COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1754-CR **Cir. Ct. No. 2013CF1811**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID LIEDERBACH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. David Liederbach appeals a judgment of conviction entered upon his guilty plea to one count of possessing a firearm in violation of a domestic abuse injunction. He claims the circuit court erroneously

denied his motion to suppress evidence that police found during an investigative stop. We disagree and affirm.

BACKGROUND

¶2 Police stopped Liederbach on April 13, 2013, patted him down, and found a revolver. The State charged Liederbach with possessing a firearm while enjoined from doing so. Liederbach moved to suppress the evidence found during the search.

¶3 At the suppression hearing, Milwaukee Police Officers Curtis Pelczynski and Ronald Campos were the only witnesses. They testified that on April 13, 2013, they were in uniform and in a marked squad car patrolling the area from 6th to 27th Streets between Greenfield and Cleveland Avenues. Pelczynski said that during the morning roll call, officers received information that men carrying handguns and wearing dark sweatshirts with the hoods up were committing armed robberies in the area at all times of day. Campos confirmed this testimony, adding that the neighborhood was a high-crime area and had been experiencing "a lot of armed robberies."

¶4 The officers went on to testify that, shortly before 9:00 a.m., they saw two men wearing dark sweatshirts with the hoods up walking westbound on Becher Street. As the squad car approached, one of the men looked back and saw the officers. The men then turned south onto 13th Street. When the police

followed, the men were nowhere in sight. The pedestrians' evasive actions, coupled with the similarity between the appearance of the men and the description of the armed robbery suspects, aroused the officers' suspicions.

¶5 As Pelczynski and Campos continued their patrol and began turning into an alley, they saw one of the men reappear approximately a block away. Pelczynski described how the man "poke[d] his head out" to peek down the street and, after looking south towards the squad car, changed direction by "turn[ing] around and walk[ing] the other way." Thinking the man had emerged from between the houses, Campos got out of the car to see if the men were in the backyards near the alley, but Pelczynski observed one of the men once again on Becher Street. Campos rejoined Pelczynski in the squad car, and the officers caught up with both men. They had again reversed their route and were walking eastbound on Becher Street, again with their hoods up and their hands in their front pockets. The pedestrians' apparent ongoing efforts to avoid encountering the police heightened the officers' suspicions.

¶6 The officers testified that Pelczynski blew the squad car's air horn, and one of the pedestrians stopped walking. The officers got out of the car, and Pelczynski asked the other pedestrian, subsequently identified as Liederbach, to stop and talk. Liederbach did not stop. Campos asked Liederbach to show his hands. He did not comply. Campos repeated the requests for Liederbach to stop and to show his hands "more than twice," and, although Liederbach finally

removed his hands from his pockets, he continued to back away until he backed into a wall. Campos seized Liederbach's arm, stating he was going to frisk Liederbach for weapons. Campos then put Liederbach in handcuffs and patted him down. In his waistband, Campos found a revolver. Liederbach also had a box of ammunition and a knife in his pocket. Campos subsequently arrested Liederbach on an outstanding warrant.

¶7 The circuit court ruled from the bench that the officers had reasonable suspicion to detain the pedestrians and talk to them based on their dress and their evasive actions, coupled with the officers' information about the characteristics of the neighborhood and the recent armed robberies there. The circuit court went on to determine that the frisk was reasonable and denied the motion to suppress. Liederbach pled guilty to feloniously possessing a firearm in violation of an injunction, and he now appeals.[1]

DISCUSSION

¶8 "We review suppression motions using a two-step process. First, we uphold the circuit court's findings of historical fact unless clearly erroneous. Whether those facts require suppression is a question of law reviewed without

[1] In an appeal from a judgment of conviction, we may review a circuit court's order denying a motion to suppress evidence notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

deference to the circuit court." ***State v. Pender***, 2008 WI App 47, ¶8, 308 Wis. 2d 428, 748 N.W.2d 471 (citations omitted).

¶9 The circuit court based its findings of fact here on the officers' testimony. The circuit court did not make an explicit credibility finding but implicitly accepted the officers' testimony as credible. We defer to that finding. *See* ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (reviewing court will accept circuit court's implicit findings on witness credibility). Liederbach does not ask us to do otherwise, conceding that this case involves the application of law to undisputed facts.

¶10 According to Liederbach, the facts reflect that the police conducted an unreasonable investigative stop. "The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." ***State v. Artic***, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. Wisconsin courts typically interpret "Article I, Section 11 of the Wisconsin Constitution in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court." *See* ***State v. Young***, 2006 WI 98, ¶30, 294 Wis. 2d 1, 717 N.W.2d 729.

¶11 Neither the Fourth Amendment nor its counterpart in the Wisconsin Constitution is offended when the police conduct an investigatory stop and briefly detain a person based on reasonable suspicion, grounded in specific articulable

facts and reasonable inferences from those facts, that an individual is or was violating the law. *See* ***State v. Young***, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997). Reasonable suspicion is based on the totality of the circumstances. *See* ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. "'The question of what 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.'" ***Id.*** (citation omitted).

¶12 Liederbach complains here that he was stopped "because the officers saw two men in hoodies, then began looking for suspicious circumstances where none existed." We cannot agree.

¶13 First, the testimony showed that police were on patrol in a neighborhood known to them as a high crime area. "[T]he reputation of an area is a[] factor in the totality of the circumstances equation." *See* ***State v. Allen***, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999).

¶14 Second, the officers had information about an ongoing rash of armed robberies occurring on the neighborhood streets at all times of day and committed by males wearing dark hooded sweatshirts with the hoods up. The male pedestrians here wore exactly the same kind of sweatshirt, worn in exactly the same way, as the men who were committing armed robberies in the area.

Observations of activity consistent with reports of particular kinds of crimes may contribute to the reasonableness of suspicion. *See* ***State v. Meyer***, 216 Wis. 2d 729, 752, 576 N.W.2d 260 (1998) (investigative stop justified where officers draw reasonable inferences from objective observations in light of knowledge about particular kinds of criminal activity).

¶15 Third, the pedestrians changed direction when they saw the officers. The pedestrians promptly turned a corner upon first seeing the police, and when the officers turned that corner themselves, the pedestrians had disappeared. A subject's decision to alter his or her course at the sight of an officer may contribute to an officer's reasonable suspicion. *See* ***State v. Williamson***, 58 Wis. 2d 514, 517-18, 206 N.W.2d 613 (1973).

¶16 Fourth, one of the pedestrians "poked his head out," peeked at the officers, then turned and walked away from them, going north when previously the pedestrians had been going south. "[E]vasion ... can properly give rise to reasonable suspicion when viewed in the totality of the circumstances." ***Young***, 294 Wis. 2d 1, ¶75.

¶17 Fifth, and finally, the training and experience of the police officers involved are relevant factors when considering the reasonableness of the officers' suspicions. *See* ***Allen***, 226 Wis. 2d at 74. While Pelczynski testified he had served for a year as a police officer, Campos testified to sixteen years of

experience as a police officer in Milwaukee, including three-and-a-half years patrolling the same area where the officers were working on the morning of April 13, 2013. Campos testified he was "very familiar with what goes on [in] ... that area," and that he "kn[ew] for quite a while ... in that particular area ... multiple suspects [were] approaching people that are walking on the street and robbing them [at] gun point. They are males. And varies between white/black. And they're always wearing hoodies." In his opinion, formed in light of his years of experience and knowledge of the area, the pedestrians' evasive behavior and resemblance to armed robbery suspects plaguing the neighborhood raised suspicion and warranted attention.

¶18 Under the totality of the circumstances, police had reasonable suspicion to stop the pedestrians when the officers sounded the air horn and said they wanted to talk. Although the pedestrians' behavior up to that point might be interpreted as innocent, "[s]uspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity…. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). Here, the confluence of pedestrians wearing clothing that matched that of men perpetrating armed robberies, the peculiar actions of one pedestrian in peeking out at the officers and then changing course, and both pedestrians' ongoing evasive action at the sight of the police, all supported a

reasonable suspicion that the pedestrians were or had recently engaged in criminal activity. Accordingly, the officers could lawfully conduct an investigative stop.

¶19 Liederbach next asserts that, even if he was lawfully stopped, police improperly conducted a pat-down search, and therefore the evidence discovered during that search should be suppressed. Again, we disagree. An officer may perform a pat-down search for weapons during a lawful investigative stop if the officer possesses an articulable '"reasonable suspicion that a suspect may be armed.'" *See* ***State v. Morgan***, 197 Wis. 2d 200, 209, 539 N.W.2d 887 (1995) (citation omitted). The relevant test is an objective one to determine whether a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety or the safety of others was in danger. *See* ***id.*** The facts satisfy that test here.

¶20 As we have seen, the police stopped Liederbach in a high-crime area. *See* ***id.*** at 211 (perception of area as a high crime area relevant to assessing reasonableness of frisk). The police were aware of ongoing armed robberies in the area conducted by assailants with guns. *See* ***State v. Flynn***, 92 Wis. 2d 427, 435, 285 N.W.2d 710 (1979) (protective frisk allowed when nature of offense under investigation "would seem to indicate a much greater likelihood that the suspect is armed"). Further, Liederbach was uncooperative as the encounter unfolded. He did not stop when asked, and he backed away from the police. A suspect's lack of cooperation is relevant in determining the propriety of a frisk. *See* ***id.***

Additionally, and perhaps most importantly, Liederbach initially disregarded directions to take his hands out of his pockets. "[A] person's returning his hands to his pockets after being asked to remove them by an officer is an important factor for a court to consider under the totality of the circumstances." ***State v. Kyles***, 2004 WI 15, ¶50, 269 Wis. 2d 1, 675 N.W.2d 449. Although a person's refusal to display his or her hands is not a *per se* justification for a protective search, "a circuit court must consider under the totality of the circumstances whether an individual's refusal to comply with an officer's direction to the individual to remove his hands from his pockets is sufficient to trigger reasonable suspicion to conduct a protective search." *See* ***id.***, ¶¶48-49. Here, the circuit court expressly found that Liederbach's lack of cooperation and reluctance to show his hands warranted the cautionary step of a frisk under the totality of the circumstances in this case.

¶21 The circuit court also considered but rejected a suggestion that the officer's decision to handcuff Liederbach undermined the legality of the protective search. The circuit court was correct. "An officer may place a suspect in restraints in order to protect himself during a ... frisk." *See* ***State v. McGill***, 2000 WI 38, ¶38, 234 Wis. 2d 560, 609 N.W.2d 795. The precaution is justified, where, as here, the subject of the stop is reluctant to keep his or her hands visible. *See* ***id.*** Simply put, an officer is entitled to conduct an investigation without fear of violence. *See* ***id.***, ¶39.

¶22 Because the police reasonably stopped Liederbach and lawfully frisked him, we conclude that the circuit court correctly denied his suppression motion.[2] Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] The parties also discuss whether the circuit court could have properly denied suppression on either of two theories: (1) Liederbach's refusal to stop when asked constituted the crime of obstructing an officer in violation of WIS. STAT. § 946.41(1), thereby justifying a search incident to arrest, *see* ***State v. Sykes***, 2005 WI 48, ¶15, 279 Wis. 2d 742, 695 N.W.2d 277; or (2) the evidence would inevitably have been discovered when Liederbach was arrested on an outstanding warrant, *see* ***State v. Avery***, 2011 WI App 124, ¶28, 337 Wis. 2d 351, 804 N.W.2d 216. Because cases should be decided on the narrowest possible grounds, we need not and do not consider these potential bases for affirmance. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997). For the same reason, we do not consider the applicability, if any, of ***Utah v. Strieff***, No. 14-1373 (U.S. June 20, 2016), released after the parties briefed this matter. *See* ***id.*** (discussing when and how an outstanding arrest warrant discovered during an unjustified police stop permits admission of evidence found during the encounter).