COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3277-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Reversed and cause remanded.*

NETTESHEIM, J. Terrence Miller appeals from a judgment of conviction for possession of cocaine entered upon his plea of no contest following the denial of his motion to suppress evidence.

The police stopped Miller after he "broke away" from a gathering of people in a high crime area. Upon questioning Miller, the police discovered that

he was concealing cocaine in a plastic bag in his mouth. Miller argues on appeal that the trial court should have suppressed the evidence resulting from the search because the police did not have a reasonable and articulable suspicion to stop him pursuant to ***Terry v. Ohio***, 392 U.S. 1 (1968). Alternatively, Miller argues that the ensuing search exceeded the scope of a ***Terry*** search when the police ordered him to spit out the object in his mouth. Because we conclude that the officers did not have a reasonable and articulable suspicion to stop Miller, we reverse the judgment and remand for further proceedings.[1]

Officer Todd Johnson of the City of Racine Police Department was the only witness to testify at Miller's suppression hearing. Johnson testified that on October 14, 1997, he and his partner were assigned to a "high crime drug activity area." Police surveillance in this area includes "sweeps, stops [and] identifications." At approximately 9:30 p.m., Johnson received a report from Officer Rodriguez, who was nearby, that when Rodriguez had approached a group of people, he observed two parties break from the group and head in the direction of an alley. Johnson and his partner, who were in the area of the alley, immediately observed two persons coming into the alley. One of the individuals turned away from the officers while the other individual, later identified as Miller, proceeded toward the officers and stopped at Johnson's command. Johnson did not observe Miller and the other party break from the group. However, he observed them entering the alley "simultaneous" to receiving information from Rodriguez.

[1] Given our decision, we need not address Miller's further argument that the officer's search exceeded the scope of ***Terry v. Ohio,*** 392 U.S. 1 (1968). *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

Johnson exited his vehicle and approached Miller who was about fifteen feet from his vehicle. Miller had his hands in his pockets. Johnson ordered him to place his hands on the squad car and Miller complied. Johnson then asked Miller his name. Miller hesitated and then spoke. Johnson testified that Miller "lisped dramatically" as if he had something in his mouth. Johnson believed that Miller was hiding drugs in his mouth and ordered Miller to "spit it out." Miller spit out a small knotted baggie containing a rock-like substance that appeared to be base cocaine. Johnson arrested Miller.

Miller was charged with unlawful possession of cocaine contrary to § 961.41(3g)(c), STATS. He filed a motion to suppress the evidence, arguing that Johnson did not have a reasonable and articulable suspicion that Miller had committed, was committing or was about to commit a crime pursuant to ***Terry***. Following an evidentiary hearing, the court issued a written decision denying Miller's motion. With respect to the officer's initial detention of Miller, the court found that it was justified because "[t]he officer confronted [Miller] in a situation where he had no reason to believe Miller was not a part of the group under surveillance."

Following the denial of his suppression motion, Miller entered a guilty plea. Section 971.31(10), STATS., authorizes our review of an adverse suppression ruling notwithstanding a subsequent guilty plea. When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS.; ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law which we decide without deference to the circuit court's decision. *See* ***State v. Patricia A.P.***, 195 Wis.2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. Temporary detentions for the purpose of investigation are seizures within the meaning of the Fourth Amendment and are constitutionally permissible if the officer has a reasonable suspicion that some kind of criminal activity has been or will be committed. *See* ***Terry,*** 392 U.S. at 20-22. Reasonable suspicion exists when specific and articulable facts available to the officer, together with the rational inferences from those facts, would warrant an officer of reasonable caution to suspect criminal activity. *See* ***State v. Goebel***, 103 Wis.2d 203, 208-09, 307 N.W.2d 915, 918 (1981) (citing ***Terry***, 392 U.S. at 21-22).

Here, Johnson received information that Rodriguez had observed two individuals "break away" from a group as he approached.[2] As to the term "break away," Johnson testified that "usually upon seeing a squad car, as in this case, based on all my experience … people involved in that type of activity as far as dealing drugs, if they're in a group, usually turn and run … immediately upon seeing a squad, will go a different direction and avoid contact with the squad that's approaching them." Based on this profile, Rodriguez's information and Johnson's sighting of the two individuals heading into the alley, Johnson stopped Miller for questioning.

Miller contends that it was unreasonable for Johnson to stop him based solely on information that he "broke away" from a group in a high crime area at approximately 9:30 p.m. Miller contends that his conduct was innocent

[2] An officer may rely on collective information when making an arrest. *See* ***Johnson v. State***, 75 Wis.2d 344, 350, 249 N.W.2d 593, 596 (1977). The inquiry is whether all the collective information is adequate to sustain the arrest. *See* ***id***.

behavior which did not carry a reasonable suggestion of possible criminal activity.[3]

The facts of this case are similar to those presented in ***State v. Young***, 212 Wis.2d 417, 569 N.W.2d 84 (Ct. App. 1997). There, an officer received information from another officer that a black male subject had made "short-term contact" with another subject in a high drug-trafficking area. *See* ***id***. at 420-21, 569 N.W.2d at 87. The officer then observed Young, who matched the description given. *See* ***id.*** at 421, 569 N.W.2d at 87. The officer stopped Young for questioning. *See* ***id.*** Young admitted that he had a marijuana pipe on his person and consented to a pat-down search which revealed a small amount of marijuana in his pockets. *See* ***id***.

At a suppression hearing, Young argued that the evidence should be suppressed because "the observation of a brief contact between two individuals walking on a sidewalk in a residential neighborhood in the afternoon is insufficient to constitute a reasonable suspicion that a drug transaction has taken place." ***Id***. at 424, 569 N.W.2d at 88. The trial court denied his motion and Young appealed.

The ***Young*** court considered the following facts as bearing on the question of reasonable suspicion: "(1) [the defendant's] presence in a high drug-trafficking area; (2) a brief meeting with another individual on a sidewalk in the

[3] The trial court appears to have viewed the dispositive issue as whether Johnson reasonably deduced that Miller was one of the persons whom Rodriguez had reported as leaving the group and entering the alley. We say this because the trial court's written decision states, "The officer confronted the Defendant in a situation where he had no reason to believe Miller was not a part of the group under surveillance…." However, Miller made no claim that he was not part of the group. Rather, Miller's trial court brief as to this issue was that his departing the group did not provide Johnson with a reasonable basis for detaining him. The court's decision did not squarely address this claim.

early afternoon; and (3) the officer's experience that drug transactions in this neighborhood take place on the street and involve brief meetings." ***Id***. at 433, 569 N.W.2d at 92. The court concluded that those facts were "not sufficient to give rise to reasonable, articulable suspicion of criminal activity that justifies the intrusion of an investigative stop." ***Id***. The court noted that the facts did not give particularized information concerning Young's conduct but instead described the conduct of large numbers of innocent persons in the neighborhood. *See* ***id***. The court said:

> [S]topping briefly on the street when meeting another person is an ordinary, everyday occurrence during daytime hours in a residential neighborhood…. The conduct that [the officer] considered suspicious, then, is conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in residential neighborhoods where drug trafficking occurs.

Id. at 429-30, 569 N.W.2d at 90-91.

Here, Johnson testified that Rodriguez observed Miller "break away" from a group of people as he approached. Johnson did not testify as to whether Miller actually saw Rodriguez prior to his departure from the group. Nor did he testify that Rodriguez had observed Miller engage in any other possibly suspicious activity, such as an exchange of items, with others in the group. Johnson testified that Miller was stopped solely because Rodriguez reported that he "broke away" from the group and that this conduct suggests drug activity.

However, the congregating of people in an urban neighborhood is not unusual. Nor is it unusual that individuals in those groups will come and go. As in ***Young***, we conclude that this type of conduct, without more, is typical of large numbers of people and is not sufficient to give rise to a reasonable, articulable suspicion of criminal activity such that an investigative stop is justified.

The State equates Miller's "breaking away" from the group as an attempt to "flee" on sight of a police officer. Relying on our supreme court's holding in ***State v. Anderson***, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990), the State correctly argues that flight at the sight of a police officer gives rise to a reasonable suspicion even though there may be innocent explanations for the conduct.[4] In ***Anderson***, the suspect fled in an automobile after he saw an officer approaching his vehicle. *See* ***id***. at 80, 454 N.W.2d at 764.

However, the evidence in this case is that Miller "broke away" from the group. Rodriguez did not report that Miller had run away or fled from the police. And although Johnson did not observe Miller "break away" from the group, his testimony was that he encountered Miller "simultaneous" to receiving Rodriguez's report. Yet, at this time, Johnson did not observe Miller running or attempting to flee. In addition, Johnson's arrest report, which he read from during his testimony, also does not allude to any flight by Miller: "While on patrol in special assignment for the W. 6 St. area due to high crime drug and gang activity OFF. RODRIGUEZ advised he saw two subjects heading through the yards from the front house area of 1529 Maple going toward the alley." Finally, we note that after Johnson saw Miller in the alley, Miller continued walking toward the squad car and stopped about fifteen feet from the squad car upon Johnson's command.

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[4] We note that the issue of whether "flight" gives rise to a reasonable suspicion to justify an investigatory stop will be examined by the United States Supreme Court. The Court has accepted certiorari in ***People v. Wardlow***, 701 N.E.2d 484 (Ill. 1998), *cert. granted*, 67 U.S.L.W. 3437 (U.S. May 3, 1999) (No. 98-1036). In ***Wardlow***, the Illinois Supreme Court held that the trial court erred in denying a motion to suppress evidence when the defendant was stopped in a high crime area and ran as the police approached. The court concluded that "flight alone is insufficient to create a reasonable suspicion of involvement in criminal conduct." ***Id.*** at 486.

Because we hold that the evidence in this case did not demonstrate flight by Miller, we see no need to hold this case pending the United States Supreme Court's decision in ***Wardlow***.

In summary, neither Johnson's testimony nor his arrest report indicates that Miller departed the group because he saw Rodriguez or, more importantly, that Miller's departure was "flight" akin to that in ***Anderson***. *See* ***id***. at 85, 454 N.W.2d at 766-67 (basing a determination of "flight" on the trial court's findings that Anderson's retreat from the area was very hasty). We also note that the trial court did not make such findings.[5]

We acknowledge that police officers are not required to rule out the possibility of innocent behavior before initiating a ***Terry*** stop. *See* ***Anderson***, 155 Wis.2d at 84, 454 N.W.2d at 766. However, possibly innocent conduct must also carry a *legitimate* suspicion of possibly criminal conduct. *See* ***id***. A police officer's training and experience which produce a suspicion in the officer's mind that criminal activity may be afoot is a proper factor for us to consider. But that suspicion alone does not govern the issue. *See* ***Young***, 212 Wis.2d at 429, 569 N.W.2d at 90.

> But the fact that an officer is experienced does not require a court to accept all of his suspicions as reasonable, nor does mere experience mean that an [officer's] perceptions are justified by the *objective* facts. The "basis of the police

[5] The facts of this case are unlike those in ***State v. Allen,*** No. 98-1600-CR, slip op. (Wis. Ct. App. Mar. 24, 1999, ordered published Apr. 21, 1999). There, the police were patrolling a high crime area during the evening hours when they observed a car pull over to a curb, two men approach the car, one of the men enter the car and then exit about one minute later, and then leave the scene. Thereafter, the two men remained in the general area for about five to ten minutes and then walked to the area of a pay phone. *See* ***id.*** at 2. Based on these observations, the police detained the two men. An ensuing search of Allen, one of the men, produced a controlled substance.

In the trial court and on appeal, Allen contended that his conduct mirrored that of a large number of innocent citizens. *See* ***id.*** at 6. The court of appeals disagreed. The court of appeals distinguished the facts of the case from those in ***Young***, concluding that the conduct was "not an everyday occurrence." *See* ***Allen,*** slip op. at 7. Here, as we have already concluded, the conduct observed by the officers mirrored that of many ordinary innocent citizens in an urban area. Thus, this is a ***Young*** case, not an ***Allen*** case.

> action must be such that it can be reviewed judicially by an objective standard."

Id. (citations omitted).

Thus, simply because Johnson's experience with drug activity and drug offenders raised a legitimate suspicion in his mind that Miller was involved in drug activity, our legal inquiry does not end there. In assessing the reasonableness of the police action, we also must consider where the conduct falls along the continuum of human conduct—particularly whether the conduct constitutes "an ordinary, everyday occurrence." ***Id***. The more the conduct qualifies under this factor, the less the conduct, objectively viewed, inspires legitimate suspicion. In such a setting, the suspicion more likely becomes a "hunch." An inchoate and unparticularized suspicion or hunch will not suffice to warrant a ***Terry*** stop. *See* ***Terry***, 392 U.S. at 27.

We do not deem it remarkable that people in an urban area will congregate and will come and go from the gathering as they please. In the words of ***Young***, this is the type of conduct which "large numbers of innocent citizens engage in every day for wholly innocent purposes, even in residential neighborhoods where drug trafficking occurs." ***Young***, 212 Wis.2d at 429-30, 569 N.W.2d at 91. Many citizens of this state are forced to live in areas that have high crime rates or they come to those areas to shop, work, play, transact business or visit relatives or friends. Legitimate human behavior occurs every day in so-called high crime areas. As a result, when the police seize a person under such facts, the courts should consider this factor with caution. We are reluctant to say that a high crime rate transforms otherwise innocent-appearing conduct into circumstances justifying the seizure of an individual. Absent evidence of flight or other

circumstances establishing a reasonable suspicion, the police may not interfere with the personal liberty of persons engaging in such conduct.

We reverse the judgment of conviction and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.