COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 99-1156

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

IN THE INTEREST OF MICHAEL V.P., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL V.P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Michael V.P. appeals from a dispositional order finding him delinquent for the commission of criminal trespass to a

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

dwelling, as party to a crime, and possession of a controlled substance (marijuana), contrary to §§ 943.14, 939.05, 961.14(4)(t), 961.01(14) and 961.41(3g)(e), STATS. He claims that his seizure by police officers on the night of March 14, 1998, took place without reasonable suspicion in violation of his Fourth Amendment rights and thereby required suppression of the marijuana found on his person. Because this court concludes that reasonable suspicion existed for the investigative stop, the order of the trial court denying suppression is affirmed.

BACKGROUND

The factual setting relative to the investigative stop is essentially undisputed. On March 14, 1998, at approximately 9:40 p.m., Milwaukee Police Officers Christian Osell and Manny Molina, while on routine squad patrol, arrested Michael in an alley in the 2300 block of South 29th Street in the City of Milwaukee. Prior to the arrest, Officers Osell and Molina were on patrol in a squad car in the 2300 block of South 29th Street when they observed three people standing about seventy-five feet down a dark alley. Osell occupied the passenger position. He had been assigned to District 6, the local police precinct station for about one and one-half years. During this time, within a six-block area, he had made numerous arrests for fighting, burglaries, possession of dangerous weapons and graffiti. In addition, he was personally aware of other arrests for similar crimes. Police regarded the area as a high-crime area. Osell routinely was involved in patrolling the alleys of this area by squad, without lights. Given this background, Osell and Molina decided to investigate the presence of the three individuals they observed in the alley.

Michael and two companions, all juveniles, were standing on the side of the alley when Molina stopped the squad within close proximity to them.

Michael was some ten feet or so ahead of the other two. Osell exited the squad first and ordered the three to remove their hands from their pockets and raise them in the air. The two companions immediately complied, but Michael did not and continued walking away. Osell repeated his request to Michael. It was a cold evening. Michael had his hands within the sleeves of his jacket which, in turn, were tucked into the pouch of the jacket. Within this short time span, Osell observed the movement of Michael's hands. Osell approached Michael and either pulled Michael's hands from his jacket or Michael himself raised his hands. Regardless, Osell pushed Michael against a garage and patted him down. In the process, Osell observed a silver-colored pipe that contained marijuana residue. At that juncture, Osell placed Michael under arrest. A subsequent search produced some marijuana cigarettes in a plastic tube. Michael moved to suppress the evidence stemming from the seizure. The trial court denied the motion. Michael now appeals.

ANALYSIS

In reviewing the denial of a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 576-77(Ct. App. 1983). However, whether a stop passes constitutional muster is a question of law, which we review independently. *See* ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990). Further, this court may affirm the trial court on grounds other than those relied on by the trial court. *See* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

Both the Fourth Amendment of the United States Constitution and article I, section 11, of the Wisconsin Constitution guarantee to all citizens the

right to be free from unreasonable searches and seizures. Because an investigative stop is a "seizure" within the meaning of the Constitution, a law enforcement officer, before stopping an individual, must reasonably suspect, in light of his or her training and experience, that the individual is, or has been, involved in criminal activity. *See* ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968); ***State v. King***, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993); and § 968.24, STATS.[2]

For a stop to be constitutionally valid, the officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834 (quoting ***Terry***, 392 U.S. at 21). It is a common-sense test; what is reasonable in a given situation depends upon the totality of the circumstances. What would a reasonable police officer suspect, in light of his or her training and experience? *See* ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

Conduct that has innocent explanations may also give rise to a reasonable suspicion of criminal activity. *See* ***State v. Waldner***, 206 Wis.2d 51, 61, 556 N.W.2d 681, 686 (1996). "If a reasonable inference of unlawful conduct can be objectively discerned, the officers may temporarily detain the individual to investigate, notwithstanding the existence of innocent inferences which could be drawn." ***State v. Young***, 212 Wis.2d 417, 430, 569 N.W.2d 84, 91 (Ct. App. 1997). It is also true that a series of acts, each of which is innocent in itself, taken together, may give rise to a reasonable suspicion of criminal conduct. *See* ***id.*** But

[2] Section 968.24, STATS., provides, among other things, that when an officer reasonably suspects that a person is committing, is about to commit or has committed a crime, the officer may demand the name and address of the person and an explanation of the person's conduct.

the test in any case is whether all the facts—including those which, individually, are consistent with innocent behavior—taken together, are indicative of criminal behavior. *See* ***United States v. Sokolow***, 490 U.S. 1, 9-10 (1989).

Evasive or furtive action by an individual once he has been asked to comply with a reasonable request of a police officer may indicate a guilty mind and may, by itself or in union with other circumstances, give rise to sufficient suspicion to justify a brief investigative detention. *See* ***State v. Amos***, 220 Wis.2d 793, 801, 584 N.W.2d 170, 173 (Ct. App. 1998).

The test is designed to balance the personal intrusion into the suspect's privacy occasioned by the stop against the societal interest in solving crimes and bringing offenders to justice. *See* ***State v. Guzy***, 139 Wis.2d 663, 680, 407 N.W.2d 548, 556 (1987). With these principles in mind, this court now examines the factual setting giving rise to this appeal.

Michael argues that because the police made it clear that he and his two friends had to stop, had to get their hands in the air, and would have to answer questions, their approach was unreasonable and, therefore, a seizure occurred. He bases this conclusion on the premise that no suspicious conduct occurred. He reasons that his slowness in either pulling his hands out of his pockets or not pulling them out high enough for police satisfaction occurred "after" the seizure. This court disagrees.

There is no support in the record to magnify the time frame between his two friends' compliance with Osell's request and his dilatory actions to thereby conclude a seizure had earlier occurred. One of Michael's friends testified that the incident took place in a matter of seconds. The interactions were, in effect, simultaneous. The fact that Osell initially ordered the three individuals to remove

their hands from their pockets and raise their hands under the circumstances of a high crime area, does not constitute a "seizure," particularly when the officers were only attempting to find out what they were doing in the alley at that hour of the evening. It was a reasonable police precaution. *See generally* ***State v. Allen***, 226 Wis.2d 66, 593 N.W.2d 504 (1999).

This court agrees with Michael that "walking down an alley with one's hands in one's pocket on a cool March evening is not a reason to seize an individual." But, this court emphatically disagrees that his activity was "no different from any other pedestrian in any other neighborhood in Milwaukee." Most assuredly, when viewed through the eyes of an experienced police officer quite familiar with the criminal activity in the immediate vicinity, it is not an ordinary, undifferentiating occurrence to find three individuals engaged in a social stroll in a dark alley at 9:40 p.m. rather than on lighted sidewalks in full view.[3]

Officer Osell's initial intent was only to find out "why" three individuals were in a darkened alley at such an unconventional time. What commenced as a neutral inquiry escalated into suspicious circumstances by Michael's comportment alone.

This court cannot divine what techniques are apposite in an investigative stop, nor ought a reviewing court engage in such an exercise. The task of this court, given the nature of this appeal, is to determine whether the police officer's conduct was reasonable in the milieu of danger in which he is

[3] Michael refers this court to ***State v. Young***, 212 Wis.2d 417, 569 N.W.2d 84 (Ct. App. 1997), ***State v. Harris***, 206 Wis.2d 243, 557 N.W.2d 245 (1996) and ***Brown v. Texas***, 443 U.S. 47 (1979). The factual bases for these decision are at sufficient variance to not be controlling or persuasive.

discharging his professional responsibilities. An investigative stop is not a series of slides, any one of which can be isolated and then examined with the precision of an academic scalpel. Rather, it is an interdependent continuum of action and reaction requiring split second decisions that ought be examined only under the microscope of reasonableness.

The factual setting of this occurrence was no "whim" or "hunch." Aware as Osell was of the furtive action of Michael, and of the other past incidents of criminal activity in the immediate six-block, high-crime vicinity, he acted reasonably in attempting to detain Michael to freeze the situation and obtain more information.

Accordingly, this court affirms.

By the Court.—Order affirmed.

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