COURT OF APPEALS
DECISION
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Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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No. 99-0956-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA JENKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 ANDERSON, J. Joshua Jenkins appeals from a judgment of conviction for possession of cocaine with the intent to distribute or deliver it contrary to WIS. STAT. § 961.41(1m)(cm) (1997-98), and from an order denying his motion to suppress evidence. He contends that the drug evidence was seized

after an illegal stop and should have been suppressed. Because we conclude that Jenkins was not stopped before the evidence fell into plain view, we affirm.

¶2 While on patrol early one evening, Officer James Zuehlke of the City of Racine Police Department observed three men hanging out and talking on a city block. The area he was patrolling was residential but also plagued by high incidences of gang, drug and other criminal activities. After driving around the area several times, Zuehlke witnessed the group talking in the same general area about half an hour later. As is his usual practice, Zuehlke decided to give the men a warning that their conduct could possibly violate the city's loitering ordinance.

¶3 Zuehlke exited his squad car north of the men and began walking toward them. Sergeant David Smetana, also on patrol in the area, saw Zuehlke pull over his car. To assist the other officer, Smetana stopped his car south of the group. Both officers exited their cars about the same time.

¶4 As Zuehlke approached the group, Jenkins was walking about five feet behind the two other men. Zuehlke told the group to "hold on a second, I'd like to talk to you." He began speaking to two of the men, but Jenkins kept walking.

¶5 Smetana got out of his car approximately five or six feet south of Jenkins. Smetana, an off-duty security officer at Horlick High School, recognized Jenkins and called out to him as he was exiting his car. He said to Jenkins, "[H]i, don't you go to Horlick or hi, Josh, don't you go to Horlick?" As Jenkins turned around and began to answer Smetana's question, the officer saw two knotted baggies fall from Jenkins's mouth.

¶6 Smetana observed the contents of the baggies, believed that the baggies contained rock cocaine and arrested Jenkins. Zuehlke warned the other two men about the loitering ordinance and permitted them to walk away after he patted them down for weapons.

¶7 Jenkins subsequently moved the trial court to suppress the cocaine evidence. He claimed that the evidence was derived from an illegal stop. Deciding that the officers had not stopped Jenkins when the evidence fell from his mouth, the court denied the motion. Jenkins then pled no contest to the offense and was convicted and sentenced to serve eighteen months in prison. Jenkins appeals.

¶8 Jenkins disputes the trial court's denial of his motion to suppress the cocaine evidence. He claims that the evidence was seized after an investigatory stop that violated the Fourth Amendment because the officers did not have a reasonable suspicion that criminal activity was occurring prior to stopping him. He disagrees with the trial court's conclusion that he had not been stopped.

¶9 The threshold issue in this case is whether, under the facts and circumstances, Jenkins had been stopped before the baggies of cocaine fell from his mouth into the officer's plain view. The determination of whether a seizure has occurred is a question of law we review de novo. *See* ***State v. Swanson***, 164 Wis. 2d 437, 445, 475 N.W.2d 148 (1991). We will, however, uphold the trial court's findings of fact for denying the suppression motion unless these findings are clearly erroneous. *See* ***State v. Harris***, 206 Wis. 2d 243, 249-50, 557 N.W.2d 245 (1996).

¶10 A person is seized when an officer restrains that person's liberty by physical force or that person submits to an officer's show of authority. *See* ***Terry***

v. Ohio, 392 U.S. 1, 19 n.16 (1968). Not every encounter between a police officer and citizens constitutes a seizure. *See* ***id.*** A seizure does not occur when a police officer merely questions an individual or asks to examine an individual's identification. *See* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). Whether a seizure has actually occurred depends on if a reasonable person in that situation would believe that he or she was not free to leave. *See* ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980).

¶11 In ***California v. Hodari D.***, 499 U.S. 621 (1991), the Supreme Court addressed a factual situation similar to our case. In ***Hodari D.***, a group of youths were huddled around a car but panicked and fled at the sight of an unmarked police car. *See* ***id.*** at 622-23. Hodari ran into an alley but was intercepted by the police officer chasing after him. When Hodari first saw the officer chasing after him, he tossed away a small rock, which turned out to be crack cocaine. *See* ***id.*** at 623. The officer immediately tackled and arrested him.

¶12 Hodari argued for the suppression of the drug evidence because it was the fruit of an illegal seizure. He contended that he had been seized when he saw the officer running after him. *See* ***id.*** The Court disagreed, concluding that Hodari was not seized until he was tackled. *See* ***id.*** at 629. It reasoned that neither physical force nor submission to a show of authority had occurred before Hodari abandoned the drugs. *See* ***id.*** at 625-26. It rejected Hodari's argument that the officer's pursuit and calling upon him to halt qualified as a show of authority, reasoning as follows:

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a

> fleeing form that continues to flee. That is no seizure. Nor can the result respondent wishes to achieve be produced—indirectly, as it were—by suggesting that [the officer's] uncomplied-with show of authority was a common-law arrest, and then appealing to the principle that all common-law arrests are seizures. An arrest requires *either* physical force (as described above) *or*, where that is absent, *submission* to the assertion of authority.

Id. at 626 (footnote omitted).

¶13 In our case, Jenkins concedes that no physical force was used. Instead, he asserts that these acts demonstrated a show of authority by the officers: (1) Zuehlke told him to "hold on a second, I'd like to talk to you," and (2) he was essentially surrounded by the two officers. After reviewing the case law on this point, we cannot agree that a show of authority occurred.

¶14 For example, the ***United States v. Angell***, 11 F.3d 806, 809 (8th Cir. 1993), court held that an officer's command that an individual should "[s]tay there" or "[h]old it right there" was not a show of authority. Although the command indicated that the individual should remain where he or she was so the officer could speak to him or her, the court evaluated the totality of the circumstances and determined that the situation was still a consensual encounter and not a seizure. Of particular interest to the present case, the court noted, "Had [the officer] couched his request in more indirect language, such as, say, 'Could I talk to you guys a minute,' or 'Would you hold up a minute, please,' there would be no question about the consensual nature of the subsequent conversation …." ***Id.***

¶15 As ***Angell*** instructs, the officers' statements should be examined under all the circumstances present at the time they were made. When Zuehlke decided to stop his squad car and speak to the group of men, it was early evening in a high-crime area. The group was hanging out on the sidewalk of a city block, a

public setting. Zuehlke did not suspect that criminal activity was afoot and only wanted to warn the group about the city's loitering ordinance. Under these circumstances, Smetana said hello to Jenkins, and Zuehlke requested him to "hold on a second" so he could talk to him. Zuehlke approached the group to explain the city's loitering ordinance. He did this in good faith and in accordance with his usual practice. He did not turn on his squad lights, block the group's path or pull out a weapon. He pulled his car over a bit ahead of the men and while walking towards them requested them to hold on a second. Smetana also stopped and exited his car a few feet behind the group. We concur with the view expressed in ***Angell*** and conclude that under these circumstances a reasonable person would construe such police conduct as consensual in nature.

¶16 Furthermore, we hold that these police actions cannot be a stop because Jenkins did not *submit* to them. After Zuehlke yelled for the group to hold on a second, Jenkins kept walking. Under the ***Hodari D.*** test, a seizure does not occur until an individual submits or yields to the officer's show of authority. *See* ***Hodari D.***, 499 U.S. at 626. This test was also applied to a similar situation in ***United States v. Lender***, 985 F.2d 151 (4th Cir. 1993).

¶17 In ***Lender***, the officers suspected a drug transaction was occurring when they observed a group of men huddled together and looking down at Lender's palm. The officers stopped their car, got out and approached the group. The group dispersed, walking with their backs to the officers. An officer called out for Lender to stop. Lender turned and told the officer, "You don't want me; you don't want me." ***Id.*** at 153.

¶18 As Lender continued walking away from the officers, he was observed fumbling with something in his waist area. He stopped walking and a loaded semi-automatic pistol fell from his waist to the ground. *See* ***id.***

¶19 At trial, Lender moved to suppress the gun evidence as the fruit of an unlawful seizure. The federal court of appeals agreed with the district court's denial of that motion, reasoning that Lender had not been seized when the gun fell into plain view. "[The officer's] show of authority in calling for the defendant to stop is not a seizure when the defendant does not yield to that authority." ***Id.*** at 154. We apply this reasoning in the present case.

¶20 In summary, we conclude that the officers' conduct did not constitute a show of authority. A stop did not occur, in any event, because Jenkins did not submit to any show of authority. As a result, we affirm the judgment of conviction and the court's order denying the suppression motion.

By the Court.—Judgment and order affirmed.

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