COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2094-CR **Cir. Ct. No. 2013CF3397**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY CHRISTOPHER MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Curley, P.J., Brennan and Bradley, JJ.

¶1 PER CURIAM. Anthony Christopher Moore appeals from a judgment, entered on a jury verdict, for one count of being a felon in possession of a firearm and one count of endangering safety by intentionally pointing a firearm at a law enforcement officer, both as a repeater. *See* WIS. STAT. §§ 941.29(2)(a),

941.20(1m)(b), and 939.62(1)(b) (2013-14).[1] The sole issue on appeal is the trial court's pretrial denial of Moore's suppression motion. Moore argues that he was unconstitutionally seized and that all evidence obtained after that unconstitutional seizure should be suppressed. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 Moore was charged with the aforementioned crimes in connection with an altercation he had with officers who were investigating a van parked on the side of the road with five men in it, including Moore. Moore filed a motion to suppress the evidence of firearms and drugs found in the van.

¶3 The trial court conducted a multi-day hearing on Moore's suppression motion at which four individuals testified: two police officers for the State and two citizen witnesses for the defense. The trial court ultimately found that the officers' testimony was more credible than that of the citizen witnesses and it made factual findings consistent with the officers' testimony.

¶4 The trial court found that the two officers "were on routine patrol in a high-crime area in the evening hours" when they "observed a van that was stopped" and parked on the street. As the officers drove past the van, they both observed Moore, who was seated in the front passenger seat, "have this startled kind of look and saw [Moore] do a quick movement … to his left, away from the officers." The trial court noted that "both officers testified that this was not … a normal reaction for a law-abiding citizen."

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 The trial court continued:

> Officer [Joel] Susler testified that he'd seen … this type of movement in the past, and firearms were found. The officers testified that they decided to do further investigation. Officer [Scott] Freiburger stopped … the squad in the street, did not put on his lights, did not put on his siren. He did not block the vehicle, and both officers got out.
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> … [T]he vehicle was running. Officer Susler approached the driver's side, and Officer Freiburger approached the passenger side. They asked for identification.

As Freiburger spoke with Moore, "Moore was reaching in his pockets." The trial court continued:

> Officer Freiburger told him to stop. He did not. He did it again, and he did not stop. Either two or three times his hand migrated toward his pocket. It also migrated toward the door handle, at one point.
>
> … Mr. Moore disregarded the lawful order of Officer Freiburger to keep his hands where he could see them and to stop rolling up the window….[2]
>
> The defendant lifted up and grabbed the firearm from underneath his buttocks, at which time, Officer Susler yelled … "Banger," which meant firearm.

[2] Freiburger testified that shortly after he told Moore to stop putting his hands in his pockets and a third officer arrived on the scene, "Moore started rolling the passenger window up and staring straight forward." Freiburger said: "I told him to stop and he continued raising the window…. Eventually I stopped the window from rolling up with my hand. At this time Mr. Moore turned his body to the left and started getting off the seat."

The officers then drew their weapons and Moore was subsequently subdued and arrested. The trial court said that the time that elapsed between when the officers approached the van and later drew their weapons was "two to three minutes."[3]

¶6 Based on these findings, the trial court made several legal conclusions and denied the suppression motion.[4] It concluded that Moore was not seized when the officers initially approached the van and spoke with its occupants, noting that it was "Moore's actions in the vehicle" that caused the interaction to escalate. The trial court concluded that "the stop and detention … [were] reasonable."

¶7 Moore's case was subsequently tried to a jury and he was found guilty. He was sentenced to two consecutive terms of six years of initial confinement and three years of extended supervision. This appeal follows.

DISCUSSION

¶8 When reviewing a trial court's ruling on a motion to suppress evidence, this court upholds the trial court's factual findings "unless they are clearly erroneous, but the application of constitutional principles to those facts

[3] Susler estimated the time at two or three minutes, and he said he did not believe it could have been "as long as five or ten minutes." This contradicted the testimony of one citizen witness that "between fifteen to twenty minutes" elapsed between the time the officers approached the van and later drew their weapons.

[4] The trial court also concluded that even if Moore was seized when the officer approached the van, the fact Moore was not wearing a seat belt in a running vehicle justified the stop. On appeal, the State offers this as an alternative basis to affirm the suppression order. We decline to consider this issue, based on our conclusion that the officers had reasonable suspicion at the time Moore was seized. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not address all issues when deciding a case on other grounds). Similarly, we decline to consider the State's argument that even if the officers' initial contact with Moore constituted a seizure, that seizure was supported by reasonable suspicion.

presents a question of law subject to *de novo* review." ***County of Grant v. Vogt***, 2014 WI 76, ¶17, 356 Wis. 2d 343, 850 N.W.2d 253 (italics added). The same standard of review applies to the issue of whether someone has been seized. ***Id.***

¶9 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect an individual's right to be free from unreasonable seizures. ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. As our supreme court has explained:

> Pursuant to ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), a police officer may, under certain circumstances, temporarily detain a person for purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest. The Wisconsin Legislature codified the ***Terry*** constitutional standard in WIS. STAT. § 968.24. When we interpret § 968.24, we rely on ***Terry*** and the cases following it.
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> According to WIS. STAT. § 968.24, an officer may conduct a temporary investigatory detention when "the officer reasonably suspects that [a] person is committing ... a crime."

State v. Blatterman, 2015 WI 46, ¶¶18-19, 362 Wis. 2d 138, 864 N.W.2d 26 (citation omitted; ellipses and brackets in original). "The determination of reasonableness is a common sense test." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. ***Post*** continued:

> The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime…. The reasonableness of a stop is determined based on the totality of the facts and circumstances.

Id. (citations omitted).

¶10 The test for reasonable suspicion is an objective one. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) ("The question of what constitutes reasonableness is a common sense test" that considers what "a reasonable police officer [would] reasonably suspect in light of his or her training and experience."). "Any subjective intention of the officers to detain a person is relevant only to the extent it is conveyed to that person." ***State v. Kramar***, 149 Wis. 2d 767, 782, 440 N.W.2d 317 (1989); *see also* ***United States v. Mendenhall***, 446 U.S. 544, 554 n.6 (1980) (agent's subjective intent to detain individual "is irrelevant except insofar as that may have been conveyed to" that individual); ***State v. Buchanan***, 178 Wis. 2d 441, 447 n.2, 504 N.W.2d 400 (Ct. App. 1993) ("[I]t is the circumstances that govern, not the officer's subjective belief.").

¶11 In order for these constitutional protections to come into play, an individual must be "seize[d]" by a governmental agent. ***Vogt***, 356 Wis. 2d 343, ¶19. The Wisconsin Supreme Court explained in ***Vogt*** that "there are countless interactions or encounters among police and members of the community," but not all encounters will constitute seizures and be afforded Constitutional protection. ***Id.***, ¶26. "A seizure occurs '[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen'" and a reasonable person would not have believed that he or she was free to leave. ***Id.***, ¶20 (citation omitted; brackets in ***Vogt***). Although most citizens will respond to a police request, the fact that a citizen does so does not necessarily mean that the citizen has been seized. *See* ***id.***, ¶24. Instead, we must look at the totality of the circumstances and determine whether a reasonable person would have felt free to leave. *See* ***id.***, ¶¶30-31.

¶12 In this case, Moore has not challenged the trial court's findings about what occurred, and has instead focused on the correctness of the trial court's

legal conclusions about when Moore was constitutionally seized and whether reasonable suspicion justified the seizure. Thus, we will apply constitutional principles *de novo* to the facts found by the trial court. *See* ***id.***, ¶17. Resolution of this appeal requires us to determine when Moore was seized and whether at the time he was seized the police officers had reasonable suspicion to suspect that Moore had committed, was committing, or was about to commit a crime. *See* ***Post***, 301 Wis. 2d 1, ¶13.

¶13 We begin with the question of when Moore was seized. The State agrees with the trial court that Moore was not seized when the officers made initial contact with the van's occupants. The State asserts that Moore was not seized until Freiburger placed his hand on the car window to prevent Moore from rolling it up, or perhaps shortly before that, when Freiburger ordered Moore to remove his hand from his pocket. In contrast, Moore argues:

> The seizure occurred as the officer[s] approached the van and asked the occupants for identification. Officer Susler testified at the motion hearing that when he initially made contact with the occupants he asked the occupants for identification. At this point, Officer Susler testified, the occupants were not free to leave.

(Record citations omitted.)

¶14 We agree with the State and the trial court that Moore was not seized at the time the officers first approached the van. Our conclusion is based in part on ***Vogt***, where our supreme court concluded that a law enforcement officer did not seize the defendant when an officer stopped his marked vehicle near another vehicle, approached the second vehicle on foot, and knocked on the driver's side window of the defendant's vehicle, while indicating that the defendant should lower his window. *See* ***id.***, 356 Wis. 2d 343, ¶¶2-3, 39-53.

¶15 Here, the van was already parked. The officers did not activate their lights or sirens when they stopped the police squad. They did not block the van and they did not display their weapons. These facts all weigh in favor of a conclusion that Moore was not seized at the time the officers initially approached the van. *See* ***id.***

¶16 As noted, Moore argues that he was seized as soon as the officers approached the van because Susler testified at the motion hearing that he did not consider the van's occupants free to leave. However, the officers' subjective intent is irrelevant unless that intent is conveyed to the individual being investigated. *See* ***Mendenhall***, 446 U.S. at 554 n.6. There is no evidence that the officers told the van's occupants that they were not free to leave. We conclude that Moore was not seized when the officers first approached the van.

¶17 Moore was seized shortly thereafter, however, during the two or three minutes that elapsed from the time the officers started talking with the van's occupants and when they drew their weapons. We agree with the State that Moore was seized by the time Freiburger placed his hand on the window to stop Moore from rolling it up, and perhaps as early as when the officer told Moore to stop putting his hands in his pockets.[5] The question becomes, then, whether at that time the officers had reasonable suspicion to suspect that Moore had committed, was committing, or was about to commit a crime. *See* ***Post***, 301 Wis. 2d 1, ¶13.

¶18 The State argues that Freiburger had the requisite reasonable suspicion at the time he directed Moore to stop putting his hands in his pockets

[5] For purposes of this appeal, we will assume that the encounter ripened into a seizure when the officer directed Moore to stop putting his hands in his pockets.

and, moments later, stopped Moore from rolling up the window. The State explains:

> When Officer Freiburger made contact with Moore, he saw Moore's left hand "moving around" in his left pants pocket and "pushing downward, toward his knees." Then, during the conversation, Officer Freiburger saw Moore's left hand migrate back toward his left pants pocket two or three times.
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> These observations buttressed the reasonableness of an existing inference that the officer had drawn upon his first spotting Moore in the van. From a distance of about five feet, Officer Freiburger saw Moore do a "double-take" as the officers drove by slowly, appear "startled," and move both arms to the left side of his body, leading the officer to conclude that Moore may have been concealing a weapon or drugs. This inference was appropriately informed by Officer Freiburger's substantial experience both with persons involved with illegal weapons and the drug trade, and with this part of his police district. The officer, who had ten years with the Milwaukee Police Department, had observed similar behavior "numerous times," and had learned it was often associated with the concealment of firearms or drugs. Further, the officer knew that this particular area had seen significant levels of criminal activity, having been involved in "a half dozen" arrests for gun-related offenses and "over a dozen" drug-related arrests there.

(Case and record citations omitted.) We agree that these facts would lead a reasonable officer to reasonably suspect that Moore had a weapon or drugs. In doing so, we reject Moore's argument that "[s]uspicious movements in a high crime area are not sufficiently individualized to support a stop of Moore in this case." When we consider the totality of the circumstances, including the officers' initial observations and Moore's subsequent movements in the vehicle after Freiburger began talking with him, we conclude there was reasonable suspicion.

¶19 For these reasons, we affirm the trial court's order denying Moore's motion to suppress. At the time Moore was seized—which occurred when

Freiburger ordered Moore to stop putting his hands in his pockets and prevented Moore from rolling up his window—Freiburger had reasonable suspicion to justify the seizure. Having rejected Moore's arguments, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.