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DISTRICT II

May 22, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1027-CR State v. Trever T. Padgett (L.C. #2016CF1315)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Trever T. Padgett appeals from a judgment convicting him of possession with intent to deliver cocaine. He contends that the circuit court should have suppressed evidence obtained as a result of a traffic stop, including his statement to police. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

At approximately 10:00 p.m. on September 29, 2016, Detective Pablo Torres stopped Padgett for driving without a seat belt. When Torres approached the vehicle, he saw Padgett with his hands tucked under his sweater near his waistband. Padgett showed his hands to Torres upon request and handed over his license. However, he appeared visibly nervous, breathing heavily. Torres asked Padgett some questions, including whether Padgett had a gun, and did not get clear responses. Instead, Padgett placed his head on the steering wheel.

Torres believed Padgett had a gun, so he radioed for backup. Less than two minutes later, when backup arrived, he told the responding officers that he thought Padgett had a gun. Intending to frisk him for weapons, Torres handcuffed Padgett in Padgett's vehicle. He then pulled Padgett outside the vehicle and asked him if he had anything illegal. Padgett replied, "[i]t's in my waistband." Torres reached for Padgett's waistband, and, rather than a gun, a baggie of cocaine fell out. Ultimately, police arrested Padgett for possession with intent to deliver cocaine.

Padgett moved to suppress evidence obtained as a result of the traffic stop, including his statement to police. He argued that police unlawfully extended the scope of the stop and improperly questioned him without *Miranda*² warnings. After a hearing on the matter, the circuit court declined to suppress evidence. Eventually, Padgett pled guilty to the charge of

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

² *See Miranda v. Arizona*, 384 U.S. 436 (1966).

possession with intent to deliver cocaine and was sentenced to eighteen months of initial confinement and four years of extended supervision. This appeal follows.

On appeal, Padgett contends that the circuit court should have granted his motion to suppress. When reviewing a circuit court's decision on a motion to suppress evidence, we apply the clearly erroneous standard to the court's findings of fact. *State v. Guard*, 2012 WI App 8, ¶14, 338 Wis. 2d 385, 808 N.W.2d 718. However, we review the court's application of constitutional principles to those facts de novo. *Id.*

During an investigative stop, police are allowed to frisk the stopped person for weapons if reasonable suspicion exists to believe that the person may be armed and dangerous. *Terry v. Ohio*, 392 US. 1, 24 (1968); *State v. Sumner*, 2008 WI 94, ¶¶21-22, 312 Wis. 2d 292, 752 N.W.2d 783. The reasonableness of a frisk is an objective standard that we evaluate based upon the totality of the circumstances. *Sumner*, 312 Wis. 2d 292, ¶22. Factors contributing to reasonable suspicion can include the time of the stop, whether the officer was alone, unusual nervousness or behavior from the person being detained, and evasions to questions. *See State v. Nesbit*, 2017 WI App 58, ¶¶12-14, 378 Wis. 2d 65, 902 N.W.2d 266; *State v. McGill*, 2000 WI 38, ¶24, 234 Wis. 2d 560, 609 N.W.2d 795.

A person subject to an investigatory stop and frisk may be considered "in custody" for constitutional purposes and entitled to *Miranda* warnings before questioning. *See State v. Morgan*, 2002 WI App 124, ¶16, 254 Wis. 2d 602, 648 N.W.2d 23. Whether a person is in custody is also an objective standard that we evaluate based upon the totality of the circumstances. *Id.*, ¶¶12, 23. The ultimate question is whether there was a formal arrest or

restraint of movement of the degree associated with a formal arrest. *State v. Lonkoski*, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552.

Here, we are satisfied that Torres properly extended the scope of the traffic stop to frisk Padgett for weapons. As noted above, Torres stopped Padgett late at night and was alone at the time. When he approached the vehicle, he saw Padgett with his hands tucked under his sweater near his waistband—a place where he could conceal a gun. Although Padgett subsequently showed Torres his hands, he appeared visibly nervous, breathing heavily. He also did not respond to Torres’ question about whether he had a gun, instead placing his head on the steering wheel. Under these circumstances, a reasonable police officer would be suspicious that Padgett was armed and dangerous.

We also conclude that Padgett was not in custody for *Miranda* purposes when Torres asked him if he had anything illegal. A reasonable innocent person in Padgett’s position at that point would not believe that he or she was about to be formally arrested. Rather, such a person would believe that he or she was being temporarily detained while police checked for weapons, and that he or she would be free to go once police completed the check and finished writing a traffic ticket. This is supported by Torres’ initial inquiry about a gun, Padgett’s failure to respond to that inquiry, and the fact that Padgett was able to remain in or near his vehicle on a public street throughout the encounter.³ Accordingly, we agree with the circuit court that suppression was not required.

³ Although Padgett was handcuffed in his vehicle for officer safety, the use of handcuffs alone does not render a suspect in custody for *Miranda* purposes. *State v. Martin*, 2012 WI 96, ¶34, 343 Wis. 2d 278, 816 N.W.2d 270.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals