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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2022AP860

Waupaca County Circuit Court Case No. 19TR4090

In the Interest of A.N.G., a person under the age of 17:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HUNTER WHEELLOCK

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Circuit Court for Waupaca County,
The Honorable Troy Nielsen, Presiding

BRIEF OF PLAINTIFF RESPONDENT

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ISSUE PRESENTED

Based on the totality of circumstances, did Sergeant Studzinski form a reasonable suspicion to make an investigatory stop where the Sergeant observed two young males, both with red watery eyes, sitting in a running vehicle parked after dark on the side of the road in an area known for underage drug and drinking activities and who said that they “looking for a place to go sledding”?

Circuit Court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. The resolution of the issue will rely primarily on legal arguments that can be developed and argued within the briefs.

STATEMENT OF THE CASE

On November 2, 2019, Sergeant Studzinski¹ of the Waupaca County Sheriff's Office while driving an unmarked squad car observed a vehicle parked on the side of a dead-end road with its lights on and the engine running. The vehicle was occupied by two “younger” males R. 24 at 6:5-13.

Without activating squad emergency lights, Sergeant Studzinski pulled his car alongside the defendant's car to inquire what was going on, whether they were in distress or needed help. He spoke to the two occupants through the rolled down car windows. R. 24 at 7:3-14. Sergeant Studzinski immediately noticed that both occupants had red, glossy eyes. R. 24 at 7:9-12. They said “they were looking for a place to go sledding.” R.

¹ Between the time of the stop and the motion hearing, Sergeant Studzinski was promoted to the rank of a Lieutenant.

24 at &:8-9. It was dark and the area was known for underage drinking and drug activities, parties and disorderly behavior. R.24 at 6:20 to 7:2, 7:22-23. The Sergeant told them to stay in the vehicle while he activated his emergency lights and pulled behind their car. R. 24 at 7:12-14. When Sergeant Studzinski approached the driver's window on foot, he smelled a strong odor of marijuana and a strong odor of cologne. R. 24:9-25 to 10-8. At that point, Sergeant Studzinski started a drug driving investigation.

The defendant filed three motions to suppress. (R. 16, 19 and 20) After an evidentiary hearing on May 7, 2021 where only Sergeant Studzinski testified, the Circuit Court denied all three motions. R. 24 at 22-25. The defendant only appeals the Circuit Court's ruling on the motion that the investigative stop was not based on reasonable suspicion. The Court ruled that the Sergeant had reasonable suspicion to believe that the young men were involved criminal or unlawful activity based on the totality of facts available to the Sergeant at the time when he decided to end window-to-window contact, activate emergency lights and pull behind the defendant's vehicle to investigate further. The reasonable suspicion included the Sergeant's direct observation of two young men, the driver's clearly bloodshot, glassy eyes, and both seated in a running vehicle parked after dark on the side of the road in an area known to police to be frequented by people of the driver and passengers' age range typically engaging in disorderly behavior and underage drug and drinking parties. R.24:22:18 to 24:14. On September 21, 2021, the Court denied defense's motion for reconsideration. R. 25. Ultimately, the defendant was convicted of Operating with Restricted Controlled Substance, First Offense. R.49

STATEMENT OF FACTS

On November 2, 2019, Sergeant Studzinski of the Waupaca County Sheriff's Office, while driving in an unmarked squad car, saw a vehicle parked on the side of Sunrise Lane, a dead-end road. R. 24 at 6:20. It was dark. R. 24 at 7:22-23. The vehicle's engine was running and its headlights were on. R. 24 at 12:20. It was occupied by two young males. R. 24 at 6:9-11. At one point, the Sergeant described them as "teenage kids." R. 24 at 8:22. While the Court did not make a finding as to their exact age, the issued citation indicates the defendant was 18 years old at the time of the stop. R. 1.

Sergeant Studzinski has been a veteran law enforcement officer since 1999 with twenty three years of experience in patrol duties and drug enforcement. He has served on the Central Wisconsin Drug Task Force, led the Waupaca County Drug Unit and has sat on the board of the Wisconsin Narcotics Officers Association. R. 24 at 7:1-18. He estimated that he had performed at least 100 stops related to operating motor vehicles under the influence of narcotics or drugs. R. 24 at 7:19-25.

Sergeant Studzinski pulled his car up to the window of the parked defendant's car and briefly spoke to the defendant and his passenger. R. 24 at 7:3-14, 18-21. He explained that his initial intent was to check if the occupants needed assistance and to make sure that the occupants were not violating the law. R. 24 at 6:14-7:2. The Sergeant further explained that the area was known to law enforcement for frequent underage drinking parties, drug use and disorderly behavior. R.24 at 6:20 to 7:2.

The first observation Sergeant Studzinski made once he pulled his car alongside the parked car was that the defendant who was seated in the driver's seat gave him a "deer-in-the-headlights" look: his eyes were big and surprised to see a police officer. R.

24 at 7:5-7, 8:4-5. Sergeant Studzinski observed that both occupants had bloodshot glossy eyes. He testified, “When I’m talking to them, I observed them to have glassy, red eyes, watery” which based on his training and experience could indicate drug or alcohol use. R. 24 at 7:9-12. The occupants told the Sergeant that “they were looking for a place to go sledding.” R. 24 at 7:8-9.

After this brief initial window-to-window contact, Sergeant Studzinski told the occupants to stay in the car as he activated squad emergency lights and parked the squad behind the defendant’s car. R. 24 at 7:13-14. He approached the driver on foot. R. 24 at 9:3-9. Once standing directly outside the driver’s window, the Sergeant immediately observed a strong odor of marijuana and a strong odor of cologne which, based on his training and experience, is frequently used as a masking agent. R. 24 at 9:25 to 10: 8. At that point, Sergeant Studzinski began a drug driving investigation which eventually resulted in an Operating a Motor Vehicle with Restricted Controlled Substance, First Offense arrest.

ARGUMENT

1. STANDARD OF REVIEW.

Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Mitchell*, 167 Wis.2d 672, 684, 482 N.W.2d 364 (1992); *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. A finding of constitutional fact consists of the circuit court's findings of historical fact, which on appeal is reviewed under the “clearly erroneous standard,” and the application of these historical facts to constitutional principles is subject to a de novo review. *Id.*, ¶¶ 18–19. *See also State v. Popke*, 2009 WI 37, ¶ 10, 317 Wis. 2d 118, 126, 765 N.W.2d 569, 573.

2. **THE TOTALITY OF CIRCUMSTANCES AMOUNTED TO A REASONABLE SUSPICION TO STOP BASED ON THE FOLLOWING FACTS: (1) BOTH THE DEFENDANT AND HIS PASSENGER HAD RED WATERY EYES, (2) THEY WERE SEATED IN A RUNNING CAR PARKED ON THE SIDE OF THE ROAD AFTER DARK, (3) THE AREA WAS KNOWN TO POLICE FOR PARTIES FREQUENTED BY PEOPLE IN THE DEFENDANT'S AGE RANGE THAT INVOLVED DRINKING AND DRUG USE, AND (4) THE DEFENDANT AND THE PASSENGER EXPLAINED THEIR PRESENCE IN THE PARKED CAR AS LOOKING FOR "A PLACE TO GO SLEDDING."**

Investigatory stops, sometimes referred to as *Terry* stops, are considered to be seizures within the meaning of the Fourth Amendment. *State v. Young*, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)). Such stops typically entail only temporary questioning and brief detention and are constitutional if police have reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Young*, 294 Wis. 2d 1, ¶20. In order to justify a *Terry* stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Houghton*, 2015 WI 79, ¶ 21, 364 Wis. 2d 234, 247, 868 N.W.2d 143, 149–50 (citing *Terry v. Ohio*, 392 U.S. 1 at ¶21.) Police officers who reasonably suspect an individual of breaking the law are permitted to conduct a traffic stop "to try to obtain information confirming or dispelling the officer's suspicions." *Houghton*, 364 Wis. 2d 1, ¶ 22. Since reasonable suspicion determination is based on the totality of circumstances, the courts must focus not on isolated, independent facts, but on "the whole picture" viewed together. *State v. Genous*, 2021 WI 50, ¶ 9, 397 Wis. 2d 293, 299, 961 N.W.2d 41, 44. The reasonable suspicion test is not an exercise in evaluating individual details in isolation, "It is the whole picture, evaluated together, that serves as the proper analytical framework." *Genous*, 397 Wis.2d 293, ¶ 13.

In this case, Sergeant Studzinski drove an unmarked squad after dark on Sunrise Lane, a dead end road, when he observed a car parked on the side the road. The car's engine was running and its lights were on. The car was occupied by two younger males. These facts alone did not point to any potentially illegal activity but mandated any conscientious police officer to stop to check on the welfare of the car occupants. This is exactly what Sergeant Studzinski did. He turned around and pulled his squad to the driver's window to inquire what was going on, as he phrased it, "anytime the vehicle is on the side of the road, you don't know if they are stopped to use the phone, you don't – don't know if they have some kind of an emergency or of the vehicle broke down. " R. 24 at 6:16-19.

While sitting in the squad car, Sergeant Studzinski illuminated the inside of the defendant's car with a flashlight and observed both occupants to have "glassy red eyes, watery" which to him "is an indication from my training and experience that they could be under the influence of something." R. 24 at 7:9-12. Sergeant Studzinski is a seasoned police officer. Most of his career has been centered around narcotic work and drug enforcement. He has worked on the Central Wisconsin Drug Task Force has led the Waupaca County Drug Unit. He has had hundreds hours of drug training, not only in drug enforcement but in how drugs affect communities and individual persons. He received training from the Wisconsin Department of Justice and the Drug Enforcement Agency. He has sat on the board for the Wisconsin Narcotics Officers Association. R. 24 at 5:1-18. He estimated to have performed approximately 100 traffic stops involving operation of vehicle under the influence of drugs or narcotics. R. 24 at 5:19-25. Based on all that training and experience, Sergeant Studzinski knew that red/bloodshot eyes that

are also glassy and watery could be a symptom of intoxication from drugs, including alcohol and some narcotics.

The defendant argues that bloodshot and glossy eyes do not or should not have value in the police assessment whether a person is impaired. While it is true that bloodshot eyes can indicate many conditions, including the presence of different health issues, observation of red/bloodshot and watery/glassy eyes is a relevant factor supporting a finding of probable cause. In *State v. Kennedy*, 2014 WI 132, ¶ 22, 359 Wis. 2d 454, 469, 856 N.W.2d 834, 841, the Wisconsin Supreme Court held, “factors sufficient to support a finding of probable cause have included bloodshot eyes, an odor of intoxicants, and slurred speech, together with a motor vehicle accident or erratic driving.” The very NHTSA study cited in Defendant-Appellant’s Brief on p. 15, Jack Stuster, NHTSA Final Report, *The Detection of DWI at BACS below 0.10*, DOT HS-808-654 (Sept. 1997) at 14, was discounted by Wisconsin Supreme Court in *State v. Tullberg*, 2014 WI 134, 359 Wis. 2d 421, 440–41, 857 N.W.2d 120, 129–30 where the Court ruled,

Tullberg argues that bloodshot and glassy eyes are not a sign of intoxication, relying on a National Highway Traffic and Safety Administration study regarding the accuracy of clues that law enforcement officers use to determine whether someone is intoxicated. The study argues that law enforcement officers should not consider bloodshot and glassy eyes to be an indicator of intoxication because such eye conditions may be caused by allergies or shift work. However, the study does not conclude that intoxication does not cause eyes to become bloodshot and glassy. We reaffirm that a law enforcement officer may consider bloodshot and glassy eyes to be one of several indicators of intoxication, even though such eye descriptors may have an innocent explanation.

Tullberg, 2014 WI 134, ¶ 35.

Here, Sergeant Studzinski was careful not to immediately conclude that the defendant and his passenger were under the influence of drugs only based on the

appearance of their eyes. The Sergeant testified that bloodshot glossy eyes were a sign that “they could be under the influence of something.”

It is important to note that Sergeant Studzinski observed both the defendant and his passenger to have red, watery and glassy eyes. The fact that both young men suffered from the same condition of bloodshot and watery eyes indicated less of a coincidence that their identical condition had an underlying medical cause.

Coupled with this factor was the fact that the two young men were parked in an area known to the police for underage drinking parties, drug use and disorderly behavior. The Sergeant testified,

This area, Sunrise Lane, is maybe a little less than a mile long. The end of it is a dead-end. Throughout my career we have had many problems down there with younger people squealing tires, drag racing. We have had underage drinking parties down there where they actually started fires right in the middle of the road. We’ve found empty beer cans, drug paraphernalia, condoms, all sorts of things down there.”

R. 24 at 6:20 to 7:2.

It is true that an individual's presence in an area of expected illegal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. *State v. Pugh*, 2013 WI App 12, ¶ 12, 345 Wis. 2d 832, 843, 826 N.W.2d 418, 423 (citing *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)). Here, Sergeant Studzinski observed a driver and a passenger parked in an area apparently favored by local young people to frequent when they want to drink or use illegal drugs.

The nature of the area provides important context to another factor contributing to the totality of circumstances: that the driver was surprised to see a police officer. The Sergeant testified, “When we made eye contact, he gave me deer-in-headlights look –

very surprised that I was a police officer.” R. 24 at 7:5-7. Persons stranded on the side of the road more typically would be expected to display signs of relief to see a police officer available to render assistance. Young people planning to drink or smoke marijuana seek and choose places where they do not expect to be caught by the police.

Defendant relies on *State v. Young*, 212 Wis.2d 417, 429, 569 N.W.2d 84, 91-92 (Ct.App.1997), and its progeny for the proposition that a person’s presence in a high crime area with red watery eyes is insufficient to give rise to a reasonable suspicion of criminal activity. While it is true a person’s mere presence in a crime ridden area does not provide reasonable suspicion to detain, the reasonable suspicion must always be evaluated in relation to the nature of the neighborhood at issue. In other words, the type of neighborhood where the suspected activity takes place is a relevant factor. The Wisconsin Supreme Court held recently that police who observed a defendant sitting in a running car outside the house of a known drug user at 3:36 a.m. and then saw a known drug user briefly enter and leave defendant’s parked vehicle, had reasonable suspicion of drug activity. *Genous*, 2021 WI 50 at ¶11-13. Even more recently, in *State v. Nimmer*, 2022 WI 47, 402 Wis. 2d 416, 431, 975 N.W.2d 598, 605, the Supreme Court held that given the totality of circumstances, police had reasonable suspicion to detain Nimmer after a ShotSpotter indicated shots fired in an area where they stopped Nimmer. The majority decision states that reasonable suspicion should be evaluated in relation to the neighborhood where he was found: “[T]he criminal activity being investigated—a shooting in a highly residential area—supplemented the reasonableness of the officers’ actions.” *State v. Nimmer*, 2022 WI 47 at ¶ 28 (emphasis added.)

Those two very recent Supreme Court decisions clarify that Courts cannot discount the area where the crime was being investigated in evaluating probable cause as it bears direct relevance in evaluating the police action.

The last factor here was that the defendant did not provide a reasonable explanation as to why he and the passenger were sitting in a parked car with its engine running on the side of the road. As the Sergeant pulled over window-to-window to the defendant's car he shone his flashlight, he observed the red watery eyes of both young men and he observed the driver's surprise to see police. The Sergeant then asked the young men what they were doing. They replied they were looking for a place to go sledding. R. 24 at 7:7-9. While it is not inconceivable to look for sledding hills while driving in the dark in early November, this answer made little sense as an answer to an inquiry seeking explanation why they were parked on the side of the road. In other words, it is highly unlikely that one would seek a place to go sledding while parked on the side of the road in the dark.

At that point, Sergeant Studzinski asked the defendant and his passenger to "stay where they [were] at." He turned the squad's emergency lights on and parked the squad behind defendant's car. He testified, "I am not going to let a couple of teenage kids drive away if I believe they are under the influence of alcohol or drugs." This belief was neither a hunch nor probable cause to arrest. It was a suspicion that the young defendant could be under the influence of an illegal substance, and that he would drive a car with his young passenger next to him. The suspicion was reasonable because it was based on several facts that were directly observed by the Sergeant and are uncontested.

Considering the totality of circumstances, a reasonable law enforcement officer with Sergeant Studzinski's experience and the observed facts, would reasonably believe that the two young men were engaged in unlawful activities of either drinking alcohol or using drugs. They were seated in a car parked on the side of the road with its engine running. It was after dark. Both had red, watery and glassy eyes. Both young males were in an area frequented by young people within the same age range who have historically chosen this dead-end road for alcohol or drugs parties. The driver was surprised to see Sergeant Studzinski as he clearly did not expect to encounter a police officer there. When asked to explain what they were doing in a parked car under those circumstances, they said they looking were for a place to go sledding. Taken together these facts amount to a reasonable suspicion that the driver of the running car could be "under the influence of something," either drugs or alcohol.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court find that Sergeant Studzinski developed sufficient reasonable suspicion to stop the defendant.

Dated this 27th day of September, 2022.

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 3b in that it is a monospaced font, 10 characters per inch, double spaced, a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of this brief is 3,899 words.

CERTIFICATE OF COMPLIANCE WITH RULE §809.19(12)

I hereby certify that I have submitted an electronic copy of this brief that complies with the requirement 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.

Dated this 27th day of September, 2022.

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