COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1575-CR **Cir. Ct. No. 2012CF2777**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MIGUEL LOMBRANO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Miguel Lombrano appeals a judgment of conviction entered upon his guilty plea to possessing a firearm as a felon. The only issue is whether the trial court properly denied his motion to suppress evidence found during an investigative stop. We affirm.

BACKGROUND

¶2 The State charged Lombrano with possessing a firearm as a felon and possession of a short-barrel shotgun after Milwaukee police officers Nathan Fager and Chad Boyack stopped Lombrano on June 4, 2012, and found a short-barrel shotgun in his backpack. Lombrano moved to suppress the shotgun.

¶3 Boyack and Fager were the only witnesses at the suppression hearing. Each officer described his substantial training and experience. Fager said that he had served as a Milwaukee police officer for nearly eight years, and Boyack said that he had served for more than fifteen years. Both were members of the anti-gang unit and routinely investigated reports of violent crimes.

¶4 On June 4, 2012, at about 12:42 a.m., the officers were in uniform and on patrol in a marked police squad car when they received a computer automated dispatch regarding a call for service at 25th and Atkinson Avenue in the city of Milwaukee. According to Boyack, the dispatcher described an argument between a male and a female "and it sounded like the phone was wrestled away from the female." The officers testified that they were familiar with the neighborhood and had made numerous arrests there. Each officer described it as a high crime area known for drug activity, shootings and robberies. When the officers drove into the area at just before 1:00 a.m., the only person in sight was a man, subsequently identified as Lombrano, riding a bicycle and wearing a backpack.

¶5 The officers observed that Lombrano was travelling south on 26th Street but that he immediately turned around at the sight of the squad car and went

north. Boyack testified that this aroused his suspicions because "when a person does change direction when they see our marked squad car, it does make you think." As the officers continued driving on Atkinson Avenue, they again saw Lombrano on the bicycle, "riding around the corner from 25th Street." Fager testified that Lombrano "was right at the address" described in the call for police service and that he was "kind of circling the area." The officers decided to "talk to Lombrano to see if he, in fact, had anything to do with this call or knew anything about what was going on in the intersection."

¶6 Boyack got out of the squad car and said "stop, police," but Lombrano did not stop. According to the officers, Lombrano instead tried to flee. As Lombrano tried to pedal away, Boyack seized the handlebar of the bicycle. Meanwhile, Fager approached Lombrano from behind and "grabbed the backpack and the front handlebar at the same time to kind of hold the bike where [it] was to prevent [Lombrano] from fleeing further."

¶7 Fager testified that "immediately when [he] grabbed [the backpack, he] felt like a long – like a hard object inside of it." He "thought immediately when [he] felt it" that the object was a shotgun because he "knew the feeling of a ... shotgun handle." Fager seized the shotgun from the backpack.

¶8 The trial court found that the officers lawfully stopped Lombrano and then lawfully discovered the shotgun pursuant to the plain touch doctrine. The trial court therefore denied Lombrano's motion to suppress.

¶9 Pursuant to a plea bargain, Lombrano pled guilty to possessing a firearm as a felon. He now appeals, challenging the denial of his suppression motion.[1]

ANALYSIS

¶10 "We review suppression motions using a two-step process. 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).

¶11 Lombrano asserts that the police stopped him without reason. "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 typically interpret "Article I, Section 11 of the Wisconsin Constitution in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court." *See* ***State v. Young***, 2006 WI 98, ¶30, 294 Wis. 2d 1, 717 N.W.2d 729.

¶12 The Fourth Amendment is not offended when the police conduct an investigatory stop and briefly detain a person based on "'reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.'" *See* ***State v. Colstad***, 2003 WI

[1] A circuit 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.

App 25, ¶¶7-8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted, brackets in ***Colstad***). The standard is the same under the Wisconsin constitution. ***State v. Young***, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997).

¶13 Reasonable suspicion is based on the totality of the circumstances. *See* ***Colstad***, 260 Wis. 2d 406, ¶8. Moreover, "'[t]he 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.'" ***Id.*** (citation omitted).

¶14 We begin with Lombrano's challenge to four of the trial court's factual findings. We reject each of those challenges.

¶15 First, Lombrano challenges the finding that "the [computer aided dispatch] report indicated that there was a potential crime being committed in the area of 25th and Atkinson." Boyack testified that he and Fager went to 25th and Atkinson in response to a call for service in which the dispatcher indicated that a man might have "wrestled [a] phone away" from a woman. Thus, at the very least, the officers had information suggesting that a man may have stolen a telephone. The first challenged fact is supported by the record.

¶16 Second, Lombrano complains about the finding that "[u]pon seeing the squad, Lombrano turned his bike around, which the circuit court described as 'noteworthy behavior.'" Boyack testified that when Lombrano first saw the squad car, "he stopped suddenly and turned [in] the other direction." Boyack explained that this aroused his suspicion. Both components of the second challenged fact are supported by the record.

¶17 Third, Lombrano complains because the trial court found that he "[wa]s the only person observed [by the officers] in the area." Fager testified that when the officers saw Lombrano, "there was nobody else in the area." The third challenged fact is supported by this testimony.

¶18 Fourth, Lombrano complains because the trial court found that "Lombrano attempted to flee from officers." Boyack testified that when the officers saw Lombrano the second time, he "tried to pedal fast away." Boyack concluded that Lombrano was "trying to flee." Similarly, Fager testified that, after Boyack directed Lombrano to stop, he "appeared to pedal faster, like he increased his speed.... [I]t appeared to [Fager] that Lombrano was trying to get away, trying to get past Officer Boyack." The fourth challenged fact is supported by this testimony.

¶19 Testimony from the police officers thus supports each finding that Lombrano disputes. The trial court expressly found the officers credible, deeming their credibility "great." Credibility assessments are for the trial court, and we will not disturb them. *See* ***State v. Peppertree Resort Villas Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Lombrano suggests the officers' testimony could have supported findings different from those that the trial court made, but "[w]hen more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." *See* ***id.***

¶20 We next consider the contention that the officers seized Lombrano without reasonable suspicion. He asserts that "the seizure in this instance occurred when police yelled an order for Mr. Lombrano to stop," but, at that time, "nothing

was known by the officers concerning Mr. Lombrano." Lombrano misunderstands the point at which the officers seized him.

¶21 "[T]o effect a seizure, an officer must make a show of authority, and the citizen must actually yield to that show of authority." ***State v. Kelsey C.R.***, 2001 WI 54, ¶33, 243 Wis. 2d 422, 626 N.W.2d 777. Here, the police made a show of authority when Boyack directed Lombrano to stop. *See* ***id.*** Lombrano, however, did not yield. He fled. Accordingly, the officers did not seize him until they physically stopped him in flight. *See* ***id.***

¶22 We turn, then, to whether the officers had reasonable suspicion allowing them to seize Lombrano as he fled. "[E]vasion and flight ... can properly give rise to reasonable suspicion when viewed in the totality of the circumstances." ***Young***, 294 Wis. 2d 1, ¶75. Here, Lombrano changed direction when he saw the squad car, behavior that Boyack immediately noted and viewed as suspicious. A subject's decision to alter his or her course at the sight of an officer may contribute to an officer's reasonable suspicion. *See* ***State v. Williamson***, 58 Wis. 2d 514, 518, 206 N.W.2d 613 (1973). Moreover, when Lombrano bicycled into the officers' view a second time, Fager thought Lombrano appeared to be "circling the area," an area where a man had reportedly wrestled a telephone from a woman just twenty minutes earlier. Unusual and ambiguous behavior can contribute to reasonable suspicion under the totality of the circumstances. *See* ***State v. Waldner***, 206 Wis. 2d 51, 60-61, 556 N.W.2d 681 (1996).

¶23 Additionally, the lateness of the hour—here, one o'clock in the morning—may properly contribute to an officer's reasonable suspicion. *See* ***State v. Allen***, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999). "[T]he reputation

of an area is another factor in the totality of the circumstances equation." ***Id.*** In this case, the officers described the neighborhood as a high crime area. Finally, the training and experience of the police officers is relevant. ***Id.*** Both Boyack and Fager drew on many years of law enforcement experience in making their observations and assessing Lombrano's behavior.

¶24 In light of the totality of the circumstances here, Lombrano's decision to flee rather than to comply with the officers' show of authority gave rise to reasonable suspicion justifying further inquiry. The officers were therefore entitled to detain Lombrano and investigate. *See* ***Colstad***, 260 Wis. 2d 406, ¶8. Moreover, given Lombrano's flight, the officers were entitled to exert reasonable physical restraint to permit them to carry out the investigation. *See* ***United States v. Sokolow***, 490 U.S. 1, 10-11 (1989) (reasonable to initiate an investigative stop by taking hold of a subject about to get into a taxicab). Indeed, the right to make an investigative stop "would mean little if the officer could not restrain a suspect who attempts to walk away from the investigation." *See* ***State v. Goyer***, 157 Wis. 2d 532, 538, 460 N.W.2d 424 (Ct. App. 1990).

¶25 We turn to the claim that the "plain touch" doctrine did not justify seizing the shotgun in Lombrano's backpack. We reject the argument.

¶26 "The 'plain touch' exception to the warrant requirement is an extension of the 'plain view' doctrine." ***State v. Buchanan***, 178 Wis. 2d 441, 449, 504 N.W.2d 400 (Ct. App. 1993). The parties agree that the exception consists of three elements:

> (1) the 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.

See ***id.*** (citation, quotation marks, and brackets omitted). When these elements are satisfied, an officer may seize evidence without a warrant. *See* ***id.*** at 449-50.

¶27 Lombrano concedes that "elements 1 and 3 are present. The firearm was in plain view/touch and the nature of the firearm was immediately obvious to Fager." Lombrano asserts, however, that the police did not have prior justification for the touching that revealed the firearm because he believes the police lacked reasonable suspicion to stop him. As we have explained, Lombrano is wrong. His flight, coupled with the circumstances surrounding it, gave rise to reasonable suspicion in this case. *See* ***Young***, 294 Wis. 2d 1, ¶75.

¶28 Lombrano next argues that, even assuming Boyack acted lawfully in restraining Lombrano, Fager's actions were unlawful because "when Fager made tactile contact with the weapon, Mr. Lombrano had already been seized by Boyack." We are not persuaded. The trial court found that Lombrano attempted to escape from the officers within two-to-five seconds before Boyack took hold of the bicycle handlebar. Fager testified that only "momentarily later" he too seized Lombrano "to prevent him from fleeing further." As the Supreme Court has explained, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." ***Graham v. Connor***, 490 U.S. 386, 396-97 (1989). Under the circumstances here, Fager acted reasonably in assisting Boyack to seize and detain Lombrano.

¶29 In sum, the officers lawfully seized Lombrano in flight and took reasonable action to detain him. Upon coming in contact with him, Fager immediately recognized that Lombrano possessed a shotgun. The "plain touch" doctrine therefore applies. *See* ***Buchanan***, 178 Wis. 2d at 449. Accordingly, the trial court properly denied Lombrano's suppression motion.

By the Court.—Judgment affirmed.

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