North Dakota Law Review

Volume 69 | Number 4 Article 7

1993

Criminal Procedure - Is Reasonable Suspicion Becoming Probable Cause

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CRIMINAL PROCEDURE—IS "REASONABLE SUSPICION" BECOMING "PROBABLE CAUSE"?
State v. Sarhegyi, 492 N.W.2d 284 (N.D. 1992)

I. INTRODUCTION

On August 6, 1991, Deputy Mitchell Burris was on routine patrol in Fargo, North Dakota.[1] At approximately 1:30 a.m., Burris noticed a lone vehicle parked among the tractors and combines on the lot of Case International.[2] Case International (Case), a farm implement dealership, is located in a "somewhat isolated area at the edge of Fargo."[3] The dealership was closed for the night.[4] Burris had not seen the car there when he had passed the lot earlier in the evening.[5] The car's lights were off,[6] and Burris was unable to tell whether there was anyone in the vehicle.[7] Concerned that a burglary was in progress, that someone needed help, or that the car was stolen, Burris drove into the lot to investigate further.[8] As he entered the parking lot, the driver of the car turned on the car's lights and began to drive off the lot.[9] Deputy Burris activated the flashing red lights of his patrol car and stopped the vehicle.[10] Burris then approached the car and asked the driver, later identified as Roberta Sarhegyi, for her identification.[11] Sarhegyi stated that her driver's license was suspended and gave Burris her name, address, and date of birth.[12] When asked why she was in the parking lot at that hour, Sarhegyi stated that she needed directions to North Fargo.[13] Believing that Sarhegyi was intoxicated, Burris administered several field sobriety tests to

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1. Transcript of proceedings at 4-5, State v. Sarhegyi, 492 N.W.2d 284 (N.D. 1992) (No. 920031) [hereinafter Transcript].

2. *Id.* at 5. At trial, Deputy Burris testified that the car could be observed from the roadway and that there was no indication that an attempt had been made to conceal the car from the view of passers-by. *Id.* at 5 and 13-14.

3. Brief of Appellant at 4, State v. Sarhegyi, 492 N.W.2d 284 (N.D. 1992) (No. 920031) [hereinafter Brief of Appellant].

4. Transcript, *supra* note 1, at 6.

5. *Id.*

6. *Id.*

7. *Id.* at 13.

8. *Id.* at 6-7.

9. State v. Sarhegyi, 492 N.W.2d 284, 285 (N.D. 1992). Deputy Burris testified that his suspicions were further aroused when the vehicle began to leave as he approached. Transcript, *supra* note 1, at 10. Deputy Burris testified that when Sarhegyi saw him pull into the parking lot she immediately turned her car lights on and began to leave the parking lot. *Id.* at 7.

10. Transcript, *supra* note 1, at 7.

11. *Sarhegyi*, 492 N.W.2d at 285.

12. Transcript, *supra* note 1, at 7-8.

13. *Id.* at 8.

her.[14] Upon her failure to adequately perform these tests, Burris arrested Sarhegyi for driving under the influence and also for operating a vehicle while her driver's license was under suspension.[15]

In a motion to suppress the evidence obtained as a result of the stop, Sarhegyi argued that the stop was an illegal seizure because the deputy possessed no articulable facts on which he could base a reasonable suspicion that she had committed a crime.[16] The trial court upheld the motion to suppress,[17] stating that Burris had admitted that he had not received a report of a prowler at that location, an alarm had not gone off at the dealership, and he had admitted that he had no reason to believe criminal activity was afoot when he stopped Sarhegyi.[18] The state appealed,[19] contending that Burris possessed reasonable and articulable suspicion of criminal activity because 1) Sarhegyi's car was observed on the lot of a closed business in a somewhat isolated area late at night; 2) Deputy Burris had not seen the car on the lot when he passed the dealership earlier; and 3) Sarhegyi "immediately attempted to leave" when Burris drove into the lot.[20] Affirming the trial court's order, the North Dakota Supreme Court held that the stop was invalid because the deputy lacked reasonable suspicion that criminal activity had occurred, or was about to occur, or that Sarhegyi was in need of assistance.[21]

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14. *Id.* at 8-9. Deputy Burris testified that Sarhegyi had bloodshot eyes, a flushed face, and slurred speech. *Id.* at 8. He also testified that Sarhegyi told him that she was drunk. *Id.*

15. *Sarhegyi*, 492 N.W.2d at 285. Sarhegyi was asked to perform an alphabet test, a counting test and a balance test. Transcript, *supra* note 1, at 9. Deputy Burris testified that Sarhegyi's performance of these tests indicated that she was under the influence of alcohol. *Id.* Sarhegyi was also asked to perform an intoxilyzer test. *Id.* The transcript of the trial court proceedings does not disclose the result of the test. Deputy Burris testified that he ran Sarhegyi's name and date of birth through the computer in his car and confirmed Sarhegyi's statement that her driver's license was under suspension. *Id.* at 9-10.

16. *Sarhegyi*, 492 N.W.2d at 285.

17. *Id.*

18. Appendix of Appellant at 10, State v. Sarhegyi, 492 N.W.2d 284 (N.D. 1992) (No. 920031) [hereinafter Appendix]. During cross-examination, Deputy Burris had testified that other than his suspicions that a burglary was in progress, that Sarhegyi needed help, or that the car was stolen, he did not have a reason to believe that Sarhegyi was committing or had committed a crime. Transcript, *supra* note 1, at 15. There was no testimony on whether there had been reports of crime in the past at Case International or the area surrounding Case.

In its memorandum opinion, the trial court noted further that Deputy Burris had not observed a traffic violation, Sarhegyi had not been slumped over the wheel of her car, and she did not gesture for help. Appendix, *supra*, at 10. The court also stated that "[t]he officer was being helpful and the ultimate result was in the public's best interests, but under these facts this Court can find no lawful basis for the stop." *Id.*

19. *Sarhegyi*, 492 N.W.2d at 285.

20. Brief of Appellant, *supra* note 3, at 4-5.

21. *Sarhegyi*, 492 N.W.2d at 286-88. The court stated that "[t]he problem in this case is the officer's lack of reasonable suspicion that criminal activity was or was about to be afoot or that a 'community caretaking function' required the stop." *Id.* at 286 (citation omitted).

II. LEGAL BACKGROUND

Unreasonable searches and seizures are prohibited by the Fourth Amendment to the United States Constitution[22] and Article I, Section 8 of the North Dakota Constitution.[23] The goal behind this prohibition is to protect the personal security of individuals against unwarranted governmental intrusions.[24] To promote this goal, the United States Supreme Court set forth the exclusionary rule, which provides that evidence obtained as a result of an unreasonable search or seizure is inadmissible in a court proceeding.[25]

Prior to the United States Supreme Court's decision in *Terry v. Ohio*,[26] a police stop which was not based on probable cause was an unreasonable seizure and any evidence obtained in such a stop was inadmissible against the defendant.[27] The *Terry* Court stated

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22. U.S. CONST. amend. IV.

23. N.D. CONST. art. I, § 8. In State v. Phelps, the North Dakota Supreme Court stated that "[t]he fourth and fourteenth amendments to the United States Constitution and Article I, § 18 (sic) of the North Dakota Constitution prohibit unreasonable searches and seizures." 286 N.W.2d 472, 475 (N.D. 1979). In *Phelps*, officers forcibly removed Phelps' clothes and searched them for glass fragments. *Id.* The court stated that the warrantless search was unreasonable because the search was not incident to a lawful arrest, there was no danger that evidence would be destroyed if the search was delayed until a warrant could be obtained, and the forcible removal of Phelps' clothing "transcended even the most liberal construction of a 'very limited' intrusion and invaded the shield of personal security that our constitution was designed to protect." *Id.* at 477.

24. Schmerber v. California, 384 U.S. 757, 767 (1966). In *Schmerber*, the United States Supreme Court stated that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.* In *Schmerber*, a police officer, over Schmerber's objections, ordered hospital personnel to take a sample of Schmerber's blood in order to determine whether Schmerber was intoxicated. *Id.* at 758. The Court found the warrantless search reasonable because the intrusion upon Schmerber's privacy interests was minimal, and to delay the search until a warrant was obtained would likely have resulted in destruction of the evidence. *Id.* at 770-71.

25. The exclusionary rule was first announced in Weeks v. United States, 232 U.S. 383 (1914). In *Weeks*, officers had obtained a key to Weeks' house and conducted a warrantless search. *Id.* at 386. The Court stated that the trial court had committed prejudicial error in permitting the evidence obtained in the search to be used against the defendant at his trial. *Id.* at 398. The *Weeks* Court noted that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . ." *Id.* at 392. In a later case, the Court stated that *Weeks* held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." Wolf v. Colorado, 338 U.S. 25, 28 (1949). The exclusionary rule was made applicable to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961), and was first applied by the North Dakota Supreme Court in State v. Manning, 134 N.W.2d 91 (N.D. 1965). In *Manning*, the defendant argued that the trial court erred in permitting the state to introduce evidence obtained during a warrantless search of his residence. *Id.* at 94. The court found the search illegal and the evidence obtained in the search inadmissible against Manning. *Id.* at 99.

26. 392 U.S. 1 (1968).

27. *See* Terry v. Ohio, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting) ("[P]olice officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*."). *See also* 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.5 (a), at 239 (1984).

that in the interest of crime prevention and detection, a police officer who is investigating a possible crime could, "in appropriate circumstances, and in an appropriate manner[,]" "approach" an individual even if the officer does not have probable cause to make an arrest.[28]

In *Terry*, Officer McFadden, a thirty-nine-year police force veteran, observed two men taking turns walking back and forth in front of a store, pausing to look in the store window each time they passed.[29] It appeared to Officer McFadden that the men were casing the store in contemplation of a robbery and he feared that they were armed.[30] McFadden confronted the men, grabbed Terry, patted him down, and discovered a gun in Terry's coat pocket.[31] Both men were arrested and subsequently convicted for carrying concealed weapons.[32] Terry appealed the trial court's

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28. *Terry*, 392 U.S. at 22. Specifically, the Court held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search . . . of such persons . . . ." *Id.* at 30.

Probable cause exists if the "facts and circumstances within [the officers'] knowledge and of which they ha[ve] reasonably trustworthy information [are] sufficient [in and of themselves] to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). Professor LaFave, explaining the difference between the *Terry* "reasonable suspicion" standard and the probable cause standard, stated that:

> [T]he precise words used are not that critical, so that what is important is to understand the manner in which the standard differs from the traditional arrest standard. . . . [T]he *Terry* reference to when "criminal activity *may be* afoot" justifies this conclusion: even though the arrest standard may sometimes require that guilt be more probable than not, this is never the case as to a stopping for investigation[,] [b]ecause the very purpose . . . is to clarify ambiguous situations. . . .

LAFAVE, *supra* note 27, § 3.8 (d), at 302.03. In *Wibben v. North Dakota State Highway Comm'r*, the North Dakota Supreme Court noted the distinction between the *Terry* reasonable suspicion standard and the probable cause standard when it stated that the information used to support an investigative stop need not support "the more exacting standard of probable cause necessary to make an arrest." 413 N.W.2d 329, 331 (N.D. 1987).

29. *Terry*, 392 U.S. at 5-6.

30. *Id.* at 6. Officer McFadden had been assigned to a downtown area for 30 years, watching for shoplifters and pickpockets. *Id.* at 5. McFadden observed two men standing together on a street corner. *Id.* One of the men left the other and walked past a store, paused to look in the window, turned and walked back to the corner, pausing again to look in the store window. *Id.* at 6. The man walked back to the other and the two appeared to converse. *Id.* The second man repeated the actions of the first. *Id.* The two men repeated the "ritual alternately between five and six times apiece . . . . " *Id.*

"At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others . . . . [The first two men] resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off . . . following the path taken earlier by the third man." *Id.* Officer McFadden suspected the men were planning to rob the store and decided to investigate further. *Id.* He approached the men and asked their names. *Id.* at 6-7. One of the men mumbled a response, and Officer McFadden grabbed Terry. *Id.* at 7.

31. *Id.*

32. *Id.*

denial of his motion to suppress the evidence obtained from McFadden's patdown.[33]

The *Terry* Court held that an officer who observes unusual conduct may stop an individual if the circumstances are such that an officer, in the light of his or her experience, could reasonably infer that the individual was involved in criminal activity.[34] The Court noted that an "inarticulate hunch[]" and "simple 'good faith on the part of the officer' " cannot serve as a basis for intruding upon an individual's Fourth Amendment right to be free from unreasonable search and seizure.[35] In *United States v. Cortez*,[36] the Court stated that:

> Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.[37]

Some states have codified the *Terry* rule. For example, a Utah state statute provides that:

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.[38]

North Dakota also has a statute that applies to the temporary questioning of persons. Section 29-29-21 of the North Dakota Century Code provides that:

> A peace officer may stop any person abroad in a public

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33. *Id.* at 4-5.

34. *Terry*, 392 U.S. at 21. The *Terry* Court did not decide if Terry had been seized at the point when Officer McFadden approached him and asked him for identification or whether the seizure took place when McFadden grabbed Terry. The Court only stated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16.

35. *Id.* at 22.

36. 449 U.S. 411 (1981).

37. United States v. Cortez, 449 U.S. 411, 417-18 (1981) (citations omitted).

38. UTAH CODE ANN. § 77-7-15 (1988 & Supp. 1993). "This section thus permits a brief investigatory stop of an individual by police officers 'when the officers "have reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." ' " State v. Baumgaertel, 762 P.2d 2, 3-4 (Utah Ct. App. 1988).

> place whom he reasonably suspects is committing, has committed, or is about to commit:
>
> 1. Any felony.
> 2. A misdemeanor relating to the possession of a concealed or dangerous weapon . . . .
> 3. Burglary or unlawful entry.
> 4. A violation of any [controlled substances] provision . . . .[39]

The statute further provides that the officer may stop and demand of a person whom she reasonably suspects of any of the stated violations the individual's name, address, and an explanation of her actions.[40] If the officer suspects that the person is armed, the officer may search the individual for weapons.[41] Section 29-29-21 has been cited in only one case.[42] Because a majority of the North Dakota Supreme Court has never discussed the statute in a reported case, it is unknown if the circumstances listed in section 29-29-21 are the only circumstances which will support a finding of reasonable suspicion. Perhaps the court should explain

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39. N.D. CENT. CODE § 29-29-21 (1991).

40. *Id.* The *Terry* Court noted that it was not deciding whether investigatory stops based on less than probable cause are constitutional. Terry v. Ohio 392 U.S. 1, 19 n.16 (1968). Thus, the Court did not decide whether an investigatory stop statute such as North Dakota's is constitutional.

On November 3, 1992, North Dakotans voted on an initiative, *MEASURE 6* (sobriety checks), which if passed would have made illegal any stop not based on probable cause. *How North Dakota Voted on Tuesday*, GRAND FORKS HERALD, Nov. 5, 1992, at 6A. The initiated measure stated, in pertinent part:

> This measure creates a new section to the North Dakota Century Code which prohibits law enforcement officers from stopping or searching vehicles and the occupants without probable cause. Evidence obtained in violation of this measure is not admissible in any administrative, civil, or criminal proceeding.
>
> Currently, law enforcement personnel may stop vehicles when they have reasonable suspicion that a violation has been committed. The officer may also "pat down" the occupants, if the officer has reason to believe the occupant is illegally carrying a concealed weapon. If approved this measure would require probable cause for all stops and searches. The amount and type of evidence needed to establish probable cause is greater than that needed to establish reasonable suspicion.

Sample Ballot, GRAND FORKS HERALD, Oct. 27, 1992, at 6D. The proposed initiative, *MEASURE 6*, was defeated with approximately 60% of voters voting against the measure. *How North Dakota Voted on Tuesday*, *supra*, at 6A. *State v. Sarhegyi* was decided on November 5, 1992. *Sarhegyi*, 492 N.W.2d 284 (N.D. 1992).

41. N.D. CENT. CODE § 29-29-21 (1991).

42. North Dakota Century Code section 29-29-21 was cited by District Judge Glaser in his concurring opinion in State v. Klevgard, 306 N.W.2d 185 (N.D. 1981) (Glaser, J. concurring). In *Klevgard*, Judge Glaser sat in place of Chief Justice Erickstad who had disqualified himself from the case. *Klevgard*, 306 N.W.2d at 195. Glaser cited the statute as providing authority for a temporary detention of persons found in circumstances which create suspicion that criminal activity may be afoot. *Id.* at 196.

why it never cites the reasonable suspicion statute when it is deciding reasonable suspicion cases.

Although the North Dakota Supreme Court has never applied the North Dakota reasonable suspicion statute, it has applied *Terry* and has stated that "an investigatory stop is a seizure within the meaning of the Fourth Amendment."[43] It has further noted that an investigative stop of a vehicle does not violate the Fourth Amendment if the officer has "an articulable and reasonable suspicion that a law has been or is being violated."[44]

Because there are different types of conduct in many varieties of circumstances which may be deemed suspicious by an officer who observes the conduct, it is difficult to articulate, with any measure of success, exactly what circumstances are suspicious enough to justify an investigative stop.[45] Most courts hold that an investigatory stop of a vehicle which is observed in close proximity to a closed business is an unwarranted Fourth Amendment intrusion unless there has been a recent report of crime in the area, the area is classified as a high crime area, or law enforcement officers have been closely patrolling the area because of criminal activity.[46] The

43. Wibben v. North Dakota State Highway Comm'r, 413 N.W.2d 329, 331 (N.D. 1987) (citing Terry v. Ohio 392 U.S. 1, 19 (1968)). The *Terry* Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16. The *Terry* Court also noted that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16. The North Dakota Supreme Court has noted that a traffic stop is a seizure because "[a] traffic stop significantly curtails the 'freedom of action' of the driver . . . ." *Sarhegyi*, 492 N.W.2d at 285. Failure to stop when a law enforcement officer signals a driver to pull over is a crime under section 12.1-08-02 of the North Dakota Century Code. Therefore, when a police officer signals a driver to pull over, "[t]here is no choice but for a driver to stop . . . ." *Id.* at 286.

44. *Wibben*, 413 N.W.2d at 331. In *Wibben*, an anonymous caller reported that a woman was sitting in her car in the parking lot of an apartment complex. *Id.* at 330. The caller said that the woman appeared to be sick or drunk. *Id.* When the officer arrived, he saw Wibben sitting in a car that fit the description given by the caller. *Id.* The officer tapped on the car window, and Wibben rolled down the window. *Id.* The officer asked her if she was all right and noticed that she appeared to be intoxicated. *Id.* The court stated that the officer's personal verification of the details of the anonymous tip gave him reasonable suspicion that a crime was being committed. *Id.* at 332-33.

45. 3 WAYNE R. LAFAVE, SEARCH & SEIZURE, § 9.3(c) at 436-37 (2d ed. 1987).

46. *See id.* at 456 (noting that courts upholding stops "frequently stress that the observed circumstances occurred in a high crime area"). *See, e.g.*, State v. Carter, 441 N.W.2d 640, 641 (Neb. 1989) (finding that even though the stop had taken place in a high crime area that had been placed on extra patrol, the stop was unjustified because the most recent crime had occurred two months before, and there had been no report of a crime that night); State v. Rein, 453 N.W.2d 114, 115 (Neb. 1990) (upholding a stop in part upon officer's testimony that there had been recent vandalism to buildings "in town"); State v. Kavanaugh, 434 N.W.2d 36, 39 (Neb. 1989) (upholding a stop that took place in an area in which there had been reports of burglaries and suspicious activities in the past); State v. Fillion, 474 A.2d 187, 190 (Me. 1984) (upholding a stop occurring on lot of warehouse which was on a list of premises officers were requested to check each night); State v. Baumgaertel,

North Dakota Supreme Court has taken a similar position, suggesting that there must be a recent report of crime in the area in order for such an investigatory stop to be valid.[47] One court has further suggested that an officer may not simply testify that there is a high incidence of crime in the area.[48] Instead, the officer must be able to testify that a particular crime, such as burglary, is prevalent in the area and that she stopped the suspect on the suspicion that the individual was about to commit that particular crime.[49]

In general, then, it appears that courts will find a stop unreasonable unless it is made for the purpose of investigating past,

762 P.2d 2, 4-5 (Utah 1988) (upholding a stop in an area in which recent burglaries had occurred).

47. *See Sarhegyi*, 492 N.W.2d at 286 (refusing to find reasonable suspicion when there was no traffic violation, no indication of emergency and "*no reports of criminal activity in the area*") (emphasis added). In an earlier case, Geiger v. Backes, 444 N.W.2d 692 (N.D. 1989), the North Dakota Supreme Court indicated that an investigatory stop is unreasonable unless there has been a recent report of crime in the area. In *Geiger*, at about 2:40 a.m., a police officer observed Geiger's vehicle traveling slowly along a frontage road adjacent to an industrial area that had been designated an "extra-patrol" area because of recent thefts. *Id.* at 693. The officer followed Geiger's car and requested a registration check on the vehicle. *Id.* The dispatcher informed the officer that the car was registered to Geiger and that Geiger's driver's license was under suspension. *Id.* The officer stopped Geiger and arrested him for driving while his license was under suspension. *Id.* The *Geiger* court stated that because Geiger was driving slowly in an area that had been placed on extra patrol because of recent crimes late at night and further because a registration check showed that Geiger's license was under suspension, the officer had "reasonable suspicion of a potential violation of the law." *Id.* at 693-94. However, the area in which Geiger was observed and the fact that the area had been placed on extra patrol may not have been key factors in the court's decision to uphold the stop. No reported case has suggested that an officer must observe a traffic violation or suspect the driver of a vehicle of a crime in order to request a registration check on a vehicle. Arguably, a registration check is not a search or seizure which must comport with Fourth Amendment reasonableness requirements because a registration check poses no greater invasion on an individual's privacy than does the perusal of a telephone directory in an attempt to ascertain a person's address or phone number. Therefore, the *Geiger* court could have upheld the stop solely on the basis that the officer had probable cause to stop Geiger when the registration check showed that Geiger's driver's license was under suspension.

48. *See* People v. Lathan, 113 Cal. Rptr. 648, 650-51 (Cal. Ct. App. 1974). In *Lathan*, at about 10:15 p.m. an officer observed Lathan stop his car on a parking lot near a liquor store. *Id.* at 650. The officer was unable to tell whether the liquor store was open. *Id.* Lathan got out of his car, put his hands underneath his jacket behind his back as if he were placing something there, walked to the door of the store and knocked several times. *Id.* Lathan then "looked in numerous directions and at one point turned to his right and looked over his shoulder" in the direction of the officer. *Id.* Lathan immediately walked to his car and drove away. *Id.* at 650. The officer stopped Lathan and subsequently discovered a weapon under the seat of Lathan's car. *Id.* In finding the stop illegal, the *Lathan* court noted that while the officer had testified that the stop was made based on his knowledge of crime in the area at that time of night and on his observations of Lathan's actions, the officer "did not indicate the type of 'crime' involved in that area or infer that he had knowledge of any report of a particular crime committed or being committed there . . . ." *Id.* at 651. Further, the court noted that the officer had not described the crime rate at that location. *Id.*

Professor LaFave agrees with the view that an officer must be able to state with particularity the crime problem that exists in the area, and notes that "[u]nspecific assertions that there is a crime problem in a particular area should be given little weight, at least as compared to more particular indications that a certain type of criminal conduct of the kind suspected is prevalent in that area." 3 LAFAVE, *supra* note 45, § 9.3 (c), at 457 (footnote omitted).

49. *Lathan*, 113 Cal. Rptr. at 650-51.

ongoing or in-progress crimes. However, Professor LaFave, with what appears to be an opposite view, has suggested that the *Terry* Court recognized that police officers cannot perform the task of crime prevention if they have authority to make a stop only when they have reason to believe that a crime has been or is being commmitted.[50] That position was adopted by the Wisconsin Supreme Court in *State v. Anderson*.[51] The *Anderson* court upheld a stop in which the individual was not suspected of a particular crime, stating that "nothing in the fourth amendment . . . requires that a police officer's suspicions relate to particular criminal activity."[52]

In addition to addressing whether there must be a recent report of criminal activity in the area in which the stop is made, courts have discussed whether innocent reasons for the individual's conduct must be ruled out before reasonable suspicion of criminal activity may be established. In *United States v. Sokolow*,[53] the Supreme Court noted that while each factor in a set of circumstances may appear innocent, when taken together the circumstances may warrant further investigation.[54] The Court also noted that " 'wholly lawful conduct might [in some circumstances] justify the suspicion that criminal activity was afoot.' "[55] In *United States v. Cortez*,[56] the Court stated that when considering the validity of a stop, a court must consider all of the circumstances surrounding the stop.[57]

Similarly, in *United States v. Holland*,[58] the Ninth Circuit Court of Appeals noted that when suspicious conduct is observed,

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50. 3 LAFAVE, *supra* note 45, § 9.2 (a), at 349-50 (quoting Terry v. Ohio, 392 U.S. 1, 35 (1968) (Douglas, J. dissenting)). In *Terry*, the Court did not specifically state that reasonable suspicion cannot exist unless the area in which the stop takes place is a high crime area or the officer is investigating a recent report of crime. Therefore, those who infer that a high crime area is a factor necessary to a finding of reasonable suspicion cannot claim support from *Terry*.

51. 454 N.W. 2d 763 (Wis. 1990).

52. State v. Anderson, 454 N.W.2d 763, 767 (Wis. 1990). In *Anderson*, the officers did not suspect Anderson of a particular crime; the sole issue was whether flight at the sight of officers in and of itself can create reasonable suspicion of criminal activity. *Id.* at 764. *Anderson* is discussed in greater detail *infra* note 83.

53. 490 U.S. 1 (1989).

54. United States v. Sokolow, 490 U.S. 1, 9 (1989).

55. *Id.* at 9 (citation omitted). "[I]nnocent behavior frequently will provide the basis for a showing of probable cause. . . ." Illinois v. Gates, 462 U.S. 213, 243-44 n.13 (1983). "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* The *Sokolow* Court noted that "[the *Gates*] principle applies equally well to the reasonable suspicion inquiry." *Sokolow*, 490 U.S. at 10.

56. 449 U.S. 411 (1981).

57. United States v. Cortez, 449 U.S. 411, 418 (1981).

58. 510 F.2d 453 (9th Cir. 1975).

officers are not required to rule out all innocent reasons for the conduct before making a brief stop and request for identification.[59] The *Holland* court noted further that even if it is equally probable that the suspect has not committed a crime, officers must be allowed to stop and question before their reasonable belief of criminal activity is verified by the suspect's escape or the completion of the crime.[60]

The Wisconsin Supreme Court has adopted the view of the *Holland* court. In *State v. Jackson*,[61] the Wisconsin court stated that:

> Jackson suggests that his actions do not necessarily imply wrongful conduct, and that the record allows other equally reasonable inferences of an innocent nature. Doubtless, many innocent explanations for Jackson's conduct could be hypothesized, but suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal. In this regard, LaFave points out that the suspects in *Terry* "might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store." We conclude that if any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.[62]

Terry supports the Wisconsin court's conclusion. In *Terry*, the Court noted that "[t]here is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. . . . Store windows, moreover, are made to be looked in."[63]

Conversely, one court has suggested that if there has not been a recent report of crime in the area, an officer observing a person in close proximity to a closed business must rule out innocent reasons for the individual's presence in the area by checking any building suspected of having been burglarized for signs of forced

59. United States v. Holland, 510 F.2d 453, 455 (9th Cir. 1975), *cert. denied*, Holland v. U.S., 422 U.S. 1010 (1975).

60. *Id.*

61. 434 N.W.2d 386 (Wis. 1989).

62. State v. Jackson, 434 N.W.2d 386, 391 (Wis. 1989) (citation omitted).

63. *Terry*, 392 U.S. at 22-23.

entry.[64] In *State v. Messer*, a police officer saw Messer's truck parked on a dimly lit end of a mall parking lot at 3:45 a.m.[65] The truck was parked close to the wall of a retail store.[66] The officer could see two people sitting in the truck.[67] All of the stores in the mall, including a bar, were closed.[68] Concerned that a burglary was in progress, the officer approached the truck and spoke with the occupants.[69] The officer saw a knife on the seat between the two occupants, and, concerned for his safety, ordered Messer and his passenger out of the truck.[70] During the subsequent search of the truck, a bag of cocaine was found.[71] In finding the stop illegal, the *Messer* court stated that "[a]t the time of the stop [the officer] knew only that defendant and his passenger were parked in an empty parking lot early in the morning . . . . He did not check the retail store to determine if there was evidence of a forced entry, and he had not received a report of any burglaries in progress."[72]

The *Messer* court appears to require that one officer detain the suspect while another checks nearby buildings for signs of forced entry. However, it is likely that most courts would hold that such a detention is a seizure, and such a seizure may not take place without reasonable suspicion of criminal activity. The reasonable suspicion standard requires that factors that suggest that the stopped individual is involved in criminal activity must be present *before* the stop is made.[73] Further, a requirement that one officer detain the suspect while another check for evidence of a crime is unworkable in jurisdictions which have as few as one officer on duty during any given shift.

When faced with facts similar to those in *Messer*, a Pennsylvania court reached a different conclusion. In *Commonwealth v. Stratton*,[74] officers observed Stratton standing in the doorway of a closed laundromat early in the morning.[75] When Stratton saw the officer, he left the doorway and began walking away at a "fast

64. State v. Messer, 692 P.2d 713, 714 (Or. Ct. App. 1984).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Messer*, 692 P.2d at 714.
70. *Id.*
71. *Id.*
72. *Id.*
73. *See* United States v. Cortez, 449 U.S. 411, 417-18 (1981) (stating that officers must have a "particularized and objective basis for suspecting the . . . person *stopped* of criminal activity") (emphasis added).
74. 331 A.2d 741 (Pa. Super. Ct. 1974).
75. Commonwealth v. Stratton, 331 A.2d 741, 741-42 (Pa. Super. Ct. 1974).

pace."[76] The *Stratton* court upheld the stop, noting that "[g]ood police work under these circumstances would demand an investigation and . . . a stop and frisk."[77] The Pennsylvania Superior Court, indicating its unwillingness to place impractical restrictions on police officers, stated that "[i]t would be the height of absurdity to conclude that the police officer should have alighted from his vehicle, walked up the walkway to check the door, decided whether his suspicions were aroused and only then pursued the defendant, all of this occurring as the defendant was removing himself hurriedly from the scene."[78]

The North Dakota Supreme Court has also provided a standard under which law enforcement officers are to determine whether reasonable suspicion exists. In *Geiger v. Backes*,[79] the court cited *Sokolow* and stated that law enforcement officers need not weigh each factor separately in determining whether there is reasonable suspicion for a stop; instead officers are to consider the "totality of the circumstances" as these circumstances unfold and use their law enforcement training and experience to determine whether the circumstances create reasonable suspicion of criminal activity.[80]

Although most courts generally agree that an officer need not rule out innocent reasons for the suspicious conduct, courts disagree on whether an attempt to avoid contact with a law enforcement officer gives rise to reasonable suspicion of criminal activity. Some courts have stated that while evasive conduct alone does not give rise to reasonable suspicion of criminal activity, flight at the sight of a police officer coupled with other suspicious circumstances may create reasonable suspicion.[81] Further, the Wisconsin

76. *Id.* at 742.

77. *Id.*

78. *Id.* at 742-43.

79. 444 N.W.2d 692 (N.D. 1989).

80. Gieger v. Backes, 444 N.W.2d 692, 693 (N.D. 1989).

81. *E.g.*, People v. Wells, 676 P.2d 698 (Colo. 1984) (en banc). In *Wells*, an officer observed Wells' vehicle backed up against a tractor-trailer in a warehouse parking lot. *Id.* at 700. The officer became suspicious that a theft was in progress and drove into the parking lot to investigate. *Id.* As he entered the lot, Wells, "apparently aware that he had been seen by the officer, attempted to leave . . . ." *Id.* at 702. The court stated that an effort to avoid police " 'coupled with an officer's specific knowledge connecting that person to some other action or circumstance indicative of criminal conduct' " gives rise to reasonable suspicion of criminal activity. *Id.* (citation omitted). The officer's observation of Wells' attempt to force open the trailer door, coupled with Wells' effort to leave when he saw the officer, created a "sufficiently particularized basis in fact for stopping the defendant in order to briefly investigate the circumstances of his conduct." *Id. See also* State v. Fry, 831 P.2d 942, 946 (Idaho Ct. App. 1991) ("The fact that Fry attempted to leave when he saw the officers does not, *without more*, supply the officers with a reason to conclude that crime was afoot.") (emphasis added); State v. Johnson, 444 N.W.2d 824, 827 (Minn. 1989) ("[The]

Supreme Court suggested in *State v. Anderson*[82] that while flight alone could never provide probable cause to arrest, flight does give rise to a reasonable suspicion that criminal activity may be afoot.[83] As a result, the *Anderson* court noted that flight alone may justify an investigative stop because flight is a strong indication of a guilty mind.[84]

Thus, while some courts have found that that evasive conduct

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trooper did not base his decision to stop solely on the fact that the defendant made a quick turn . . . after he looked the trooper in the eye.").

In People v. Bower, 597 P.2d 115, 117 (Cal. 1979), a group of people who had been talking together dispersed upon seeing police officers. One of the men walked away quickly, " 'almost a run,' " through a passageway. *Id.* The officers stopped this individual and subsequently discovered that he was carrying a concealed weapon. *Id.* at 117-18. The California Supreme Court stated that persons are free to avoid contact with the police unless the police "have the power to insist upon an encounter—that is, [the] officer has the power to 'detain' . . . ." *Id.* at 121. This power, the court noted, does not exist unless the officer has adequate cause for a stop. *Id.* The *Bower* court thus indicated that evasive conduct in and of itself cannot support a reasonable suspicion of criminal activity. *Id.* at 122.

82. 454 N.W.2d 763 (Wis. 1990).

83. State v. Anderson, 454 N.W.2d 763, 766 (Wis. 1990). In *Anderson*, police officers observed Anderson driving his vehicle in an alley behind a restaurant. *Id.* at 764. Anderson lived above the restaurant and usually parked his car in the alley. *Id.* Upon seeing the officers, Anderson "turned south into an adjoining alley, attaining a speed of approximately ten to fifteen miles per hour." *Id.* He then turned onto a city street, "attaining a speed of approximately thirty miles per hour." *Id.* The trial court did not call this action "flight" but noted that Anderson had "proceeded in a very hast[y] fashion away from the officers . . . ." *Id.* at 767 (alteration original).

The court concluded that "Anderson's evasive behavior in avoiding police contact alone justified the temporary stop[,]" *id.* at 768, and noted that:

> [F]light at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well. Under these circumstances, "[i]t would have been poor police work indeed for an officer . . . to have failed to investigate this behavior further."

Id. at 766 (quoting Terry v. Ohio, 392 U.S. 1, 23 (1968)). Because Anderson's conduct arguably was not fast, erratic, or extreme, it may be argued that *Anderson* suggests that flight need not be fast, erratic, or extreme in order to give rise to a reasonable suspicion of criminal activity. However, the *Sarhegyi* court took *Anderson* a step farther and cited *Anderson* as support for the proposition that "courts have held that mere avoidance of a police car is insufficient unless erratic, fast, and extreme." State v. Sarhegyi, 492 N.W.2d 284, 287 (N.D. 1992) (citing State v. Anderson, 454 N.W.2d 763 (Wis. 1990)).

It may also be argued that while the *Anderson* court stated that flight in and of itself may give rise to a reasonable suspicion of criminal activity, the court instead considered the totality of the circumstances when it determined that reasonable suspicion existed. Arguably, *Anderson* could be interpreted as support for the proposition that the totality of the circumstances supported a finding of reasonable suspicion because the officers reasonably believed that Anderson was returning home and would therefore stop in the alley rather than driving past them. Further, the concurring opinion in *Anderson* stated that the trial judge had not concluded that Anderson's conduct constituted flight, but instead had found reasonable suspicion "because it was 2:00 a.m., Anderson avoided the police, he was speeding, and it was in an alleyway behind business areas." *Anderson*, 454 N.W.2d at 769 (Heffernan, C. J., concurring).

84. *Anderson*, 454 N.W.2d at 768.

does not create reasonable suspicion that criminal activity may be afoot, other courts have declined to adopt that view.

III. ANALYSIS

The *Sarhegyi* court stated that when determining whether an investigative stop is reasonable, "[t]he reviewing court must (1) determine whether the facts warranted the intrusion of the individual's Fourth Amendment rights, and if so, (2) determine whether the scope of the intrusion was reasonably related to the circumstances which justified the interference in the first place."[85] Noting that an investigatory stop is justified if the officer has " 'an articulable and reasonable suspicion' that a law has been or is being violated,"[86] the court found that Deputy Burris did not possess reasonable suspicion of criminal activity because Sarhegyi had not committed a traffic violation and there had been no report of a crime in the area.[87] The court also noted that there were no circumstances which suggested that Sarhegyi was in need of emergency assistance.[88] By this, the *Sarhegyi* court has indicated a

85. *Sarhegyi*, 492 N.W.2d at 286 (citations omitted).
86. *Id.* (citations omitted).
87. *Id.*
88. *Id.* Stops made for the purpose of ascertaining the welfare of an occupant of a vehicle have been called "community caretaker" stops. Wibben v. North Dakota State Highway Comm'r, 413 N.W.2d 329, 331 n.1 (N.D. 1987). A United States District Court has stated that "the physical and psychological intrusion upon the stopped motorist . . . is the same regardless of whether the police officer has a penal or regulatory purpose, or a benign purpose of rendering assistance." United States v. Dunbar, 470 F. Supp. 704, 706 (D. Conn. 1979). However, the *Dunbar* court indicated that when a stop is made for benign purposes, the individual's interest in being free from governmental intrusion is balanced against the government's interest in ascertaining the individual's welfare. *Id.* Thus, the *Dunbar* court, while stating that the degree of intrusion upon the motorist is the same no matter the purpose for the stop, suggested that the reasonable suspicion of criminal activity standard applies to stops in which the motorist is suspected of a crime, and a lesser standard applies if the officer is attempting to ascertain the welfare of the motorist.

In *Wibben*, the North Dakota Supreme Court suggested that when a community caretaker stop is challenged, the reasonable suspicion standard applies only if the stop has the dual purposes of crime investigation and ascertainment of an individual's welfare. 413 N.W.2d at 331 n.1. Thus, the reasonable suspicion standard applies to a vehicle stop if the officer is concerned that the occupant of the vehicle is ill and, in addition, suspects that the individual may be intoxicated. Further, following *Dunbar*, the *Wibben* court noted that if the officer does not suspect the occupant of committing or having committed a crime, the reviewing court will determine the validity of the stop by balancing the state's interest in investigating the officer's reasonable suspicion that the individual may be ill or injured against the individual's privacy interest. *Id.* at 331 n.1, 333.

Other courts have circumvented the issue of whether the reasonable suspicion standard must be applied to community caretaker stops by finding that a community caretaker stop is not a seizure because the officer is not using a show of authority to stop the individual. In People v. Murray, 560 N.E.2d 309, 311-12 (Ill. 1990), the court stated that a " '*Terry*' stop . . . must be supported by a reasonable suspicion of criminal activity . . . . [A community caretaking stop] involves no coercion or detention and therefore does not involve a seizure." The court stated that " '[because] the person to whom the questions are put remains free to . . . walk away, there has been no intrusion upon that person's liberty or

new-found inclination to narrow the investigatory stop standard of reasonable suspicion, because *Terry* did not require a showing that the stop was made in a high crime area or that the officer was investigating a report of crime when the stop was made.[89] The narrowing of the standard of reasonable suspicion brings the standard closer to the probable cause standard, which requires that the officer have a reasonable belief that a crime has been committed or is being committed.[90]

Conversely, individuals who believe that the reasonable suspicion standard is a doormat for the police and has historically given law enforcement officers too much power and discretion may be reassured by the *Sarhegyi* decision which possibly suggests that the standard does in fact have some "bite."

The *Sarhegyi* court also took the position that an attempt to avoid contact with a law enforcement officer alone does not establish reasonable suspicion of criminal activity.[91] Courts in other jurisdictions have ruled similarly;[92] however, those courts have also indicated that flight plus other circumstances can lead to a finding of reasonable suspicion.[93] Had the Sarhegyi court chosen

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privacy as would under the Constitution require some particularized and objective justification.'" *Id.* at 312 (quoting United States v. Mendenhall, 446 N.S. 544, 553 (1980)).

The *Sarhegyi* court stated that in order for a community caretaker stop to take place, there must be indicia of an emergency. 492 N.W.2d at 286. The trial court had found that Sarhegyi had not "gesture[d] for help nor was she slumped over the wheel[;]" thus there was no indication that an emergency existed. Trial court memorandum at 2, State v. Sarhegyi, 492 N.W.2d 284 (N.D. 1992) (No. 920031). At trial, Deputy Burris had testified that when he first viewed the vehicle he was unable to tell whether it was occupied. Transcript, *supra* note 1, at 13. The *Sarhegyi* court thus suggests that if an officer observes a parked vehicle under suspicious circumstances and cannot tell whether the vehicle is occupied, the officer may approach the vehicle in order to ascertain whether there are occupants in need of assistance; however, if the driver/occupant(s) become aware of the officer's presence and drive off before the officer makes contact, the occupants of the vehicle are presumed to not need assistance.

89. *See supra* note 50. The North Dakota Supreme Court suggested in *Geiger* that a recent report of crime is necessary to support a reasonable suspicion of criminal activity. *See supra* note 47. Another state court has indicated that an investigatory stop of a vehicle which is observed on the lot of a closed business late at night is not reasonable unless there is a high crime rate in the area or the officer is investigating a report of crime when the vehicle is observed. *See supra* notes 48-50 and accompanying text.

By narrowing the standard of reasonable suspicion set forth in *Terry*, the North Dakota Supreme Court is indicating that the North Dakota State Constitution provides greater protection against unreasonable searches and seizures than does the United States Constitution. In Cooper v. California, 386 U.S. 58, 62 (1967), the United States Supreme Court stated that individual states constitutions may impose "higher standards on searches and seizures than required by the Federal Constitution . . . ." The North Dakota Supreme Court cited *Cooper* with approval in State v. Stockert, 245 N.W.2d 266, 271 (N.D. 1976), noting that "[i]ndividual States are free to impose higher standards than the Federal Standards."

90. *See supra* note 28.

91. *See Sarhegyi*, 492 N.W.2d at 286 ("The fact that Sarhegyi moved her car when Deputy Burris approached is not sufficient to justify a stop.").

92. *E.g.*, State v. Fry, 831 P.2d 942, 946 (Idaho Ct. App. 1991), discussed *supra* note 81.

93. *E.g.*, People v. Wells, 676 P.2d 698, 702 (Colo. 1984), discussed *supra* note 81.

to recognize that a vehicle parked on the lot of a closed, somewhat isolated business late at night is a circumstance which justifiably gives rise to a suspicion that all is not well, the court could have found that those circumstances, coupled with Sarhegyi's attempt to avoid contact with Deputy Burris, created reasonable suspicion of criminal activity.[94] However, by indicating that flight can lead to a finding of reasonable suspicion only if the flight is fast, erratic, or extreme and thus viewing flight in a vaccuum rather than considering flight plus other circumstances, the *Sarhegyi* court tightened the standard of reasonable suspicion.

In its opinion, the court cited *People v. Freeman*[95] for the proposition that an individual violates no law by stopping on a public parking lot, unless the property is posted against trespassing or the individual has been ordered off the property by the owner.[96] The *Freeman* court indicated that because there are innocent reasons why people might stop their vehicles on parking lots late at night, there must be some other "specific, objective facts" in addition to presence on the premises in order to support reasonable suspicion of criminal activity.[97] One could argue that both the *Freeman* and *Sarhegyi* courts would find that presence on the lot of a closed business alone can never support a reasonable suspicion of crime, because it is not a violation to be on unposted property, and there are "innocent" reasons why persons may stop on the parking lot of a closed business. Following this line of rea-

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94. Alternatively, the court could have found that because Deputy Burris had decided to stop Sarhegyi *prior* to her attempt to avoid him, the avoidance was not a factor included in Deputy Burris' decision to stop; therefore, it was unnecessary to determine whether Sarhegyi's act of avoidance created reasonable suspicion. *See* State v. Baumgaertel, 762 P.2d 2, 4 n.2 (Utah Ct. App. 1988) (noting that "the deputy's observation of the driver's 'evasive' behavior . . . was made after the deputy decided to follow the vehicle, and, thus, did not enter into the facts upon which he based his suspicion of criminal activity[]").

95. 320 N.W.2d 878 (Mich. 1982).

96. *Sarhegyi*, 492 N.W.2d at 287. The *Freeman* court stated that:

> A lone automobile idling in a darkened parking lot late at night does not, without more, support a reasonable suspicion of criminal activity. People may temporarily stop their automobiles in such locations for a variety of reasons: to rest, to check directions, to rendezvous with others, to converse, etc. It is not an offense for an individual to be upon the private property of another unless he has entered "after having been forbidden so to do by the owner or occupant" or refused to depart after having been told to do so.

Freeman, 320 N.W.2d at 880. However, the stop at issue in *Freeman* involved a vehicle that was parked on a residential, not commercial, parking lot. *Id.* at 879. Professor LaFave distinguishes presence on residential premises from presence on commercial property, suggesting that "something more than presence in immediate proximity to [residential] premises will ordinarily be required, for persons have occasion to enter and exit their residence at all hours." 3 LAFAVE, *supra* note 45, at 441.

97. *Freeman*, 320 N.W.2d at 880. The court stated that "a report linking a vehicle of the same description to recent criminal activity" is a factor that would be specific and objective. *Id.* Thus, the *Freeman* court appears to suggest that investigatory stops should be used solely for purposes of crime investigation, not crime prevention.

soning, the *Sarhegyi* court thus requires an officer to rule out innocent reasons for the individual's activity, with the arguable result that the officer must reasonably believe that a crime is being committed, rather than merely possess an articulable reason for her belief that criminal activity is afoot. Whether it appears that the individual was attempting to secret her presence from the view of passers-by, or whether the lot at issue is a parking lot in a largely residential area, as opposed to a lot in a commercial area which has little traffic at night, appears to be irrelevant to the two courts. The *Sarhegyi* court seems to suggest that unless there is a recent report of crime in the area, a traffic violation, or there are indications that an emergency exists, an investigatory stop of a vehicle which has been observed on the lot of a closed business late at night is not justified.

IV. IMPLICATIONS

In order to prevent burglaries and other crimes, many law enforcement agencies have a general policy that requires officers on the night shift to closely patrol businesses.[98] Although it is unknown whether the North Dakota Supreme Court would accept the articulation of a general extra patrol of businesses as support for an investigatory stop of a vehicle which was observed on the lot of a closed business late at night, *Sarhegyi* indicates that absent a recent report of a particular type of crime, the stop is unjustified. Because the court requires a recent report of crime in the area, the court suggests that an investigatory stop may be used only to investigate past or on-going crimes and may not be used for crime-prevention purposes. In essence, the criminal is given "one free shot." After a crime has been committed in an area, officers may stop suspicious vehicles, but until a crime has been reported, a stop is unjustified. Because probable cause consists of a reasonable belief that a crime has been or is being committed,[99] and, as *Terry* indicates, reasonable suspicion may be based on a reasonable belief that a crime is about to be committed, the *Sarhegyi* court, by requiring a report of recent crime in the area to justify a stop based on reasonable suspicion has blurred the distinction between reasonable suspicion and probable cause by bringing about the

98. Thomas C. Durrett, *Burglary Prevention Concepts*, LAW AND ORDER, Sept. 1987, at 26 (noting that because lack of eyewitnesses makes it difficult to solve nighttime burglaries, police need to deter burglaries of closed businesses).

99. *See supra* note 28 and accompanying text.

odd result that reasonable suspicion cannot exist unless a crime has already occurred or is in progress.

As a result of the *Sarhegyi* decision, an officer who observes a vehicle parked under circumstances which suggest that a burglary may be in progress may not stop the vehicle if it begins moving upon his approach unless the driver commits a traffic violation. If no violation is committed, the officer will have to simply note the car's tag number for future reference. This could obviously impose onerous burdens on the police if it is later discovered that the business has been vandalized or burglarized, because the officer will have to hope that the owner of the vehicle was driving the car at the time it was observed and that the owner's name and address on file in the computer represent the correct information, or it may be impossible to locate the driver at a later date.

The *Sarhegyi* court found that a brief stop made in order to identify the driver of a vehicle observed on the lot of a closed business late at night is an unreasonable seizure, and that finding suggests that the court might hold that investigatory stops may not be used for the purpose of crime prevention or detection. In future cases, the court may distinguish between circumstances in which the business directly abutted a well-travelled street or was located in an isolated area, but the *Sarhegyi* court did not indicate that the area in which the business was located could be a factor in determining reasonable suspicion of criminal activity. The court simply indicated that because there are innocent reasons why a person might stop her vehicle on private property, a stop of a person viewed leaving the lot of a closed business late at night is an unreasonable seizure unless the person is observed committing a violation, there is a recent report of crime in the area, or it appears that the officer's assistance is needed.

The *Sarhegyi* decision indicates that the court is willing to hypothesize reasons for the individual's conduct and that the officer may not stop an individual unless she has eliminated all possible innocent reasons for the person's activity. Further, the court indicated that an attempt to avoid conduct with the officer can never give rise to reasonable suspicion of criminal activity unless the evasive action is fast, erratic, or extreme. This information will provide would-be criminals with an incentive to remain calm when they are caught in the act. More importantly, as a result of the *Sarhegyi* decision, a law enforcement officer may not stop a vehicle unless she is investigating a report of a crime or there has been a recent report of crime in the area. The officer may not

make an investigatory stop unless she knows that there have been recent crimes in the area and she observes the individual make an overt action indicative of crime.

Therefore, the *Sarhegyi* decision will make it more difficult for law enforcement officers to pursue their crime prevention and detection duties. The decision will give defense attorneys ammunition with which to argue for suppression of evidence obtained in stops made for these purposes. As result of the *Sarhegyi* decision, the line between reasonable suspicion and probable cause, while never clear, is blurred to the point of extinction.

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