COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0999

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

IN THE INTEREST OF ALEXIS C.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALEXIS C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Reversed.*

¶1 FINE, J. Alexis C. appeals from an order adjudicating him a delinquent for the illegal possession of marijuana. He claims that the trial court

erroneously denied his motion to suppress evidence seized as the result of a non-consensual stop. We agree and reverse.

I.

¶2 Alexis C. and three friends were sitting on bleachers overlooking some baseball diamonds at a Milwaukee community center. It was around 9:30 p.m. Although the facility was not in use, there was free access to the bleachers from a public sidewalk, some ten to twenty feet away. A Milwaukee police officer on bicycle patrol saw the four young men from a distance, using a ten-power monocular device. He did not see any unusual activity; rather, he agreed with Alexis C.'s trial lawyer when she asked: "All it appeared to you it was four guys sitting on the bleachers possibly talking?" The officer testified that he walked over to the young men, and "announced myself and asked them what they were doing." At that point, Alexis C., whom the officer had recognized as "a gang member" and, from the officer's prior experience with him, as someone who "might possibly be armed," "walked away from the group approximately ten feet, put his hand on a fence post." The officer "ordered him to stop." Alexis C. complied, and returned to where the others were. Then, according to the officer: "I got a little bit of static. You're harassing us. We're not doing anything wrong. Words to that effect." At that point the officer ordered Alexis C. to raise his hands, and the officer started to "pat him down for weapons." Ultimately, the officer found the marijuana that formed the basis for Alexis C.'s adjudication. The officer testified that if he had not found the marijuana, he would have "absolutely" released Alexis C.

¶3 The trial court credited the testimony of the police officer, from which we have taken our recitation of the facts material to this appeal, and upheld

the stop and search.[1] In the course of its ruling, the trial court opined that it believed "an officer can stop and conduct a field investigation of people who are out anywhere," noting that although "[t]hey don't have to answer questions," the officer is "entitled to come up and stop and talk to people."

II.

¶4 In reviewing an order suppressing evidence, we will uphold a trial court's findings of historical fact unless they are clearly erroneous; however, we review *de novo* a trial court's conclusion whether a stop and search complied with the Fourth Amendment. *See* ***State v. Harris***, 206 Wis. 2d 243, 249–250, 557 N.W.2d 245, 248 (1996). Under both the Fourth Amendment and the Wisconsin Constitution police "'may only infringe on an individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime.'" ***Id.***, 206 Wis. 2d at 259, 557 N.W.2d at 252 (quoted source omitted). "This is an objective test." ***Ibid.***

[1] Although not material to our decision, we note that the trial court erred in applying the standard of proof that must be considered when deciding a motion to suppress evidence. In weighing the testimony of the officer and one of the young men who was with Alexis C. that night, and who was the only person other than the police officer to testify at the suppression hearing, the trial court, in colloquy with Alexis C.'s trial lawyer, said "you're asking me to find beyond a reasonable doubt that [the young man]'s version of events is what happened." This has it backwards. First, it is the *State's* burden to prove the facts essential to a finding that a stop or seizure was lawful, except where a defendant asserts a defense that he or she must prove. *See* ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873, 880 (1973) ("Where a violation of the Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state."); ***State v. Rewolinski***, 159 Wis. 2d 1, 16, 464 N.W.2d 401, 406 (1990) ("defendant bears the burden of proof on the question of whether his subjective expectation of privacy was reasonable"). Second, the burden of proof, which, as just noted, is on the State and not the defendant or juvenile, is not beyond a reasonable doubt but, rather, by a preponderance of the evidence. *See* WIS. STAT. RULE 901.04(1); ***Rewolinski***, 159 Wis. 2d at 16 n.7, 464 N.W.2d at 407 n.7.

¶5 There is absolutely nothing in the record here that could possibly support even an inference that Alexis C. was committing, or had committed, a crime. The only thing that he did was precisely what he had a right to do; walk away and not talk to the officer. *See* ***State v. Reichl***, 114 Wis. 2d 511, 515, 339 N.W.2d 127, 128 (Ct. App. 1983). When the officer told Alexis C. to stop, and Alexis C. complied, the officer seized him. *See* ***California v. Hodari D.***, 499 U.S. 621, 625–627 (1991) (seizure occurs when person stops in response to a command of "show of authority"); ***Reichl***, 114 Wis. 2d at 515, 339 N.W.2d at 128–129. Thus, although the trial court was correct in noting that the officer had a right to talk to Alexis C. and the others, the officer had no right to stop him from leaving unless, as noted, the officer had "a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that [Alexis C.] has committed a crime." *See* ***Harris***, 206 Wis. 2d at 259, 557 N.W.2d at 252. That the officer suspected or even "knew" that Alexis C. was a "a gang member" and that Alexis C. "might possibly be armed" is so general as to be worthless in assessing the standard that we must apply—if police could seize any person who, without more, had any prior contact with law enforcement, it would create an exception to our Fourth-Amendment jurisprudence that would swallow the protection.

¶6 Although drugs and crime are a serious problem in our communities, that problem will not be solved by the seizure of those whose actions betray no illegal activity. As Professor Charles A. Reich has written: "If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight." Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1172 (1966) (quoted in

Papachristou v. City of Jacksonville, 405 U.S. 156, 164 n.6 (1972)). Mere hanging out and shooting the breeze with one's pals is similarly protected activity.

By the Court.—Order reversed.

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