COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1989-CR **Cir. Ct. No. 2011CF5206**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DYNZEL E. JONES,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Dynzel E. Jones appeals from a judgment of conviction, entered upon his guilty plea, on one count of possession of THC as a second or subsequent offense. Jones also appeals from an order denying his postconviction motion. Jones contends the drug evidence used against him should

have been suppressed because of an unlawful search and seizure. We reject Jones's arguments and affirm the judgment and order.

¶2 Officers patrolling in their squad car encountered Jones at an intersection when he stepped in front of their car and the driver had to swerve to avoid hitting him. When the car stopped, one of the officers asked Jones a question. Ultimately, the officers recovered two baggies of marijuana from the pocket of Jones's sweatshirt, resulting in the charge against him. Jones moved to suppress the drugs, asserting that the officers unlawfully seized him by asking him a question on the street. Jones also claimed the search of his person lacked probable cause or reasonable suspicion and was, therefore, unlawful.

¶3 At the suppression hearing, Jones testified, as did officers Dustin Frank and Daniel Robinson. Jones told the circuit court that he was acquainted with Robinson from prior contacts, that the officers had come upon his location while driving about forty-five miles per hour, that they had their guns drawn as they approached, and that Robinson told him he was not going to let Jones get away with this one. Jones further denied that the search was in any way consensual.

¶4 However, the circuit court found, based on the officers' testimony, that the officers had been out on patrol and saw Jones on a street corner. As they approached, Jones stepped into the road and Robinson, who was driving at no more than about twenty miles per hour, had to swerve to avoid hitting him. It was possible that Jones was distracted or not paying attention, because he seemed a little shocked as the squad came to a stop in front of him. Frank, the passenger, had his window down and asked Jones whether he had any firearms on him. Jones answered that he did not and lifted his shirt to so demonstrate. Jones then stated,

"To be honest, I do have a little bit of weed." Consequently, Frank got out of the car, searched Jones for the admitted marijuana after Jones indicated it was in his pocket, and took Jones into custody. Based on these findings, the circuit court concluded that there had been no seizure and denied the motion to suppress.

¶5 After the motion to suppress was denied, Jones entered a guilty plea to the possession charge. After he was sentenced, he filed a postconviction motion, seeking to vacate his conviction for a lack of probable cause.[1] The circuit court denied the motion, stating that it stood by its original determination. Further, Jones's admission to carrying marijuana justified the search. Jones now appeals.

¶6 The threshold question here is whether Jones was seized upon his initial interaction with police. This is a question of constitutional fact, subject to a two-part standard of review. *See* ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. The circuit court's findings of fact are upheld unless clearly erroneous, but application of those facts to the constitutional standard is a question of law we review *de novo*. *See* ***id.***

¶7 "Not all encounters with law enforcement officers are 'seizures' within the meaning of the Fourth Amendment." ***Id.***, ¶20. "As long as a reasonable person would have believed he was free to disregard the police presence and go about his business, there is no seizure[.]" ***State v. Young***, 2006

[1] The State notes that a postconviction motion was probably not necessary. *See* WIS. STAT. § 971.31(10) (2011-12) ("An order denying a motion to suppress evidence … may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty[.]").

The State also notes that the postconviction motion inexplicably invokes WIS. STAT. § 973.19 (2011-12), which concerns motions to modify sentences, and WIS. STAT. § 972.15 (2011-12), which concerns presentence investigations.

WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. "Generally, therefore, police-citizen contact becomes a seizure within the meaning of the Fourth Amendment when an officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen[.]" ***Id.*** (internal quotation marks and citation omitted).

¶8 Jones argues that Frank had no reason to question him at all. Further, he did not feel free to leave, in part because of his past contacts with Robinson. These complaints, however, ignore both the applicable test and the applicable standard of review.

¶9 The test is whether a *reasonable person* would have felt free to ignore the police presence, not whether *Jones* reasonably felt free to do so. This is, of course, a largely fact-dependent inquiry, and we defer to the circuit court's factual findings. *See* ***Williams***, 255 Wis. 2d 1, ¶17. In this case, the circuit court noted that there were no overt signs of police authority—the squad car had no lights on other than its normal headlights, the siren had not been activated, and the officers had not drawn their guns. Indeed, the officers had not even gotten out of the car at the time Frank spoke to Jones, practically eliminating the chance of any physical force. There is nothing, in the facts found by the circuit court, to indicate police in any way restrained Jones's liberty when Frank asked whether Jones had any firearms.[2] Thus, we agree with the circuit court's conclusion that there was no seizure.

[2] We note that the circuit court rejected the argument that Jones did not feel free to leave because of his prior contacts with Robinson: it found that Frank was the one who spoke with Jones and, further, that Frank was wholly unaware of any history between Robinson and Jones.

¶10 Subsequent to that lawful encounter, Jones volunteered that he was in possession of marijuana. As the circuit court concluded, such a statement gave Frank sufficient probable cause to seize and search Jones for the admitted marijuana. The suppression and postconviction motions were properly denied.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).