COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP256-CR **Cir. Ct. No. 2010CF2191**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES EARL WILKINS, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Earl Wilkins, Jr., appeals a judgment entered upon his guilty plea to possessing cocaine as a second or subsequent offense. He argues that the trial court erroneously denied his motion to suppress evidence that police found during a traffic stop. Because the totality of the circumstances warranted the protective frisk that uncovered the evidence, and

because the police acted appropriately in retrieving the cocaine that Wilkins had clenched in his buttocks, we affirm.

BACKGROUND

¶2 The parties developed the relevant facts at the suppression hearing. Milwaukee police officer Matthew Seitz was the sole witness. He testified that he is part of the Milwaukee Neighborhood Task Force, which "put[s] officers in the most challenged parts of the city; neighborhoods that have the most instances of violent crime, shots fired, armed robberies, [and] drug dealing complaints." He testified that "37th and Garfield [is] a neighborhood that is within that area" and that, on May 2, 2010, at approximately 6:07 p.m., he and his partner were patrolling there when they stopped a sport utility vehicle displaying an expired registration.

¶3 The SUV contained three men and a child. Each man produced identification, and the officers determined that the driver and the man riding in the back seat were on probation. The third adult in the car was Wilkins, the front seat passenger.

¶4 The officers arrested the driver based on a probation hold. The driver consented to a search of the SUV, and the officers then asked the passengers to step out of the car. Seitz testified that, before starting the vehicular search, he patted down the outer garments of the two adult passengers for officer safety. He said that his safety concerns arose from a variety of factors, among them that "it was starting to get darker," the area was dangerous, and the officers were outnumbered by the adults involved in the traffic stop. Additionally, Seitz noted his concern about the probationary status of two of those adults.

¶5 Seitz testified that patting down Wilkins took ten or fifteen seconds. Seitz explained that he conducted the frisk using an "open-bladed hand," with his fingers together and his thumb up. He said that using an open-bladed hand increases the surface area that he can rely on during the procedure while also avoiding "anything that even comes close to grabbing." He testified that he had frisked subjects "thousands of times" using this technique. While conducting the frisk, Seitz "felt a bulge in the buttocks area of [] Wilkins's pants consistent with something being concealed" there. Seitz described the bulge as having "the consistency of a knotted bag," and he testified that he could hear "the sound a plastic bag makes when it's crumpled or crinkled." Seitz believed that Wilkins had contraband clenched in his buttocks. Seitz dislodged the item, and a bag containing a substance that Seitz believed was cocaine fell from Wilkins's pants leg onto the ground.

¶6 At the conclusion of the hearing, the trial court found that Seitz testified truthfully. Based on his testimony, the circuit court determined that the officers stopped the sport utility vehicle for a valid reason, namely, an expired registration. Next, the trial court found that Seitz conducted a "completely reasonable ... relatively quick pat down so the officers could be assured that they were not going to be in danger." The trial court concluded that Seitz lawfully frisked Wilkins and denied Wilkins's motion to suppress the evidence that the frisk uncovered. Wilkins thereafter pled guilty to possessing cocaine as a repeat offender, and this appeal followed.[1]

[1] A trial court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

¶7 "The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." ***State v. Artic***, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. Wisconsin courts normally "construe[] the protections of these [constitutional] provisions coextensively." ***Id.*** The usual remedy for a violation of these protections is suppression of the evidence found as a result of the unreasonable intrusion. *See* ***State v. Ferguson***, 2009 WI 50, ¶21, 317 Wis. 2d 586, 767 N.W.2d 187.

¶8 The determination of whether a warrantless search and seizure is constitutionally sound presents a question of constitutional fact. *See* ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Accordingly, we review suppression motions using the two-step process applicable to such questions. *See* ***id.*** "First, we uphold the [trial] court's findings of historical fact unless clearly erroneous. Whether those facts require suppression is a question of law reviewed without deference to the [trial] court." ***State v. Pender***, 2008 WI App 47, ¶8, 308 Wis. 2d 428, 748 N.W.2d 471 (citations omitted).

¶9 Here, police officers stopped the car in which Wilkins was riding because they observed that the car had an expired registration. "An officer may conduct a traffic stop when he or she has probable cause to believe a traffic violation has occurred." ***State v. Popke***, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569. Further, after officers lawfully stop a car for a traffic violation, they may, as a matter of course, order the passengers out of the vehicle without violating the Fourth Amendment's prohibition against unreasonable seizures. ***Maryland v. Wilson***, 519 U.S. 408, 410-12 (1997). On appeal, Wilkins does not

dispute the lawfulness of his seizure. He limits his challenge to a contention that the police conducted an illegal search.

¶10 An officer who has lawfully stopped a car may frisk an occupant if the officer has "a reasonable suspicion that the person is dangerous and may have immediate access to a weapon." ***State v. Johnson***, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182. "'The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.'" ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted). An officer may not act on a mere "hunch." ***State v. Alexander***, 2008 WI App 9, ¶8, 307 Wis. 2d 323, 744 N.W.2d 909. An officer may, however, "'draw from the facts in light of his experience.' These cases are fact-intensive and must be decided on a 'case-by-case basis, evaluating the totality of the circumstances.'" ***Id.*** (citations, brackets, and one set of quotation marks omitted).

¶11 The trial court in this case found that Seitz testified truthfully. Credibility assessments rest with the circuit court. ***State v. Berggren***, 2009 WI App 82, ¶18, 320 Wis. 2d 209, 769 N.W.2d 110. Accordingly, we review Seitz's testimony to determine *de novo* whether the totality of the circumstances that he described establishes reasonable suspicion justifying the protective search. ***Williams***, 241 Wis. 2d 631, ¶48.

¶12 We are satisfied that the police lawfully conducted a protective search of Wilkins. First, Seitz testified that the officers stopped Wilkins in a high-crime area. This fact is critical. "'[T]he area in which the suspect is found is

itself a highly relevant consideration' in justifying a search." ***State v. Morgan***, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995) (citation omitted).

¶13 Second, the officers conducted the traffic stop shortly after six o'clock in the evening, when "it was starting to get darker." Our supreme court "ha[s] consistently upheld protective frisks that occur in the evening hours." ***State v. McGill***, 2000 WI 38, ¶32, 234 Wis. 2d 560, 609 N.W.2d 795. As the ***McGill*** court emphasized, "most assaults on police officers occur during the evening or nighttime hours." *See* ***id.***

¶14 A third significant consideration is the ratio of police to individuals stopped. *See* ***State v. Limon***, 2008 WI App 77, ¶34, 312 Wis. 2d 174, 751 N.W.2d 877. Here, Seitz and his partner were outnumbered when they confronted the occupants of the SUV, increasing the risk both to the officers and to others in the area. *See* ***State v. Chambers***, 55 Wis. 2d 289, 298, 198 N.W.2d 377 (1972) (concluding that "the fact that the two police officers were … outnumbered made the danger of disorder and the consequences of a weapon being carried by one of those present greater for the officers and for all others present").

¶15 Fourth, Seitz conducted the frisk just before the officers began a consensual search of the vehicle. Police are "entitled to take into consideration that, in searches as in arrests, it is not uncommon to encounter violent resistance from those involved or affected." *See* ***id.*** at 297. Here, the two officers would have been in a particularly exposed and vulnerable position when searching the interior of the SUV while simultaneously attempting to guard against any sudden violence from some or all of the three subjects involved in the traffic stop.

¶16 Finally, the knowledge that two of the three men stopped were on probation contributed to Seitz's concern that Wilkins might be armed and pose a

risk to the officers. *See* ***State v. Malone***, 2004 WI 108, ¶39, 274 Wis. 2d 540, 683 N.W.2d 1 (information that suspect is with other people who are on probation contributed to officers' reasonable suspicion).

¶17 Although each consideration, standing alone, might be insufficient to arouse reasonable suspicion, "[a] court must employ common sense in its analysis of whether an officer, at the time of the encounter, faced a situation which in its entirety justified a pat-down." *See* ***Morgan***, 197 Wis. 2d at 216 (Geske, J., concurring, joined by five other justices). Moreover, "[i]t bears repeating that 'police officers are not required to take unnecessary risks in the performance of their increasingly hazardous duties.'" ***State v. Allen***, 226 Wis. 2d 66, 77, 593 N.W.2d 504 (Ct. App. 1999) (citation and one set of brackets omitted). The totality of the circumstances here, including the vulnerability of the officers, the ratio of officers to subjects, the probationary status of two of the subjects, the time of day, and the nature of the neighborhood, all combined to warrant a protective frisk for officer safety in this case.[2]

[2] The State alternatively contends that the police could have lawfully frisked Wilkins based solely on his status as a companion of an arrested person. *See* ***United States v. Berryhill***, 445 F.2d 1189, 1193 (9th Cir. 1971). In ***Berryhill***, the Ninth Circuit Court of Appeals held that "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed." *See* ***id.*** The parties term this holding "the automatic companion rule." The State maintains that the rule applies in Wisconsin and permits police to "automatically" pat down every arrested person's companions without further analysis. Wilkins disagrees with both propositions. We need not determine whether an "automatic companion rule" governs in Wisconsin, nor need we consider whether such a rule would support the frisk of Wilkins in this case. We are satisfied that, under well-settled Wisconsin law, the totality of the circumstances gave rise to reasonable suspicion justifying the limited intrusion here. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on narrowest possible grounds).

¶18 We turn to Wilkins's assertion that the evidence found during the traffic stop should be suppressed because Seitz did not conduct a limited protective frisk for officer safety but rather conducted a thorough search. *See* ***State v. Triplett***, 2005 WI App 255, ¶11, 288 Wis. 2d 515, 707 N.W.2d 881 (scope of frisk should be limited to what is necessary for determining whether individual is armed). Wilkins's contention, presented in a single paragraph, is wholly undeveloped and offered without citation to authority. Normally, we do not address undeveloped and unsupported arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). For the sake of completeness, we depart from our normal practice to address the argument here.

¶19 Wilkins suggests that patting down his buttocks area for weapons was improper because "it is illogical for a dangerous weapon to be found where the officer was searching in the manner that it was searched for." To the extent that Wilkins contends that people do not hide weapons in or near their buttocks, his assertion is refuted by the record: Seitz testified that, during past searches, he has found small weapons concealed in suspects' buttocks areas. Wilkins offers nothing that permits us to discount Seitz's testimony, which the trial court deemed truthful and uncontroverted. *Cf.* ***Triplett***, 288 Wis. 2d 515, ¶9 (we accept credibility assessments of trial court and uphold its findings of fact unless they are clearly erroneous).

¶20 Wilkins also suggests that Seitz used an unconstitutionally intrusive pat down technique, but this contention runs counter to Wisconsin law. Our supreme court "has defined 'patdown' to mean a search characterized by 'careful exploration of the outer surfaces of a person's clothing.'" ***Id.***, ¶11 (citations omitted). Indeed, "in a traditional patdown, the officer must 'feel with sensitive fingers every portion of the person's body.'" ***Id.***, ¶14 (citation and brackets

omitted). Here, Seitz testified that he used a bladed hand when patting down Wilkins to ensure "no grabbing, no squeezing." The record reveals nothing improper about the scope or method of the frisk.

¶21 During the frisk, Seitz encountered a bulge in Wilkins's buttocks area that felt like a knotted bag and made the sound a plastic bag makes when handled. Seitz testified that he immediately concluded that Wilson was concealing contraband. "[W]hen an officer ... feels an object during a pat down which his or her training and experience lead the officer to believe may be contraband, the officer is justified in retrieving the item. The rationale ... is that the object is in the 'plain view' of the officer's lawful touch." ***State v. Ford***, 211 Wis. 2d 741, 746, 565 N.W.2d 286 (Ct. App. 1997) (citations omitted).

¶22 A three-factor analysis determines whether an officer may constitutionally seize an object that the officer feels during a frisk. *See* ***State v. Applewhite***, 2008 WI App 138, ¶14, 314 Wis. 2d 179, 758 N.W.2d 181.

> (1) [T]he evidence must be in plain view; (2) the officer must have a prior justification for being in the position from which he or she discovers the evidence in "plain view"; and (3) the evidence seized "in itself or in itself with facts known to the officer at the time of the seizure, must provide probable cause to believe there is a connection between the evidence and criminal activity."

Id. (one set of brackets added, citation and two sets of brackets omitted).

¶23 Here, the State presented evidence that fully satisfies the three-factor analysis described in ***Applewhite***. First, Seitz felt an object while patting down Wilkins's outer garments. *See* ***id.***, ¶15 (evidence is in plain view when officer feels object through subject's clothing during frisk). Second, Seitz had prior justification for the search. As we have already determined, Seitz felt the object

while he was engaged in lawfully frisking Wilkins for officer safety during a traffic stop. Third, the facts known to Seitz gave him probable cause to believe that the object he felt was connected to criminal activity: Seitz explained that, in his experience as a police officer, when a subject is transporting an object pinched in his or her buttocks, the object is consistently illegal drugs or other contraband. He added that his experience, which included "thousands" of frisks during his nine years as a police officer, had also taught him that "it's not uncommon for people to conceal illegal narcotics in their buttocks."

¶24 Seitz plainly had sufficient information and experience to support his belief that the object clenched in Wilkins's buttocks was probably evidence of a crime. Accordingly, Seitz acted properly in retrieving the object. *See* ***id.***, ¶14. We affirm.

By the Court.—Judgment affirmed.

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