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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP000296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TRACY DEAN MARTIN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEAN MARIE KIES, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED

Page

OTHER AUTHORITIES CITED

STATE OF WISCONSIN

C O U R T OF A P P E A L S

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ISSUE PRESENTED

Did the arresting officer have reasonable suspicion to seize Mr. Martin?

Trial Court answered: Yes

State's Position on Appeal: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On May 22, 2015, around 12:30AM, West Allis Police Officer Foy was dispatched to Taco Bell in the city of West Allis. (R35:5). Dispatch advised that they had a report of a male sleeping in his vehicle in the parking lot and the caller believed the male to be intoxicated. *Id*. When Officer Foy arrived to the Taco Bell, he observed the vehicle parked perpendicular at about a forty-five degree angle to any actual parking spot. (R35:7). Officer Foy also observed that there was a male in the driver's seat vehicle, later to be determined Martin, with his head back against the head rest. *Id*. Martin had a taco in one of his hands and was sleeping. Officer Foy observed that the keys were in the ignition with the headlights on, but the vehicle's engine was not running. (R35:14).

Officer Foy then ran the registration for the vehicle that was occupied by Martin. (R35:7). That check revealed that the vehicle was registered to Martin and that Martin had three prior OWI convictions. *Id.* Martin also had a .02 alcohol restriction. *Id*. At this point, Officer Kleinfeldt and Officer Foy approached Martin's vehicle. (R35:6). Officer Kleinfeldt approached on the passenger side of the vehicle. *Id.* Officer Kleinfeldt then entered through the passenger side door of the vehicle and removed the keys from the ignition, so as to not possibly startle Martin in a potential situation where he may react and drive away. *Id*.

Martin was eventually arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant after he performed poorly on the Standardized Field Sobriety Tests. (R35:10). On May 29, 2016, the State filed the Criminal

Complaint charging Martin with one count of Operating a Motor Vehicle While Intoxicated – Fourth Offense and one count of Operating with Prohibited Alcohol Concentration – Fourth Offense. (R1).

On November 30, 2015, Martin filed a Motion to Suppress based on the initial seizure of Martin. (R10). The State filed a written response on December 22, 2015. (R11). A motion hearing was held on February 19, 2016 before the Honorable Paul J. Rifelj. (R35).

Judge Rifelj denied Martin's motion to suppress. He found that officers were called to respond to Taco Bell because of a report of a possible intoxicated driver at that specific location. (R35:27-28). When officers arrived at that specific location, they saw the vehicle parked irregularly, they see Martin asleep at the wheel, the keys were in the ignition, the vehicle's headlights were on, and it was 12:30AM. Judge Rifelj held that the vast majority of reasonable people would have a reasonable suspicion under those circumstances that Martin may have been operating while intoxicated. (R35:28).

On April 29, 2016, Martin filed a motion for reconsideration. (R15). On May 12, 2016, the State filed a response to Martin's reconsideration motion. (R16). On May 31, 2016, the judge denied Martin's motion for reconsideration (R36), holding that the anonymous tip was part of the reasonable suspicion, but the personal observations of the officer when approaching the vehicle were enough to cause a reasonable person to suspect that there was an OWI afoot. (R36:4). On August 1, 2016, a judicial transfer occurred, and on August 8, 2016, Martin filed the motion for reconsideration again. (R15). On September 16, 2016, the Honorable Jean M. Kies denied Martin's motion. (R37). On December 19, 2016, Martin pled guilty to Operating While Intoxicated and the judgement of conviction was entered. (R30). The charge of Operating with a Prohibited Alcohol Concentration was dismissed. *Id*.

STANDARD OF REVIEW

Review of a motion to suppress evidence involves a two-step analysis. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463 (citations omitted); *State v. Sloan*, 2007 WI App 146, ¶ 7, 303 Wis. 2d 438, 736 N.W. 2d 189. First, appellate courts will uphold the circuit court's findings of historical fact unless clearly erroneous. *Robinson*, 327 Wis. 2d 302, ¶ 22; *Sloan*, 303 Wis. 2d 438, ¶ 7. And second, whether those facts constitute reasonable suspicion are reviewed de novo. *State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989).

ARGUMENT

I. LEGAL FRAMEWORK

The United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures, U.S. Const. amend. IV; Wis. Const. art. 1, § 11. Wisconsin's constitutional provisions on searches and seizures are understood to be "coextensive" with the federal constitution. *State v. Houghton*, 2015 WI 79, ¶¶ 49-50, 364 Wis. 2d 234, 868 N.W.2d 143 (citation omitted).

In *Terry v. Ohio*, 392 U.S. 1, 21 (1968), the United States Supreme Court established that an investigatory stop is a seizure that is permitted when the officer has reasonable suspicion, based on the totality of the circumstances, that the person stopped has committed, is committing or is about to commit a crime or violation. The Court later extended the reasoning in Terry to include investigatory traffic stops. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

The essential inquiry is whether the officer's actions were reasonable under all the facts and circumstances present. *State v. Williams*, 2002 WI App 306, ¶ 12, 258 Wis. 2d 395, 403–04, 655 N.W.2d 462, 466. The State carries the burden to establish that an investigative stop is reasonable. *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634.

The question of what constitutes reasonable suspicion becomes a common sense test: "'What would a reasonable police officer reasonably suspect in light of his or her training and experience.'" *State v. Allen*, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999) (quotation omitted); *see also Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior").

In determining whether an officer has the requisite reasonable suspicion, a court looks at the facts known to the officer at the time, together with any rational inferences drawn from those facts. But an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305.

A fair summary of the applicable law is that reasonable suspicion is subject to an objective inquiry based on the totality of the circumstances. While reasonable suspicion requires less than the probable cause necessary for an arrest, it requires more than an unparticularized suspicion or hunch. An officer is not required to eliminate all possibilities of innocent behavior before initiating a Fourth Amendment intrusion; it is a common sense balancing between the interests of the public in solving crime with the reasonableness of the intrusion.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE OFFICERS HAD REASONABLE SUSPICION TO DETAIN MARTIN

In the present case, it is the State's position that the officers clearly had the reasonable suspicion to detain Martin. At 12:30AM, Officer Foy was dispatched to the Taco Bell parking lot (R35:5). The caller stated that a male was sleeping in his vehicle in the parking lot and the caller believed the male to be intoxicated. *Id*. The State agrees with Martin in that this caller must be treated as an anonymous tipster.

Officer Foy testified that prior to making contact with Martin, that is all the information that he had. (R35:12). Officer

Foy also testified that he did not get the description of the vehicle that was parked in the Taco Bell parking lot with the male sleeping in it. (R35:18). Martin argues that that the anonymous call fails constitutional scrutiny, because it lacks the necessary reliability to support a seizure by itself. (Appellant's Brief: 6). The State would agree with that assertion, if that were the only information available to the officer, and the officer hadn't made his own observations. However, Officer Foy had made his own observations when he arrived at Taco Bell. Martin incorrectly focuses his argument primarily on the anonymous tip.

Martin argues that this case is similar to *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), in that the tipster's information fell below the required threshold for reliability according to the Court. The Court found that in *J.L.,* the anonymous tip failed to demonstrate the informant's veracity, and thus the police were required to corroborate the tip. *Id*. at 274. In *J.L.*, the tipster said that a young, black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. *Id*. at 268. When police arrived to that location, they did not see a firearm and the officers had no reason to suspect illegal conduct prior to seizing J.L. *Id.*

Martin also argues that the case at hand is dissimilar to *State v Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d. In that case, an unidentified motorist reported that he or she was observing a vehicle driving erratically. *Id*. at 733. The motorist gave the location of the driver. Subsequently, the police responded to that area and pulled over that specific vehicle, without actually having any independent observations of the erratic driving. *Id*. at 734. The Court found that the unidentified motorist provided sufficient justification for an investigative stop based on the fact that the caller left himself open to identification and arrest, the tipster provided verifiable information and contemporaneous observations, and the tip suggested that Rutzinski was an imminent threat to public's safety. *Id*. at 747-748. The Court also noted that the case alleged a potential imminent danger to public safety, namely, drunk driving. That, along with the sufficient indicia of reliability, outweighed the minimal intrusion that the stop would have presented had Rutzinski not been intoxicated. *Id*. at 751-752.

This case is unlike *J.L.* in that Officer Foy did make his own observations prior to Martin being seized, which led to his suspicion that Martin was intoxicated. Officer Foy saw Martin's vehicle in the Taco Bell parking lot, which is where the caller stated the man was sleeping in the vehicle. (R35:6). Officer Foy observed Martin's vehicle unusually parked in the parking lot. The vehicle was parked perpendicular at about a forty-five degree angle to any actual parking spot and the vehicle was occupying about four different parking spots. (R35:7). Officer Foy also observed Martin sleeping in the vehicle. Officer Foy testified that Martin had his head back against the head rest and was holding a taco in one of his hands. (*Id*.) Prior to making contact with Martin, Officer Foy ran Martin's registration, which revealed that Martin had three prior OWI convictions and he had a .02 alcohol restriction. *Id*. Therefore, Officer Foy made several observations, unlike the officer in *J.L. J.L.*, 529 U.S. 266.

Any one of these facts, standing along, might well be insufficient. However, that is not the test that is applied here. The facts do coalesce to add up to a reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 61, 556 N.W.2d 681, 686 (1996). As the court in *Waldner* stated,

> The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts. These facts gave rise to a reasonable suspicion that something unlawful might well be afoot.

Id. at 58

Officer Foy not only received a call from dispatch around 12:30AM stating that there was a possible intoxicated driver sleeping in a vehicle in that specific Taco Bell parking lot, but Officer Foy also went there and made several of his own independent observations. He observed the vehicle strangely parked across 4 parking stalls, he observed keys in the ignition of the vehicle, he observed Martin asleep, he observed the taco in Martin's hand while he slept, and he ran a registration check on the vehicle, which revealed Martin had 3 prior OWIs and a .02 alcohol restriction. (R35:7).

Officer Foy had more than an inchoate and unparticularized suspicion or hunch that a crime was being committed. The officer had a suspicion that was grounded in specific, articulable facts and made a reasonable inference from those makes that Martin was committing a crime. Any reasonable police officer in light of his or her training and experience would suspect that Martin was committing a crime.

Additionally, this case is similar to *Rutzinski* in that this case also involved a possible drunk driver, which is potential imminent danger to public safety. *Rutzinski*, 241 Wis. 2d at 751-752. In this case, with all of the independent observations the officer made, along with the potential danger to public safety, it would have been poor police work if the officers failed to investigate the situation.

CONCLUSION

The State believes that the trial court correctly concluded that the officer had reasonable suspicion to seize Mr. Martin based on the reasons listed above. Therefore, the State respectfully requests that this court uphold the decision of the circuit court denying Mr. Martin's motion and uphold the judgment of conviction and sentence.

Dated this _____ day of May, 2017.

Respectfully submitted,

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_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,269.

_____ _____

Date Jennifer L. Pickett
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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 s. 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.

_____ _____

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