COURT OF APPEALS DECISION DATED AND FILED

July 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-0782-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL E. HNANICEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

FINE, J. Paul Elliot Hnanicek pled guilty to one count of illegally possessing marijuana. *See* §§ 961.14(4)(t), 961.01(14) & 961.41(3g)(e), STATS. He complains that the police found the marijuana as the result of an illegal arrest.[1] We affirm.

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[1] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. Section 971.31(10), STATS.

I.

Police arrested Hnanicek for violating a City of Milwaukee ordinance making it unlawful for anyone to "knowingly resist or obstruct an officer while the officer is doing any act in an official capacity and with lawful authority." MILWAUKEE CODE OF ORDINANCES § 105-138. The officers were investigating citizens' complaints that a house in the City was being used as a base from which to sell drugs. The officers, who were in plain clothes, went to the house some thirty minutes before midnight. The officers drove by the house and saw a group of what they estimated to be between six and eight persons in an alley adjacent to the house. The officers parked and walked to the house, when they saw, according to one of officers' testimony, "approximately ten people come out from" the alley. The officer told the trial court at the suppression hearing that when he was ten feet from the group he identified himself as a police officer and showed them his badge, which was hanging around his neck. The other officer also identified himself as an officer. At that point, according to the officer, one of the group "got kind of agitated, and I started talking to him." At that point, Hnanicek started to back up and then "bolted" towards the alley. The officer told Hnanicek to stop and, when Hnanicek did not stop, chased him. The officer finally caught Hnanicek when Hnanicek fell.

As noted, the officer arrested Hnanicek for violating § 105-138 of the Milwaukee Code of Ordinances. Searching Hnanicek incident to the arrest, the officer found the marijuana in one of Hnanicek's pockets. The officer did not, however, give Hnanicek a citation for violating the ordinance because, according to the officer's testimony, the "other events that night led to it being a state charge" for illegally possessing marijuana. The trial court held that the officer had probable cause to arrest Hnanicek for violating the ordinance and that, therefore,

the search was lawful.[2] The trial court denied Hnanicek's motion to suppress the marijuana.

II.

This case presents two interrelated questions, both of which are subject to our *de novo* review. *See* ***State v. Waldner***, 206 Wis.2d 51, 54, 556 N.W.2d 681, 683 (1996) (constitutional issues are subject to *de novo* review by appellate court). First, whether the officers were acting with lawful authority when they approached the group to question the approximately ten persons. Second, if so, did the officer who arrested Hnanicek have probable cause for the arrest. The answer to each of these questions is "yes."

A. *Initial approach.*

Both officers were investigating possible drug activity at the house. This was, obviously, lawful. Moreover, as Hnanicek concedes, the officers could lawfully seek information from persons without first suspecting them of criminal activity. ***Florida v. Royer***, 460 U.S. 491, 497 (1983) ("law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen") (White J., on behalf of four justices, announcing judgment of court) (collecting authorities). *See also* ***Terry v. Ohio,*** 392 U.S. 1, 34 (1968) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on

[2] The trial court applied case law interpreting the statute on which § 105-138 of the Milwaukee Code of Ordinances was patterned, § 946.41, STATS. Hnanicek does not argue that any different standard applies under the ordinance.

the streets.") (White, J., concurring). Further, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." ***Florida v. Bostick,*** 501 U.S. 429, 434 (1991) (citation omitted). Until Hnanicek unexpectedly "bolted," the near-midnight encounter was routine. Once he ran, the officer had a right to chase him. *See* ***State v. Anderson***, 155 Wis.2d 77, 84–88, 454 N.W.2d 763, 766–768 (1990).

B. *Arrest.*

It is lawful in Wisconsin to arrest someone for violating a municipal ordinance. Section 800.02(6), STATS. ("A person may be arrested without a warrant for the violation of a municipal ordinance if the arresting officer has reasonable grounds to believe that the person is violating or has violated the ordinance."). "Reasonable grounds" in this context is the same as "probable cause." ***City of Milwaukee v. Nelson***, 149 Wis.2d 434, 460, 439 N.W.2d 562, 572 (1989). Probable cause to arrest does not require proof beyond a reasonable doubt, which is the burden of proof in criminal cases, or even that "guilt is more likely than not." ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547–548 (Ct. App. 1996) (internal quotation marks omitted).[3] It is enough for a reasonable officer to conclude, based upon the information in the officer's possession, that the "defendant probably committed a crime" or, in the case of an ordinance, probably

[3] The burden of proving a person guilty of an ordinance violation is by the middle burden of proof, "clear and convincing" evidence, not the beyond a reasonable doubt burden applicable in criminal cases. *See* ***State v. Walberg***, 109 Wis.2d 96, 102, 325 N.W.2d 687, 691 (1982), *habeas corpus denied*, 587 F. Supp. 1476 (E.D. Wis. 1984), *rev'd*, 766 F.2d 1071 (7th Cir.) (not addressing the issue of the burden of proof to convict for a violation of a municipal ordinance), *cert. denied*, 474 U.S. 1013.

violated the ordinance. *See* ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993), *cert. denied*, 510 U.S. 880; ***Nelson***, 149 Wis.2d at 460, 439 N.W.2d at 572.

The syllogism supporting the officer's arrest of Hnanicek is: 1) as discussed in Part II.A, the officers had the legal right to try to talk to the persons they saw near the suspected drug house; 2) the officers had the legal right to try to talk to those persons without being interfered with by someone else; 3) the officer who arrested Hnanicek had reasonable grounds to believe that Hnanicek's running destabilized the situation and interfered with the officers' ability to talk to the others. Of course, the persons approached by the officers, including Hnanicek, did not have to talk to the officers. *See* ***Bostick***, 501 U.S. at 434. Nevertheless, each was obligated not to interfere with the officers' investigation. *See* ***State v. Grobstick***, 200 Wis.2d 242, 249, 546 N.W.2d 187, 190 (Ct. App. 1996) (obstruction is conduct that "prevents or makes more difficult the performance of the officer's duties"). Although convicting Hnanicek of violating the ordinance might have been difficult, that fact is not material as to whether the officer had probable cause to arrest Hnanicek for violating the ordinance.[4] *See* ***State v. Paszek***, 50 Wis.2d 619, 624–625, 184 N.W.2d 836, 839–840 (1971) (officer may

[4] An element of the offense of obstructing is that the defendant knew that he or she was interfering with the officer. *See* ***State v. Grobstick***, 200 Wis.2d 242, 248, 546 N.W.2d 187, 189 (Ct. App. 1996).

arrest even though he or she does not have proof that guilt is more likely than not). The arrest was lawful.[5]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

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[5] Hnanicek argues that § 946.41, STATS. (and, by implication, § 105-138 of the Milwaukee Code of Ordinances), is impermissibly vague. He was not, however, convicted of violating either the statute or the ordinance. As noted above, the issue here is not whether Hnanicek could have been convicted of violating the ordinance, the issue is whether the officer had probable cause to believe that Hnanicek was interfering with the officer's lawful attempt to talk to the others. Moreover, an officer's probable cause to arrest someone for violating a statute or ordinance is not destroyed because the statute or ordinance is later held to be unconstitutional. ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis.2d 646, 649–650, 292 N.W.2d 807, 809 (1980).

Similarly without merit is Hnanicek's contention that the "obstructing an officer" laws, either the ordinance or the statute, unconstitutionally permit officers to circumvent persons' rights to be free from unreasonable searches. As with any statute or ordinance making certain behavior unlawful, no officer may search someone arrested for violating that statute or ordinance unless the officer has "probable cause" to believe that the person arrested did, in fact, violate the law. Hnanicek's argument, based as it is on his contention that he did nothing unlawful that night, is circular.