COURT OF APPEALS
DECISION
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Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-0163-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARION JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Marion Jones appeals from the judgment of conviction entered after the trial court denied her motion to suppress and she pled guilty to possession with intent to deliver a controlled substance, as a party to a

crime, contrary to WIS. STAT. §§ 961.41(1m)(cm)1 and 939.05.[1] Jones argues that: (1) after the police failed to find any drugs in her possession the first time she was stopped and searched, there was no reasonable basis to stop her a second time absent new information to support a reasonable suspicion; and (2) her consent to the second search was not voluntarily given. We conclude that the second stop was justified because it was supported by a reasonable suspicion that Jones was engaged in criminal activity. We also conclude that Jones voluntarily consented to the second search. Therefore, we affirm.

I. BACKGROUND.

¶2 On March 24, 1998, several Milwaukee police officers stopped a woman who had a history of prostitution and drug offenses as she was leaving a suspected drug house that the officers had been watching. The woman informed the officers that the occupants of the house were transporting cocaine from one drug house to another because they knew that they were under police surveillance. As Jones walked past the informant, she identified her as the individual transporting the cocaine.

¶3 One of the officers stopped Jones and conducted a pat down search of her outer clothing, but failed to find any drugs. The informant reiterated her assertion, advising the police that a female officer should conduct a more thorough search because she knew that Jones was carrying drugs. The officers followed Jones and stopped her a second time. A female officer conducted a more thorough search and found cocaine tucked under a ponytail holder in Jones's hair.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

¶4 Jones was arrested and charged with possession of a controlled substance with intent to deliver, as a party to a crime. Jones filed a motion to suppress her statements and the physical evidence, alleging that both the initial stop and search and the subsequent stop and search were illegal.[2] Following a hearing, the trial court denied Jones's motion to suppress. Jones pled guilty, and the trial court entered a judgment of conviction.

II. ANALYSIS.

¶5 Jones argues that the trial court erred in denying her motion to suppress the evidence seized during the second search because: (1) the second stop was illegal, and (2) she did not voluntarily consent to the second search. When reviewing a trial court's denial of a motion to suppress, this court "will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). However, "[w]hether those facts satisfy the constitutional requirement of reasonableness is a question of law and therefore we are not bound by the lower court's decisions on that issue." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

¶6 The validity of an investigatory stop and temporary detention is governed by ***Terry v. Ohio***, 392 U.S. 1 (1968), and is codified in WIS. STAT. § 968.24. *See* ***State v. King***, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993). In ***Terry***, the United States Supreme Court held that police officers may, "in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no

[2] On appeal, Jones does not challenge the legality of the initial stop and search.

probable cause to make an arrest." ***Terry***, 392 U.S. at 22. To execute a valid investigatory stop, a law enforcement officer must reasonably suspect, in light of his or her experience, that criminal activity has, is, or is about to take place. *See* ***Richardson***, 156 Wis. 2d at 139. Such reasonable suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, and judged against an objective standard, would warrant a person of reasonable caution in the belief that the action taken was appropriate. *See* ***id.*** The determination of reasonableness,

> "is a common sense question, which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present."

Id. at 139-40 (citation omitted). In ascertaining the reasonableness of an investigatory stop, we must consider the totality of the circumstances. *See* ***id.***

¶7 Jones contends that the second stop constituted an unreasonable intrusion. Jones asserts that after the police failed to find any drugs during the first stop and search, they could not stop her a second time without a reasonable suspicion that she was engaged in criminal activity. Jones avers that the police lacked sufficient information to establish a reasonable suspicion because they had not received any new information after the first stop and search. Therefore, Jones concludes that the second stop was unjustified. We disagree. We are satisfied that the officers had formed a reasonable suspicion that Jones was engaged in criminal activity which justified the second stop of Jones. The totality of the circumstances supports our conclusion.

¶8 Several police officers, including Officers Ederesinghe and Lay, had a suspected drug house under surveillance. The officers watched as several individuals entered the house, and then left the house a short time later. Officer Ederesinghe stopped one of the individuals whom he recognized as a woman he had previously arrested on prostitution and drug charges. Several times in the past, the woman had assisted Officer Ederesinghe by providing information that proved to be truthful. Based on these prior encounters, Officer Ederesinghe considered the woman to be a reliable informant.

¶9 Officer Ederesinghe spoke to the woman in an alley behind the suspected drug house. The woman informed Officer Ederesinghe that the people in the house were, indeed, selling drugs, but that they knew the police were watching and so they were transferring the drugs to a new location. The informant told Officer Ederesinghe that a black female was to carry the drugs. Immediately after the informant gave this information to Officer Ederesinghe, someone walked past the entrance to the alley. The informant pointed to the pedestrian and identified her as the black female who was transporting the drugs. The pedestrian that the informant had identified turned out to be Jones.

¶10 Officer Ederesinghe radioed Officer Lay and told him to stop Jones. Officer Lay stopped Jones and asked for her name and whether she would consent to be searched. Jones consented, and Officer Lay conducted a brief pat-down search of her outer clothing. Officer Lay failed to find any drugs during this first search so he allowed Jones to leave.

¶11 Officer Lay reported to Officer Ederesinghe that the pat-down search of Jones's outer clothing failed to reveal any drugs. Officer Ederesinghe relayed this information to the informant. The informant insisted that Jones was the one

carrying the drugs and she told Officer Ederesinghe that, "[y]ou'd better get a female here and search her good because I know she has drugs on her person." Officer Ederesinghe left the informant and, together with Officer Lay, began to follow Jones.[3]

¶12 The officers followed Jones to a Subway sandwich shop, and then to a pay phone across the street from a second known drug house. Officer Ederesinghe testified that the police knew that the pay phone was often used by prospective customers to call the drug house across the street. As Jones was talking on the phone, Officer Lay approached her from the front, in plain view, while Officer Ederesinghe walked up behind her. Officer Ederesinghe testified that as he approached he heard Jones say, "[t]he police are coming right now. They are crossing the street." At that point Officer Ederesinghe addressed Jones and identified himself as a police officer. Shortly thereafter, Jones consented to a second search, and a female officer conducted a more thorough search, discovering the cocaine hidden in Jones's ponytail holder.

¶13 We conclude that, under the totality of the circumstances, the officers acted reasonably in stopping Jones a second time. We are satisfied that the officers had formed a reasonable suspicion that Jones was engaged in criminal activity. This reasonable suspicion was based on specific and articulable facts, particularly: the reliable informant's assertion that a black female was transporting

[3] Based on the fact that it was a cold day in March and Jones was wearing a heavy jacket, we note that, after Officer Lay's search of Jones's outer clothing failed to reveal any drugs, the officers could rationally infer that Jones was transporting the drugs underneath the outer layer of clothing and, therefore, the informant was correct in her assertions that they would need a female officer to conduct a more thorough search. *See, e.g.,* ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (reasonable suspicion must be based on articulable facts taken together with rational inferences drawn from those facts).

drugs from one drug house to another, followed immediately by her identification of Jones, who was passing by, as the woman carrying the drugs; the informant's subsequent insistence that she knew that Jones was the carrier, coupled with her assertion that a female officer would be necessary to conduct a more thorough search; the fact that the officers kept Jones in sight; and the fact that Jones stopped across the street from a second known drug house, to use a pay phone commonly used by prospective customers to call the drug house. These facts, taken together with rational inferences from those facts, and judged against an objective standard, would warrant a person of reasonable caution in the belief that the action was appropriate. Therefore, we reject Jones's argument that the second investigatory stop constituted an unreasonable intrusion.

¶14 Next, we address the second issue raised by Jones—whether she voluntarily consented to the second search. Jones argues that all of the evidence seized during the second search should have been suppressed because, even if the second stop was legal, she did not voluntarily consent to the second search. Jones does not contest the fact that she consented to the search; rather, she argues that the officers coerced her into consenting. Jones asserts that her consent to the second search was obtained as a result of the officer's persistent pursuit, physical intimidation, and her lack of prior experience with the police. We are not persuaded by her contentions.

¶15 Consent to a search is a well-settled exception to the Fourth Amendment requirements of both a warrant and probable cause. *See* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973) (under the Fourth Amendment, a warrantless search is presumptively unreasonable). "[A] warrantless search conducted pursuant to consent which is 'freely and voluntarily given' does not violate the Fourth Amendment." ***State v. Phillips***, 218 Wis. 2d 180, 196, 577

N.W.2d 794 (1998) (citation omitted). We will not overturn the trial court's findings of historical fact unless they are clearly erroneous. *See* ***State v. Xiong***, 178 Wis. 2d 525, 531, 504 N.W.2d 428 (Ct. App. 1993). "We independently apply constitutional principles to the facts as found to determine whether the standard of voluntariness has been met." ***Id.*** In making this constitutional determination we give no deference to the trial court. *See* ***id***. To determine whether Jones voluntarily consented to be searched, we engage in a two-step analysis. *See* ***Phillips***, 218 Wis. 2d at 196-97.

¶16 First, we must determine whether Jones, in fact, consented to be searched. *See* ***id.*** Jones does not contest the fact that she consented to the search; rather, she argues that, "[t]he critical question is whether the police coerced that consent." Therefore, we will proceed directly to the second step of the analysis.

¶17 The second step requires us to examine whether Jones's consent was voluntarily given. *See* ***id.*** at 197. "The test for voluntariness is whether consent to search was given in the 'absence of actual coercive, improper police practices designed to overcome the resistance of the defendant.'" ***Xiong***, 178 Wis. 2d at 532 (citation omitted); *see also* ***Phillips***, 218 Wis. 2d at 197 ("The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied."). The State bears the burden of proving by clear and convincing evidence that Jones voluntarily consented to the search. *See* ***Phillips***, 218 Wis. 2d at 197. This determination must be made based on the totality of the circumstances surrounding both Jones's consent and her overall character. *See* ***id.*** at 198. In applying the test to determine whether Jones voluntarily consented, we follow the Wisconsin Supreme Court's analysis in ***Phillips***.

¶18 In ***Phillips***, the court considered numerous factors in determining whether the defendant's consent was coerced. Specifically, the court noted that: the police did not use misrepresentation, deception, or trickery to coerce the defendant; the evidence failed to indicate that the police threatened, physically intimidated, or punished the defendant; the defendant was questioned and searched under non-threatening, cooperative conditions; and finally, the defendant neither acted annoyed nor objected to the police presence. *See* ***id.*** at 198-201. The court then asserted that, when focusing on the defendant to determine voluntariness, courts should consider the defendant's age, intelligence, education, physical and emotional condition, and prior experience with the police. *See* ***id.*** at 202.

¶19 The record supports the trial court's finding that Jones voluntarily consented to the search and that her consent was not coerced. At no time did the police use misrepresentation, deception, or trickery to coerce Jones, nor could she claim surprise. Indeed, according to the statement Officer Ederesinghe overheard Jones make while she was talking on the phone, she already knew that the police were watching her and that they were coming for her. Her statement belies any allegation that she was surprised by the sudden appearance of a police officer. The police properly identified themselves and informed Jones that they wished to conduct a more thorough search, but that she was not under arrest. Officer Stelter, the female officer called to search Jones, testified that she also asked Jones for consent to conduct the search, and that Jones gave her consent.

¶20 Jones claimed that she was physically intimidated by the police officers, but the trial court found that the officers did not make promises, threaten, or physically intimidate Jones to obtain her consent. Jones alleges that Officer Ederesinghe approached Jones in a physically intimidating way, and took her hand

to hang up the phone before she was finished using it. Jones also testified that Officer Ederesinghe took her by the jacket and pulled her out of the phone booth.

¶21 Not surprisingly, the officers' account of the encounter was somewhat different. The officers asserted that they did not approach Jones in a physically intimidating way. Officer Ederesinghe related that he did approach Jones from behind, presumably out of her line of sight; however, Officer Lay approached Jones from the front, in plain view, and the record indicates that Jones, in fact, saw him coming towards her and recognized him as a police officer. Furthermore, Officer Ederesinghe testified that he asked Jones to hang up the phone and that he simply assisted her when she began to comply with the request. Finally, Officer Ederesinghe testified that he did not touch Jones's clothing in any way to assist her in stepping away from the phone booth. The trial court found that the officer's testimony and version of the events was more credible than Jones's testimony, a finding that we shall not disturb on appeal. *See* ***State v. Owens***, 148 Wis. 2d 922, 930-31, 436 N.W.2d 869 (1989) (credibility determinations are left to the trial court).

¶22 Jones argues that when the police further isolated her by taking her a block from the site of the stop, they created an atmosphere in which she did not feel free to refuse the search. We reject this contention. When the officers asked for Jones's consent to search, they were standing on a busy street corner. The officers advised Jones that they were standing in front of a drug house where weapons had been recently recovered, and they asked Jones if she minded moving to a new location for her safety as well as theirs. Jones voluntarily agreed to accompany the officers to a new location a block away so that they would not be standing in front of the drug house. The new location was in front of a house and

next to a large restaurant parking lot. Jones cannot reasonably claim that the police coerced her into consenting by isolating her.

¶23 Furthermore, there was no evidence to suggest that the conditions under which Jones was questioned and searched were threatening and uncooperative. The police did not brandish any weapons. Jones was expressly advised that she was not under arrest. Officer Ederesinghe testified that Jones maintained that she was not carrying any drugs, so she did not mind being searched. Further, the officers testified that Jones was not handcuffed until after the drugs had been found. Finally, the trial court accepted the officer's contention that it was not until after the drugs were discovered that Jones asked to go to the bathroom, and expressed a desire to go home.

¶24 Jones's personal characteristics also do not render her consent involuntary. On the Guilty Plea Questionnaire and Waiver of Rights Form, Jones indicated that she was forty-three years old, and had graduated from high school. Jones further indicated that she had never been committed to a mental institution and had never received psychological or psychiatric care. There was no evidence presented that Jones was of below average intelligence, or that she was not in good physical and emotional condition. However, Jones argues that the "critical factor" in determining whether her consent was coerced is her lack of prior experience with the police. Jones asserts that she was not aware of her rights and did not know that she could refuse to be searched because she had never been in trouble before, and had no prior contacts with the police.

¶25 It is possible that Jones would have been more aware of her rights had she had prior contacts with the police, and that her lack of experience could have made her more susceptible to police coercion. However, we have concluded

that the preceding factors indicate that the police did not employ coercive tactics and, therefore, Jones was not placed at a disadvantage by her lack of experience. We do not find Jones's lack of experience fatal to the State's case. *Cf.* ***Phillips***, 218 Wis. 2d at 203 (if the defendant was not explicitly informed that she was allowed to withhold consent it weighs against the State, but is not fatal to the case). We conclude that the evidence does not support the conclusion that the police coerced Jones into consenting, or that they employed tactics designed to overcome her will; therefore, we are satisfied that Jones voluntarily consented to the second search.

¶26 For these reasons, we conclude that: (1) the second stop was supported by reasonable suspicion, and (2) Jones voluntarily consented to the second search.

By the Court.—Judgment affirmed.

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