COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

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.

NOTICE

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

No. 96-0913-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OLTON LEE DUMAS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

ROGGENSACK, J. Olton Lee Dumas appeals a judgment of conviction for obstructing an officer, possession of drug paraphernalia and carrying a concealed weapon, on the grounds that the trial court erred by failing to suppress evidence seized during a warrantless search and that the convictions were not supported by the evidence. Because this court concludes that untainted probable cause for the arrest existed at the time Dumas was taken into custody and searched, and that the record contains sufficient

evidence to prove all elements necessary to his convictions beyond a reasonable doubt, the judgment is affirmed.[1]

BACKGROUND

On March 15, 1995 at approximately 11:40 p.m., Officer John Fahrney of the Beloit Police observed Dumas briefly contact two persons standing on a corner. After the contact, he and the other persons immediately walked away, in opposite directions. Fahrney stated that the contact aroused his interest because of its brevity, the immediate leave-taking and the frequency of drug dealing in the area. He asked Officer Penny Evans, who was in the area in another squad car, to ask Dumas to identify himself. Evans found Dumas, and called out the window of her squad car, asking him his name. When Fahrney drove back to the area where Evans was talking with Dumas, he heard Dumas tell Evans that his name was Walter Lee Dumas.

Fahrney asked Dumas whether he had just said that he was Walter Lee Dumas, and Dumas responded affirmatively. Fahrney challenged him by asking if he wasn't really Olton Dumas. Dumas began to walk away. Fahrney grabbed Dumas's arm and asked him whether he was carrying any weapons. When Dumas failed to respond, Fahrney advised him that he was under arrest for obstructing. After a brief period of resistance, Dumas submitted to being handcuffed and searched. The search revealed a 10-inch folding knife, .25 caliber bullets, a police radio scanner, and a drug pipe. Returning to the scene after taking Dumas into custody, officers also found a .25 caliber gun and a wallet with Dumas' identification in it. Dumas moved to have the evidence suppressed as the fruit of an illegal stop.

At the suppression hearing, Evans stated that it was her intention to ask Dumas for identification. Dumas testified that he didn't recall Officer Evans asking him to stop, only calling after him, asking for his name. He stated that he came back to meet her to see what the problem was. Fahrney confirmed the voluntary nature of the contact, testifying that Dumas would have been free to leave if he had refused to provide any information.

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

The trial court found that the officers had a reasonable and articulable suspicion that Dumas was involved in drug activity, so a ***Terry***[2] stop was justified. The trial court determined that the officers had probable cause to arrest for obstructing an officer, once Dumas gave them a false name. Therefore, it denied the suppression motion. A jury convicted Dumas of carrying a concealed weapon, contrary to § 941.23, STATS.; possessing drug paraphernalia, contrary to § 161.573, STATS.; and obstructing an officer, contrary to § 946.41(1), STATS. All three convictions were enhanced under the habitual criminality statute, § 939.62, STATS. Dumas was sentenced to three years on each charge, to be served consecutively. This appeal followed.

DISCUSSION

Scope of Review.

When a suppression motion is reviewed, the trial court's findings of fact will be sustained unless they are clearly erroneous. ***State v. Roberts***, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, the appellate court will independently examine the totality of the circumstances at the time when the complained of conduct occurred, to determine whether the officers' acts were reasonable. *Id.*

Whether a search made incident to an arrest meets Wisconsin's statutory and constitutional muster, depends on whether there was probable cause to arrest. ***State v. Koch***, 175 Wis.2d 684, 700, 499 N.W.2d 152, 161 (1993). Probable cause based on disputed facts is a mixed question of law and fact. This court will not overturn the trial court's findings of historical fact unless they are clearly erroneous. ***State v. Gaines***, __ Wis.2d __, 539 N.W.2d 723, 726 (Ct. App. 1995). Once the facts have been found, whether probable cause exists is a constitutional issue we resolve independent of the trial court's ruling. ***State v. Mitchell***, 167 Wis.2d 672, 684, 482 N.W.2d 364, 368 (1992).

[2] ***Terry v. Ohio***, 392 U.S. 1 (1968).

The test to review the sufficiency of the evidence on a criminal appeal is whether this court can conclude that the trier of fact could reasonably have been convinced of all elements beyond a reasonable doubt, viewing all facts and inferences in the light most favorable to the State. ***Bautista v. State***, 53 Wis.2d 218, 223, 191 N.W.2d 725, 726 (1971).

Suppression Motion.

Dumas asserts a chain reaction theory to support his claim of error in regard to the suppression motion. He contends that the officers lacked reasonable suspicion to stop him to ask for his identification. Therefore, he reasons, his false statement occurred during a period of illegal detention and cannot be used to provide probable cause for his arrest. If the arrest was unlawful, so goes his argument, the search incident to the arrest was unlawful, and the fruits of that search must be suppressed. However, Dumas' chain reaction theory is dependent on a determination that a seizure in violation of the Fourth Amendment occurred before probable cause to arrest was established.

When officers prevent a person from leaving and require him to identify himself, they perform a seizure of the person subject to the requirements of the Fourth Amendment. ***Brown v. Texas***, 443 U.S. 47, 50 (1979). To do so lawfully, they must have at least a reasonable and articulable suspicion that the person is or has been engaged in criminal activity. ***Id.*** Statements given and items seized during a period of illegal detention are inadmissible. ***Florida v. Royer***, 460 U.S. 491, 501 (1983).

However, there is nothing in the Constitution which prevents police officers from addressing questions to anyone on the street. ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980) (opinion of Stewart, J.). As long as the person to whom the questions are addressed remains free to disregard the questions and walk away, there has been no seizure for Fourth Amendment purposes. The test to determine when a stop triggers Fourth Amendment scrutiny is whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that she was free to leave. ***Id***. at 554.

Thus, in ***United States v. Mendenhall***, the U.S. Supreme Court concluded that no seizure had occurred when drug enforcement agents approached a woman in an airport concourse and asked her if she would show them her ticket and identification, and eventually asked her to accompany them to another room where she consented to a search. ***Id***. at 555. The Court reasoned that Mendenhall's cooperation was completely voluntary, even though she was never expressly told that she was free to leave.

Here, the question of whether Dumas felt detained and without the freedom to leave when Evans requested that he identify himself is clearly answered by Dumas' own testimony. At the hearing on his suppression motion when he was asked if Evans told him to stop, Dumas testified, "No. Someone was hollering, what was my name. That's what I remember." Additionally, Fahrney testified that had Dumas refused to provide any information at all, he would have been free to leave.

The factual circumstances under which Dumas answered Evans' question show he answered of his own accord. There was no physical contact or attempt to restrain Dumas until *after* he had given the officers a false name and tried to walk away. Therefore, his arrest is the point at which Fourth Amendment concerns arise, i.e., the point at which probable cause must have existed.[3]

Probable cause for arrest is required by the Fourth Amendment of the U.S. Constitution, as well as by the provisions of Article I, section 11 of the Wisconsin Constitution, and § 968.07(1)(d), STATS. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Koch***, 175 Wis.2d at 701, 499 N.W.2d at 161.

In ***United States v. Tipton***, the 7th Circuit held that Illinois police officers had probable cause to arrest a motorist for obstruction of justice when

[3] Because this court concludes that Dumas was not "seized" until after he had given a false name to police, it need not address whether the police had reasonable suspicion for a ***Terry*** stop before that point.

the motorist gave a false name after the officers had stopped the motorist's car for failure to display his license in a high car-theft area of town. ***United States v. Tipton***, 3 F.3d 1119 (7th Cir. 1993). Other circuits have similarly found that giving a false name to a police officer or resisting during an investigative stop gave rise to probable cause to arrest. *See* ***United States v. McCarthy***, 77 F.3d 522 (1st Cir. 1996) (holding that a defendant's presentation of identification during an investigatory stop which the police officer knew to be false provided probable cause for arrest); ***United States v. Dawdy***, 46 F.3d 1427 (8th Cir. 1995) (holding that a defendant's resistance to even an invalid arrest or ***Terry*** stop could provide independent probable cause); *and* ***United States v. Stamps***, 430 F.2d 33 (5th Cir. 1970) (holding that the act of giving a false name to a police officer investigating a burglary supported arrest).

Wisconsin makes it a crime to knowingly give false information to a police officer with the intent to mislead the officer in the performance of his or her duty. *See* § 946.41, STATS. Fahrney had sufficient reason to believe that Dumas had committed the crime of obstructing an officer at the time he arrested him because he knew that the name Dumas gave to Evans was false. Therefore, Dumas' arrest was supported by probable cause; the evidence obtained in the search after arrest was admissible; and the suppression motion was properly denied.

Sufficiency of the Evidence.

Dumas also argues that his convictions for obstructing an officer and carrying a concealed weapon were not supported by the evidence. After examining the elements of both crimes and the evidence produced at trial, this court disagrees.

The offense of obstructing an officer requires the state to prove: (1) the defendant obstructed an officer; (2) who was acting within his or her official capacity, with lawful authority; and (3) the defendant knew or believed that he or she was obstructing the officer while the officer was acting in his or her official capacity, with lawful authority. ***Henes v. Morrissey***, 194 Wis.2d 338, 353, 533 N.W.2d 802, 807 (1995); § 946.41, STATS.

Giving false information to a police officer has been held to constitute obstruction as a matter of law, obviating any need to prove that the false information made the officer's performance of duties more difficult. ***State v. Caldwell***, 154 Wis.2d 683, 686, 454 N.W.2d 13, 14-15 (Ct. App. 1990). The lawful authority question turns on whether the officer's actions are conducted in accordance with the law. ***State v. Barrett***, 96 Wis.2d 174, 181, 291 N.W.2d 498, 501 (1980). The defendant's subjective intent must be determined from the totality of the circumstances, including what the defendant and officers said or did. ***State v. Lossman***, 118 Wis.2d 526, 543, 348 N.W.2d 159, 167 (1984).

Dumas argues that the officers were not acting within their lawful authority because they had illegally stopped him for questioning. This is a bootstrap argument which requires an initial finding that Dumas was unlawfully detained by Evans. Dumas' own testimony refutes this argument, as he said he did not hear anyone tell him to stop, and he voluntarily walked back to Evans.

He also argues that there was no evidence from which a jury could determine that he knew or believed that the officers were acting within their lawful authority when they asked him who he was. However, the officers were in squad cars and there was testimony that Dumas attempted to flee after he was caught giving a false name. Viewing all inferences in the light most favorable to the State, a jury could reasonably have concluded that Dumas knew or believed that the officers were acting with lawful authority when he lied to them.

Section 941.23, STATS., proscribes going "armed with a concealed and dangerous weapon." "Armed" has been defined as having the weapon within reach. ***Mularkey v. State***, 201 Wis. 429, 432, 230 N.W. 76, 77 (1930). A "dangerous weapon" is defined in § 939.22(10), STATS., as "any device designed as a weapon and capable of producing death or great bodily harm." The jury was instructed that a "dangerous weapon" is a "device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm."

Dumas contends that the State failed to show that he intended[4] to use the knife in a manner calculated or likely to produce great bodily harm. The knife he was carrying had a five-inch blade. Evidence was presented that the defendant possessed drug paraphernalia, a police radio scanner and bullets on his person. Also, the neighborhood had been the site of numerous drug sales, and there is no opportunity to hunt or fish or to use the knife for some other sporting purpose in the neighborhood. A jury could conclude from these facts, and the nature of the knife itself, that Dumas intended to use the knife as a weapon. His conviction is supported by the evidence.

[4] This court does not decide whether actual intent to use the knife is an element of § 941.23, STATS., which the State needed to prove, but instead, analyzes Dumas' argument as though it were.

CONCLUSION

It is the conclusion of this court that the evidence obtained during the search of Dumas was properly admitted because it was obtained incident to a lawful arrest and that his convictions were supported by the evidence.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE § 809.23(1)(b)4, STATS.