COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1068-CR **Cir. Ct. No. 2011CF841**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHONSEA JEROME KING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Reversed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. Chonsea King appeals a judgment of conviction for one count of possession of heroin with the intent to deliver, contrary to WIS. STAT.

§ 961.41(1m)(d)3. (2011-12).[1] King contends that all evidence against him was obtained pursuant to an illegal seizure and that the circuit court erred in denying his motion to suppress that evidence. We conclude that there was no reasonable suspicion to detain King at the time King was seized and that the circuit court should have granted King's motion to suppress. Accordingly, we reverse the judgment of conviction.

BACKGROUND

¶2 King was charged with possession of heroin with the intent to deliver, maintaining a drug trafficking place on or near a school, and possession of drug paraphernalia, all as a repeater. King moved the circuit court to suppress any and all evidence obtained by police on the basis that the evidence was obtained through an illegal seizure. Following a hearing, the court denied King's motion.

¶3 At the motion to suppress hearing, Danny Tilley, an officer with the Beloit police department and supervisor of the gang and drug unit, testified that on April 12, 2011, at approximately 9:25 p.m., he observed a vehicle in a parking lot located at 1250 6th Street in Beloit. Tilley testified that the Beloit police department's drug and gang unit had "received numerous [pieces of] intelligence regarding illegal drug activity occurring in [that] parking lot." Tilley further testified that he had received "more than one piece of intelligence on that location within the last two weeks prior to" April 12. Tilley testified that he observed at least two occupants in the vehicle and parked his car along 6th Street and observed the vehicle for approximately five minutes. Tilley testified that during that time,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

he did not observe anyone exit the vehicle or any activity outside the vehicle, but did observe the interior lights in the car turn on and off "a couple [of] times." Tilley testified that the intelligence regarding the location where the vehicle was parked, in conjunction with his observation of the occupants of the vehicle, led him to believe that illegal drug activity might be afoot.

¶4 Tilley testified that after observing the vehicle, he pulled his unmarked squad car into the parking lot, turned on his vehicle's high beams, and parked behind the vehicle. Tilley, who stated that he was easily identifiable as a police officer by his attire, exited his squad car, as did King, who had been sitting in the driver's seat of the vehicle Tilley had been observing. Tilley testified that he asked King to sit back down inside King's vehicle and that King did so, though King left one leg outside the vehicle, which Tilley found to be unusual. Tilley testified that as he approached King's vehicle, he observed a plastic sandwich bag with one corner missing and the corner of a plastic baggy on the ground underneath King's foot, which Tilley testified was indicative of drug packaging.

¶5 Tilley testified that King identified himself and that Tilley was aware of prior intelligence that King had been involved in illegal drug activity. Tilley testified that King was "acting nervous" and he had concerns that King was a possible flight risk, so he asked King to exit his vehicle, which King did. At that point, Tilley placed King in handcuffs and put King in the backseat of the vehicle of another officer who had arrived to assist. King's vehicle and King's person were subsequently searched, and the police discovered or King turned over baggies containing heroin.

¶6 The circuit court ultimately denied King's motion, determining that officers had conducted a valid investigatory stop, and that King's constitutional

rights were not overstepped by an illegal search. Following the denial of his motion to suppress, King pled guilty to possession of heroin, with the intent to deliver, as a repeater, and a judgment of conviction was entered. King appeals.

ANALYSIS

¶7 King contends the circuit court erred in denying his motion to suppress evidence. He claims that he was seized when Tilley pulled over his patrol car behind King's car, turned on his high beams, and exited his patrol car and approached King's car while wearing his police uniform. King claims that Tilley lacked reasonable suspicion to conduct an investigatory stop at that point and therefore the seizure was unlawful and any evidence obtained as a result should have been suppressed. The State contends that King was not seized until Tilley asked King to exit his vehicle after King had returned to his car, at which point Tilley had reasonable suspicion for an investigatory stop. Thus, the State argues that any evidence obtained from any of the officers' contacts with King was admissible.

¶8 Our review of a circuit court's denial of a motion to suppress presents a mixed question of fact and law. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. We review the court's findings of historical fact under the clearly erroneous standard. ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182. Application of the historical facts to constitutional principals presents a question of law, which we review de novo. ***Id.***

¶9 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect an individual's right to be free from unreasonable searches and seizures. ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. Critical to resolving whether King's motion

to suppress should have been granted is determining at what point King was seized. "The moment of 'seizure' is critical for two reasons: (1) it determines when Fourth Amendment … protections become applicable; and (2) it limits the facts we may consider in evaluating whether" Tilley had reasonable suspicion to initiate the seizure. ***Id.***, ¶23.

¶10 Not every encounter between police and a private citizen is a seizure subject to the prohibition of the Fourth Amendment. ***Id.***, ¶18. A police-citizen encounter becomes a seizure when the law enforcement officer "'by means of physical force or show of authority'" in some way restrains the liberty of the citizen. ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980) (quoted source omitted).

¶11 The United States Supreme Court has set forth the following test for determining whether a particular police-citizen encounter constitutes a seizure for purposes of the Fourth Amendment:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-55.

¶12 Under ***Mendenhall***, a seizure will generally occur when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Young***, 294 Wis. 2d 1, ¶3.

¶13 It is undisputed that Tilly pulled the patrol car behind King's vehicle, exited the patrol car wearing attire that clearly identified him as a police officer, and asked King, who had stepped out of his vehicle, to sit back down inside his vehicle, which King did. King argues that a seizure occurred at this point because "[n]o reasonable person would believe he had the right to [] pull away from the officer at that point and leave the scene without the officer's permission."

¶14 Relying on a statement by the supreme court in ***Young*** that it is "unreasonable to expect an officer, traveling alone near midnight, in a problem area, to leave his squad car and approach a suspicious car full of people," *see* ***Young***, 294 Wis. 2d 1, ¶67, the State argues that pulling Tilley's squad car behind King's vehicle, turning on his high beams and approaching King's vehicle on foot did not give rise to a seizure. We read the State's brief as further arguing that these facts, in conjunction with Tilley then asking King to return to the inside of his car, also did not under the totality of the circumstances give rise to a seizure because if it did, Tilley would have been required to allow King to approach him on foot, if Tilley wanted to avoid effecting a seizure at that point, which "would discourage effective law enforcement." *See* ***id.***, ¶67.

¶15 In ***Young***, the supreme court observed that although an officer's use of a spotlight may constitute a show of authority, many courts have found it an insufficient show of authority to constitute a seizure. *See* ***id.***, ¶65 n.18. We assume, without deciding, that the State is correct that a seizure did not occur at

the point where Tilley pulled his patrol car behind King's vehicle, turned on his high beams, and exited his car and approached King's vehicle. We do not agree with the State, however, that a seizure did not occur when Tilley asked King to return to the inside of his vehicle. The question under ***Mendenhall*** is whether a reasonable person would have believed himself or herself free to leave. We conclude that under the totality of the circumstances in this case—a police vehicle parked in close proximity, bright lights illuminated, an approaching officer, and direction by that officer to return to the inside of the person's vehicle—a reasonable person would not have believed that he or she was free to leave.

¶16 Having determined that King was seized when Tilley approached him and directed him to return to the inside of his vehicle, we now turn to the question of whether Tilley was justified in his seizure of King at that point. An investigatory stop, otherwise known as a ***Terry*** stop,[2] is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. ***Id.***, ¶20. Reasonable suspicion requires that a police officer possess specific and articulable facts, not merely a hunch, that warrant a reasonable belief that criminal activity is afoot. ***Id.***, ¶21.

¶17 To ascertain whether a police officer had reasonable suspicion to initiate a seizure, we examine the facts leading up to the stop to determine whether those facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion. ***Id.***, ¶58. Doing so here, we conclude that neither the individual facts, nor the totality of those facts, support a finding of objectively

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

reasonable suspicion that criminal activity was afoot at the point when King was seized.

¶18 As stated above, Tilley testified that his unit in the police department had received "numerous [pieces of] intelligence regarding illegal drug activity occurring in the parking lot" where King's vehicle was parked. Tilley testified that he observed King's vehicle parked in the parking lot, with at least two occupants inside and that during his approximate five-minute observation of King's vehicle, the only activity he observed in or around the vehicle was the occasional illumination of the vehicle's interior lights. Tilley also testified that the seizure took place around 9:25 p.m. and that it was dark outside.

¶19 Reasonable suspicion that criminal activity is afoot requires more than mere presence in a public place. *See* ***State v. Pugh***, 2013 WI App 12, ¶12, 345 Wis. 2d 832, 826 N.W.2d 418. We have held that without more, an individual's presence in a known drug-trafficking area, an officer's observation of a brief meeting between the individual and another man on the street, and the officer's experience that drug deals often occur in brief on-street meetings, did not create a reasonable suspicion to justify an investigatory stop. *See* ***State v. Young***, 212 Wis. 2d 417, 433, 569 N.W.2d 84 (Ct. App. 1997). In the present case, we have even fewer facts to suggest criminal activity was afoot. King's car was observed parked for at least five minutes, at 9:25 p.m., in a parking lot known for drug activity. No interactions between the occupants of the vehicle and other individuals were observed, and there was no testimony that the location of the vehicle aside, King's behavior was otherwise peculiar or suspicious. The fact that the interior light went on and off appears to add nothing to the analysis. Accordingly, considering the totality of the circumstances, we conclude that in this

case Tilley's observations prior to King's seizure did not give rise to reasonable suspicion to initiate the seizure.

¶20 Because we conclude that Tilley did not have reasonable suspicion to seize King through conduct that included asking King to return to his car, we conclude that the circuit court erred in denying King's motion to suppress and we reverse the judgment of conviction.

CONCLUSION

¶21 For the reasons discussed above, we reverse.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.