COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2358-CR **Cir. Ct. No. 2013CF1295**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER L. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Reversed and cause remanded for further proceedings*.

¶1 HOOVER, P.J.[1] Jennifer Wilson appeals a judgment convicting her of misdemeanor possession of cocaine and misdemeanor possession of drug

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

paraphernalia. Wilson argues the court erred when it denied her motion to suppress because the evidence was obtained pursuant to an illegal search and seizure. We agree and reverse.

BACKGROUND

¶2 Wilson moved to suppress evidence obtained by arresting officer Mallory Meves of the City of Green Bay Police Department after Wilson was stopped and frisked on October 21, 2012. The court conducted a hearing on the motion, at which Meves testified.

¶3 Meves stated she received a call from dispatch at 9:39 p.m. informing her of "a suspicious situation that was taking place. A vehicle had pulled up on 8th Street and right near the alley of South Oakland, and it's a known drug area." The dispatcher reported, via an anonymous complainant, a red pickup truck "was located on 8th Street and that an occupant had gotten out and walked down the alley," and the complainant suspected there was possibly a drug transaction taking place. Meves explained, "I've worked that area. I get to know my neighbors. I get to know my neighborhood. In that kind of area there's frequent calls for drug activity. Particularly there was a drug house." Meves added the police "had been keeping an eye on [the drug house], a lot of foot traffic, vehicle traffic, people park on a street then walk down the alley, vehicles out in front of the address [at] random times, that kind of thing, and so that's what we were investigating."

¶4 Meves testified when she arrived at the location about ten or fifteen minutes later, her backup officer had already arrived and was "conducting … a traffic stop on the truck." She testified that the house under suspicion for drug activity was approximately four houses to the south of the red pickup truck's

location. Meves stated she planned to approach the truck and "act as the cover officer coming to cover, and that's when I observed [Wilson] … walking northbound down the alley, and that's when I turned my spotlight on her because I saw her and asked her to stay where she was, and I approached her." She agreed Wilson was not free to ignore her demands, but was detained when Meves advised her to stop where she was. After instructing Wilson to stop, Meves approached her, and

> advised her that I was investigating a suspicious situation and she happened to be in the area at the time as long as—as well as the vehicle leaving that area that was described to me. I then advised her that I was going to pat her down for officer safety, checking for weapons, needles, anything that might stab me or anything like that for my safety.

¶5 On cross-examination, Meves was asked to clarify what was suspicious about the vehicle. She answered, "It was more the—given the time of day and that the vehicle was parked on the corner of the street and someone had gotten out. It—the occupant didn't go over to a home right near there … instead, the person had walked down the alleyway." Meves testified there was no "like, illegal parking or anything like that there." Rather, she agreed that the detainment was based solely on the anonymous complainant's report that a suspicious vehicle had parked, a woman exited that vehicle and walked down the alley, and the complainant suspected a drug transaction was taking place. Meves testified she did not believe the complainant gave a physical description of the person from the red truck other than that she was female. She also testified that she did not observe any illegal activity but was "merely doing my investigation at that point."

¶6 The circuit court denied Wilson's motion to suppress, finding Meves had reasonable suspicion to believe Wilson was involved in a drug transaction.

Wilson pleaded guilty to misdemeanor possession of cocaine and misdemeanor possession of drug paraphernalia. She now appeals. *See* WIS. STAT. § 971.31(10).

DISCUSSION

¶7 "Whether evidence should be suppressed is a question of constitutional fact." ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182 (quotation and citation omitted). We defer to the circuit court's findings of historical fact unless clearly erroneous, but we independently apply the relevant constitutional standards to those facts. ***Id.***

¶8 In this case, the guiding constitutional principles are found in the Fourth Amendment to the United States Constitution, and article I, section 11 of the Wisconsin Constitution, which guarantee the right of citizens to be free from "unreasonable searches and seizures." ***State v. Washington***, 2005 WI App 123, ¶12, 284 Wis. 2d 456, 700 N.W.2d 305. "Our supreme court consistently follows the United States Supreme Court's 'interpretation of the search and seizure provision of the [F]ourth [A]mendment in construing the same provision of the state constitution.'" ***Id.*** (quoting ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990)). It is uncontested that Meves seized Wilson when she turned a spotlight on Wilson and told her to stop where she was; accordingly, it is the reasonableness of the search and seizure that are at issue on appeal.[2]

¶9 Police may "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts

[2] The parties dispute the reasonableness of both the search and the seizure; because we determine the seizure was unlawful, we need not address the search.

that criminal activity 'may be afoot,' even if the officer lacks probable cause." ***United States v. Sokolow***, 490 U.S. 1, 7 (1989) (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). The Fourth Amendment's protections require that police have more than an "inchoate and unparticularized suspicion or 'hunch.'" ***Terry***, 392 U.S. at 27. "[W]hat 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. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997) (citing ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989)).

¶10 The State asserts, under the totality of the circumstances, the investigatory stop was reasonable because of the following objective facts Meves had at her disposal: an anonymous informant had reported a vehicle had parked near an alley and a female left the vehicle and walked down the alley, possibly to engage in a drug transaction; Meves was familiar with the neighborhood and its reputation for drug activity; she knew that "a particular resident" in "a specific house on the same block" "had a history of violence and drug distribution[;]" and Wilson was walking toward the truck, from the direction of the alleged drug house, approximately ten to fifteen minutes after the dispatch.

¶11 Wilson, in turn, disputes that Meves had reasonable suspicion to believe Wilson had engaged in a drug transaction or any other criminal activity. Wilson argues, "What is striking about this case is that while the officer seemed to be familiar with the neighborhood in which this encounter transpired, she knew remarkably little about Wilson herself." The State contends Meves "indicated that [Wilson] appeared to be the person who was reported as walking away from the vehicle." Yet, Wilson points out that the record reflects no description by the anonymous caller of the person who left the truck and walked down the alley.

Wilson argues the record indicates she did not act nervously, she obeyed Meves' commands, and she did not attempt to flee or to avoid contact with Meves. In addition, Meves had testified she did not observe any illegal activity, but "was merely doing [her] investigation at that point."

¶12 Wilson further observes Meves arrived ten to fifteen minutes after receiving the dispatch, and argues that while Wilson was walking "in the general direction of the parked vehicle … [n]othing other than her mere presence in the alley connected her to the vehicle." Moreover, Wilson contends, the parking of the truck was not itself suspicious or illegal. The record does not indicate the anonymous caller observed Wilson enter the suspected "drug house," nor does anything else in the record support the assumption that Wilson visited that house, or interacted with anyone. Wilson accordingly asserts "[t]he mere fact that Wilson was walking in an area *near* a house which was known to have been the site of prior drug activity does not render her conduct sufficiently suspicious to justify an investigative detention." Based on our review of relevant case law, and the lack of particularized facts pertaining to Wilson's conduct that could give rise to a reasonable suspicion that criminal activity was afoot, we agree.

¶13 In ***State v. Pugh***, 2013 WI App 12, ¶¶2-3, 5, 12-13, 345 Wis. 2d 832, 826 N.W.2d 418, we held law enforcement lacked reasonable suspicion to justify an investigatory stop when they seized a man at eleven p.m. while he was walking behind a vacant apartment building, approximately fifty feet from a drug house the officers were investigating. We observed "'[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.'" ***Id.***, ¶12 (quoting ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000)). *See also* ***Brown v. Texas***, 443 U.S. 47, 51-52 (1979) (defendant's presence in an alley in a

neighborhood frequented by drug users was not sufficient to conclude he was engaged in criminal conduct, without more.).

¶14 Likewise, in ***Washington***, we held there was no reasonable suspicion to justify the seizure of a man when officers had received a complaint of loitering and drug sales, were aware that Washington did not live in the neighborhood in which he was seized, and knew he had previously been arrested for narcotics sales. ***Washington***, 284 Wis. 2d 456, ¶¶2-3. We concluded:

> Investigating a vague complaint of loitering and observing Washington in the area near a house that the officer believed to be vacant, even taken in combination with the officer's past experiences with Washington and his knowledge of the area, does not supply the requisite reasonable suspicion for a valid investigatory stop. People, even convicted felons, have a right to walk down the street without being subjected to unjustified police stops.

Id., ¶17.

¶15 In yet another case, a recent unpublished[3] decision, we concluded there was no reasonable suspicion to support an investigatory stop when a defendant's vehicle was parked at 9:25 p.m. in a particular parking lot that had been the subject of "numerous [pieces of] intelligence regarding illegal drug activity." ***State v. King***, No. 2013AP1068-CR, unpublished slip op. ¶¶17-18 (WI App Feb. 13, 2014). Police observed the two occupants in King's vehicle for approximately five minutes, during which the interior lights were turned on and off "a couple [of] times." ***Id.***, ¶3. We concluded the officer's observations and knowledge did not give rise to reasonable suspicion to initiate the seizure. ***Id.***, ¶20.

[3] *See* WIS. STAT. RULE 809.23(3)(b).

¶16 Finally, we have held a person's presence in a high drug-trafficking area, together with information conveyed from one police officer to another that the defendant had had a "short-term contact" with another individual, was not sufficient to constitute reasonable suspicion of criminal activity justifying an investigative stop, despite the officer's experience that drug transactions in that neighborhood often took place on the street during brief meetings. ***Young***, 212 Wis. 2d at 429-30. We noted those factors did not constitute "particularized information concerning Young's conduct and … describe[d] large numbers of innocent persons in the neighborhood." ***Id.*** at 433.

¶17 We could go on. Suffice it to say that Wilson's presence in a neighborhood known to have drug activity, while it could permissibly factor into Meves' evaluation of the situation, was not enough to rise to the level of reasonable suspicion to justify an investigatory stop without other objective facts that suggested criminal activity had taken or was taking place.

¶18 We examine then, the additional information available to Meves that, in conjunction with the location, could establish reasonable suspicion. We observe the anonymous call provided little particularized information from the start that could then be substantiated by Meves. The red truck was not parked in front of the "drug house," nor was Wilson observed entering or exiting the "drug house," by the caller or by Meves. Even if she had been observed entering or exiting that particular address, that tells us little about her activities there. *See* ***State v. Doughty***, 239 P.3d 573, 575 (Wash. 2010) ("Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes."). Meves initiated the investigatory stop as soon as she saw Wilson, without any independent observations of her conduct. She admitted she did not observe any illegal activity, nor did she testify

that Wilson had behaved suspiciously. In sum, Meves failed to articulate sufficient objective facts about Wilson that could "warrant a reasonable [person] of caution in the belief that the action taken was appropriate." ***Terry***, 392 U.S. at 22 (quotation and citation omitted).

¶19 Law enforcement officers are not required to rule out the possibility of innocent behavior; nevertheless, they must, at minimum, "have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." ***Washington***, 284 Wis. 2d 456, ¶16; *see also* ***Richardson***, 156 Wis. 2d at 139. Here, the record is devoid of facts supporting an inference that Wilson engaged in a drug transaction—or any criminal activity, for that matter—especially given that she was never observed interacting with or making an exchange with anyone. *See* ***United States v. Roberson***, 90 F.3d 75, 80 (3d Cir. 1996) (no reasonable suspicion where uncorroborated anonymous tip gave a description of a person selling drugs on a particular corner where drugs were often sold; immediately after, defendant, who matched the description, was observed at that location walking over to a parked car and leaning in to speak to the occupants).

¶20 After reviewing the totality of the circumstances, we conclude Meves acted improperly on the basis of an unparticularized hunch that Wilson was engaged in drug activity. Because Wilson's seizure was illegal, we need not analyze the constitutionality of the subsequent search. The evidence obtained subsequent to the unlawful seizure requires suppression. ***Pugh***, 345 Wis. 2d 832, ¶13; *see also* ***Wong Sun v. United States***, 371 U.S. 471, 484-85, 487-88 (1963). We therefore reverse the judgment of conviction and remand for proceedings consistent with this decision.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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