was a confirmed gang member, that gave him a "heightened awareness," 3) the occupants were opening doors and moving around a lot, and significantly outnumbered the officer, and 4) the occupants disproportionate response to his approach on foot with his squad lights off. Each individual fact in this case in isolation may have an innocent explanation, but when considered in their totality, the factual observations of Officer Brann rise to reasonable suspicion.

Therefore, the State respectfully requests that the Court find that Officer Brann did have reasonable suspicion to seize the Defendant to investigate criminal activity, and uphold Judge Hinkfuss' denial of the Defendant's motion to suppress evidence.

Dated this 8th day of March, 2017.

Respectfully submitted,



Beau G. Liegeois
Assistant District Attorney
Brown County
State Bar #1066186
Law Enforcement Center
300 East Walnut Street
P.O.Box 23600
Green Bay, WI 54305-3600

Attorney for Plaintiff-Respondent.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief and appendix produced with a 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 this brief is 1,474 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 Section 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 8th day of March, 2017.

A handwritten signature in cursive script, appearing to read "Beau Liegeois", written in dark ink.

Beau G. Liegeois
Assistant District Attorney
Brown County

APPENDIX OF PLAINTIFF-RESPONDENT

November 19, 2015, Motion Hearing transcript, pages 7 to 33

November 19, 2015, Motion Hearing transcript, pages 50 to 52

Defense Exhibit #1 “Calls for Service Report by Address”

CERTIFICATION OF APPENDIX

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 8th day of March, 2017.

A handwritten signature in cursive script, appearing to read "Beau Liegeois", written in dark ink.

Beau G. Liegeois
Assistant District Attorney
Brown County