COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 1999

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. 99-0021-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT M. LEWIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

BROWN, J. Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking if he or she is willing to answer some questions, by putting questions to him or her if the person is willing to listen, or by offering in evidence in a criminal prosecution his or her voluntary answers to such questions. *See* ***Florida v. Royer***, 460 U.S. 491, 497 (1983). Police officers are free to address

questions to anyone on the streets because police officers, like all other citizens, enjoy the liberty to address questions to others. *See* ***United States v. Mendenhall***, 446 U.S. 544, 553 (1980). "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." ***Id.*** at 554. This law governs the facts in this case and commands affirmance.

On October 14, 1997, at about 10:30 p.m., a Manitowoc county sheriff's deputy had just completed a traffic stop on the city's north side when he heard the city dispatcher put out a call of a disturbance at a residence in the 400 block of Park Street. The deputy responded to the call and en route the dispatcher reported that a male was outside the residence and had just gotten into a vehicle to leave. Seconds later, the deputy arrived at the intersection of 4th and Park and observed one vehicle on Park Street traveling westbound. The deputy turned around and "went after [the] vehicle." Before catching up to the vehicle, the deputy noticed a stopped Manitowoc city police officer's squad car. The deputy stopped his vehicle near the city squad car and asked the city officer if there was a description of the suspect's vehicle and the officer replied that it was a small, white vehicle. At this time, the deputy noticed that the vehicle he was "trying to catch up with" had pulled over. At no time did either the deputy's squad car or the city police squad car have its flashing lights or any other emergency signals going. The city officer continued in the direction of the residence and the deputy drove to the vehicle that had voluntarily pulled over. The vehicle's lights were on and the engine was running. The deputy stopped even with the pulled-over vehicle and noticed that the vehicle was a blue station wagon. The operator was Robert M. Lewis, a person known to the deputy.

The deputy observed that Lewis had a startled look on his face. The deputy then backed up behind Lewis' vehicle and activated his "take-down light" which simply illuminates the scene so that the deputy can "see who [he is] talking to." The deputy did not activate his red and blue lights. The deputy then got out of his squad car and approached Lewis in order to talk to him. The deputy asked Lewis what residence he came from on Park Street and Lewis replied that he was not at a residence on Park Street but was coming from Two Rivers. At this point, the deputy noticed a strong odor of marijuana on Lewis' breath. The deputy informed Lewis that he could smell the strong odor of marijuana and asked Lewis to "voluntarily" give it to him since there was reason to believe that there was some in his vehicle. Lewis responded that there was none in his vehicle. As the deputy was looking down at Lewis sitting in his vehicle, he could see a clear plastic baggy in Lewis' jacket breast pocket. The deputy asked what the baggy was and Lewis said there was nothing in his pocket. Lewis opened the pocket to show the deputy that there was nothing in it, but as he did so, the deputy realized that the baggy he had seen was not actually inside the pocket but was inside the liner ripped out from Lewis' jacket. The deputy pulled the baggy out and saw a green, leafy substance. It was at that time that the deputy first turned on his red and blue flashers, walked back and informed Lewis that he was going to conduct a search of the car. At this time, Lewis voluntarily handed a pipe over to the deputy. While Lewis was not arrested that evening, eventually a complaint was issued against Lewis for possession of THC and possession of drug paraphernalia. He brought a motion to suppress, which was denied. Lewis then changed his plea to guilty to the charge of THC possession. Apparently, the drug paraphernalia charge was dismissed as part of the plea bargain. He now appeals his possession conviction.

Lewis' position on appeal is this: The police officer seized him without reasonable, articulable suspicion under the ***Terry*** statute, § 968.24, STATS., and therefore violated Lewis' Fourth Amendment and Article I, Section 11 rights. Because the seizure was illegal, the evidence of the marijuana and marijuana pipe taken from his person was the "fruit" of the illegal seizure and should have been suppressed.

The problem with this theory is that there was no seizure. Lewis was not pulled over by the deputy; he stopped of his own accord. He was not even being pursued by the deputy when he decided to pull over. The deputy was still engaged in talking to the city police officer and had no emergency lights of any kind activated. Lewis did not shut off his car; he kept it running, with the lights on. When the deputy drove over to him and pulled behind him, the deputy did not activate his red and blue lights. When the officer went up to Lewis, it was for the purpose of asking a question that was at one and the same time a legitimate law enforcement practice and not an arbitrary or oppressive interference with Lewis' liberty rights—he simply asked which residence Lewis was coming from on Park Street. A reasonable person in that situation with the officer asking that kind of question would not believe his or her liberty was restrained. Here, Lewis can point to no intrusion of liberty or privacy at the point the question was asked. In fact, there is nothing to show that Lewis was not free to disregard the question and tell the officer he was going to drive away.

We acknowledge that a police officer uniform exhibits, by its very nature, a show of authority. But such a show of authority does not mean that liberty has been ipso facto curtailed. That is not the law. ***Royer*** and ***Mendenhall*** teach otherwise.

Lewis spent much of his brief claiming that the six-factor test of ***State v. Guzy***, 139 Wis.2d 663, 407 N.W.2d 548 (1987), must be decided in his favor. And the State obviously felt obliged to respond and answer each ***Guzy*** argument. But ***Guzy*** is only relevant when police *have* seized a person pursuant to § 968.24, STATS., and the question is whether the seizure was reasonable. As the trial court pointed out and as the State observed in its brief, Lewis stopped of his own accord. Thus, ***Guzy*** is not important to the analysis of this case. We conclude that the encounter between the deputy and Lewis was one where an officer approached an individual voluntarily stopped on a public street and asked a nonaccusatory, nonintrusive question. The smell of the marijuana, the subsequent plain view of the baggy and obtaining the pipe all stem from that legal encounter. Thus, the possession of THC charge rests on solid ground and will not be disturbed.

By the Court.—Order affirmed.

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