COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1540-CR **Cir. Ct. No. 2011CM1410**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTURO LUIZ-LORENZO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

¶1 HAGEDORN, J.[1] Arturo Luiz-Lorenzo appeals from a judgment convicting him of two misdemeanors—one for possession of cocaine and one for

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

bail jumping. He contends that the circuit court erred in denying his motion to suppress evidence police obtained during a ***Terry***[2] stop because the officer lacked reasonable suspicion. We disagree and affirm.

Background

¶2 On September 25, 2011, in the wee hours of the morning, Officer Austin Hancock received a report of several individuals causing a disturbance near 63rd Street and 22nd Avenue in the City of Kenosha.[3] It was around 3:00 a.m. when Hancock went to investigate, but found no one in the immediate area of the report. Not content to leave things as they were, he went around the corner into an alley off 22nd Avenue to investigate further. No businesses were open at this time. Hancock looked down the poorly lit alley and observed a male—later identified as Luiz-Lorenzo—standing against the wall of one of the closed businesses. Hancock relayed that in the past, he had contact with people involved in criminal activity in that alley. In his experience, people would frequently retreat into this alley to be out of sight from anyone traveling on 22nd Avenue.

¶3 Without activating his emergency lights, Hancock approached Luiz-Lorenzo in his marked squad car and stopped. As Hancock was getting out of the car, Luiz-Lorenzo "immediately started to walk into some nearby bushes." Hancock testified that he suspected Luiz-Lorenzo was involved in some type of criminal activity and might be trying to break into one of the businesses. In

[2] ***Terry v. Ohio***, 392 U.S. 1, 22 (1968).

[3] The criminal complaint stated the disturbance was near 23rd Avenue, but Hancock testified it was near 22nd Avenue.

Hancock's opinion, it was suspicious for someone to be in that alley at that time of night and "an indication to [him] that someone may be committing a crime."

¶4 At this point, Hancock ordered Luiz-Lorenzo to stop. Luiz-Lorenzo complied by walking out of the bushes with his left hand in his pocket. Hancock told Luiz-Lorenzo to take his hand out of his pocket, and Luiz-Lorenzo complied and apologized. While Hancock was questioning him, Luiz-Lorenzo again put his hand back into his pocket and did not take it out when asked to do so. Fearing that Luiz-Lorenzo might have a weapon, Hancock placed Luiz-Lorenzo in an "escort hold" and attempted to do a pat-down for weapons. Luiz-Lorenzo still refused to take his hand out of his pocket and tried to pull away from Hancock. This noncompliance eventually led to Luiz-Lorenzo's arrest. When Hancock and another officer who arrived on the scene searched Luiz-Lorenzo's wallet, they found a folded dollar bill with a white powdery substance inside. Hancock testified that based on his training and experience, the substance was cocaine.

¶5 The State charged Luiz-Lorenzo with two misdemeanors: possession of cocaine and bail jumping. Luiz-Lorenzo moved to suppress the evidence on the ground that Hancock did not have reasonable suspicion to justify the seizure. At the suppression hearing, Luiz-Lorenzo offered an innocent explanation for his actions. He claimed that prior to his arrest, he spent a couple of hours in a nearby bar, La Frontera, and was simply waiting in the alley for a friend to give him a ride. Although he had never been in the alley before, Luiz-Lorenzo testified that he exited the front of the bar and walked around to the alley to wait. When Hancock approached him, Luiz-Lorenzo claimed he walked away because the lights on the car were blinding him. He also claimed he has a "tick" where he puts his hands in his pockets and did not fully understand Hancock's commands due to his limited English language abilities.

¶6 The circuit court reasoned that when Luiz-Lorenzo started walking away, an investigative stop was justified and explained that "it's not uncommon for an officer at 3 in the morning to think that a single person in a dark alley is suspicious." Accordingly, the court denied Luiz-Lorenzo's motion. Luiz-Lorenzo pled guilty to both counts and the court entered judgment. He now appeals from that judgment.

Discussion

¶7 The question here is whether Hancock's stop of Luiz-Lorenzo was reasonable under the Wisconsin Constitution and United States Constitution. When we review a motion to suppress, we will affirm the circuit court's findings of fact unless they are clearly erroneous. ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). However, "[w]hether those facts satisfy the constitutional requirement of reasonableness is a question of law … we review de novo." ***Id.***

¶8 The United States Constitution and Wisconsin Constitution guarantee the right to be free from "unreasonable" searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. Our courts have held that a brief stop of a suspicious individual to investigate is reasonable in appropriate circumstances. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968); ***State v. Richardson***, 156 Wis. 2d 128, 138-39, 456 N.W.2d 830 (1990). Such stops must be based on reasonable suspicion, which requires a "particularized and objective basis" to suspect criminal activity. ***State v. Washington***, 2005 WI App 123, ¶16, 284

Wis. 2d 456, 700 N.W.2d 305 (citation omitted).[4] The officer must be able to identify specific and articulable facts, and inferences from those facts, that warrant the stop. ***Young***, 212 Wis. 2d at 423-24. The test is what a reasonable police officer would reasonably suspect in light of his or her training under the totality of the circumstances. ***Id.*** at 424. The officer need not, however, wait until he or she observes illegal behavior or rules out the possibility of innocent behavior. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶9 Luiz-Lorenzo argues that the circuit court should have granted his motion to suppress because Hancock did not have reasonable suspicion to stop him. He contends that he was seized when Hancock ordered him to stop and that Hancock lacked a particularized and objective basis to stop him. He maintains that there were no facts to connect him to the disorderly conduct complaint Hancock was investigating, and Hancock did not observe any other illegal behavior. Luiz-Lorenzo further contends that basing a stop solely on his walking away from Hancock is problematic because he has a right to walk away and need not answer police questions. The State responds that Luiz-Lorenzo was not seized until Hancock put him into an escort hold, and even if he was seized when ordered to stop, the State maintains that Hancock had reasonable suspicion at that time. We agree that Hancock had reasonable suspicion when he ordered Luiz-Lorenzo to stop. As a result, we will assume without deciding that Luiz-Lorenzo was seized when Hancock ordered him to stop.

[4] The standard is the same for both the Wisconsin Constitution and the United States Constitution. ***State v. Harris***, 206 Wis. 2d 243, 258, 557 N.W.2d 245 (1996).

¶10 Hancock identified a number of specific facts supporting his suspicion that Luiz-Lorenzo might be involved in criminal activity. Hancock was already on call investigating a complaint for disorderly conduct. Luiz-Lorenzo was not on a midday smoke break out back. It was 3:00 a.m., after all the businesses had closed, in a poorly lit alley, and Luiz-Lorenzo was all by himself. Hancock was familiar with the area; he had prior contact with criminals there, and he testified that people would use the alley to escape detection from the main road. Given his familiarity with the alley and the late hour, Hancock decided—reasonably so—to investigate further and proceed down the alley. Upon seeing Hancock pull up, Luiz-Lorenzo did not continue to wait for his ride; he immediately headed for the bushes. Hancock testified that, in his opinion, "someone shouldn't be [there] at that time of night." He suspected that Luiz-Lorenzo might be breaking into a business or committing some other crime.

¶11 Far from an unparticularized hunch, Hancock's suspicion was based on the odd hour, the odd location in a poorly lit alley, and Luiz-Lorenzo's odd behavior of immediately walking into the bushes when Hancock pulled up. The test, again, is whether a reasonable officer would reasonably suspect illegal behavior. Given what Hancock observed, his conclusion that criminal activity might be afoot was indeed reasonable.

¶12 Such a stop does not, as Luiz-Lorenzo laments, undermine his right to decline police interaction. Had Luiz-Lorenzo simply refused to answer questions, Hancock would have had much flimsier grounds to detain him. But Luiz-Lorenzo's solitary interlude at 3:00 a.m. in a darkly lit back-alley known for shady behavior, followed by a bee-line to the bushes when the police arrived, is—by any measure—suspicious. It may be true that Hancock did not observe anything illegal, but that is not the standard. The question was whether Hancock's

suspicion was objectively reasonable. We conclude that it was. Accordingly, we affirm the circuit court.

By the Court.—Judgment affirmed.

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