COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2307-CR **Cir. Ct. No. 2014CF4480**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL K. DIXON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS J. McADAMS, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Samuel Dixon appeals a judgment convicting him of felon in possession of a firearm. Dixon challenges the circuit court's denial of his suppression motion. Specifically, Dixon argues that he was unconstitutionally

seized when a police officer detained him without reasonable suspicion. We agree with Dixon that reasonable suspicion was lacking and, therefore, reverse and remand for the circuit court to grant suppression of evidence resulting from the unlawful seizure.

Background

¶2 The relevant facts are few, and we recite them in a light most favorable to the circuit court's decision.

¶3 The sole witness at the suppression hearing was the officer. The circuit court made factual findings, and we rely on those findings as well as the officer's testimony in setting forth the facts.

¶4 During the early morning hours, about 5:50 a.m., the officer was in an unmarked squad car patrolling an approximately eight-by-five block area near the intersection of North 29th Street and Lisbon Avenue in the City of Milwaukee. Over the previous month or so, police had received several complaints regarding prostitution-related activity occurring in that area.

¶5 The officer drove past a man and a woman who were walking near a closed liquor store. The particular liquor store area was associated with some of the prior complaints of prostitution-related activity.

¶6 The officer circled back in his car, parked about half a block away from the man and the woman, and observed them for about five minutes. The officer described the man as "well dressed [and] clean cut." The officer did not describe the appearance or apparent age of the woman, other than to say, in the officer's words, that she was a "thicker black female." The officer characterized and described their behavior during this five-minute period as: "just hang[ing] out

on the corner"; "[j]ust walk[ing] back and forth … [p]robably a good 3, 4 times"; "just walking and just talking"; "engaging in conversation and just walking and talking and like circular motions"; "chitchatting"; and "smiling." There was no other evidence about their behavior at that time.

¶7 The officer left his parking spot and pulled his unmarked squad car partially onto the sidewalk so that one of the car's front tires was, in the officer's words, "maybe 2 feet" from the man. As the officer was pulling up, or as soon as he came to a stop, he activated the car's red and blue lights. The man, who turned out to be Dixon, remained in place. The officer testified that Dixon "just stood there."

¶8 The officer exited the squad car. He then observed Dixon trying to reach into or toward one of Dixon's back pants pockets and repeatedly ordered Dixon not to reach into his pocket.[1] Dixon did not comply with the officer's commands not to reach into his pocket. The officer then ordered Dixon to put his hands up and turn around, and Dixon complied with both commands. Subsequent investigation led to the discovery that Dixon had a gun and that he was a felon.

¶9 In denying Dixon's suppression motion, the circuit court rejected Dixon's argument that he was unconstitutionally seized. We reference additional facts as needed below.

[1] The officer's testimony suggests that Dixon's reaching behavior and the officer's repeated orders to stop reaching occurred in a very short but non-specified period of time. Although that testimony was ambiguous as to when the officer observed Dixon reaching, the circuit court resolved the ambiguity by finding that Dixon reached for his pocket after the officer exited the squad, and the State on appeal does not challenge that finding.

Discussion

¶10 "When reviewing a trial court's ruling on a motion to suppress evidence, we will uphold the trial court's factual findings unless they are clearly erroneous." ***State v. Washington***, 2005 WI App 123, ¶11, 284 Wis. 2d 456, 700 N.W.2d 305. "We independently decide, however, whether the facts establish that a particular search or seizure occurred and, if so, whether it violated constitutional standards." ***Id.*** "Accordingly, what we must determine … is: (1) when [the defendant] was seized, and (2) whether the seizure was reasonable—whether the [police] had reasonable suspicion ...." ***Id.***

¶11 Dixon argues that he was seized when the officer pulled the squad car partially onto the sidewalk two feet from Dixon and activated the squad car's red and blue lights. Dixon further argues that the officer lacked reasonable suspicion of illegal activity at that time. Therefore, Dixon argues, the circuit court should have suppressed evidence resulting from the seizure. We agree with these arguments.

A. When Dixon Was Seized

¶12 Our supreme court has recognized that, under ***United States v. Mendenhall***, 446 U.S. 544 (1980), a seizure occurs when the police restrain a suspect's liberty by using physical force or a "show of authority" such that a reasonable person would not feel free to leave:

> A seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." ***Mendenhall***, 446 U.S. at 552 (quoting ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968)). As Justice Stewart stated in ***Mendenhall***, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the

> incident, a reasonable person would have believed that he was not free to leave." ***Id.*** at 554 (footnote omitted).

County of Grant v. Vogt, 2014 WI 76, ¶20, 356 Wis. 2d 343, 850 N.W.2d 253.

¶13 Dixon argues that "[n]o reasonable person would feel free to leave [when] a police officer drove his squad car up on the sidewalk, stopped two feet from the person, and then activated the car's red and blue emergency lights." We agree, at least barring additional circumstances, such as circumstances supporting a reasonable belief by the person that the police actions were directed at someone else or were for safety or traffic reasons. Here, nothing in the officer's testimony suggested that such additional circumstances were present.

¶14 Implicitly conceding the point, the State does not develop an argument that Dixon should have felt free to leave when the officer pulled the squad car partially onto the sidewalk so close to Dixon and activated the squad car's red and blue lights. Rather, the State focuses on Dixon's subsequent failure to comply with the officer's first order that Dixon stop reaching for his back pants pocket. The State argues that, under ***California v. Hodari D.***, 499 U.S. 621 (1991), and ***State v. Young***, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729, the ***Mendenhall*** free-to-leave test does not apply when a suspect refuses to submit to a police show of authority and Dixon's failure to comply with the officer's order to stop reaching was such a refusal to submit. The State argues that, under ***Hodari D.*** and ***Young***, Dixon was not seized until he submitted to the officer's order that he put his hands up and turn around.

¶15 We are not persuaded by the State's ***Hodari D.*** argument. To begin, ***Hodari D.*** and ***Young*** involved suspects who fled from an officer. However, that is not the reason we reject the State's ***Hodari D.*** argument. Whatever reasoning

there is in ***Hodari D.*** or ***Young*** that might or might not justify extending ***Hodari D.*** to non-flight situations, what we have here is a suspect who *did* submit to a police show of authority. Specifically, Dixon stayed in place when the officer pulled his squad car up partially onto the sidewalk two feet from Dixon and activated the squad car's red and blue lights. As noted, the officer testified that Dixon "just stood there." Dixon's subsequent reaching toward his back pocket in apparent disobedience of the officer's order not to reach would have justified a protective frisk or further investigation, but those subsequent events do not negate the seizure that already occurred under ***Mendenhall***. *See* ***Young***, 294 Wis. 2d 1, ¶40 n.13 ("[A] court does not reach the ***Hodari D.*** test until a defendant refuses to submit to a police show of authority.").

B. Reasonable Suspicion

¶16 We turn to Dixon's argument that the officer lacked reasonable suspicion to seize Dixon when the officer pulled the squad car up to Dixon and activated the squad car's red and blue lights. Specifically, the parties dispute whether the officer reasonably suspected that Dixon was involved in prostitution-related activity, with Dixon in the role of either "john" or "pimp."

¶17 "When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the circumstances." ***Washington***, 284 Wis. 2d 456, ¶16. "[A]n officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop." ***Id.*** However, there must be "a particularized and objective basis" for suspecting illegal activity. *See* ***id.*** (quoted sources omitted). Reasonable suspicion cannot be

based on an "inchoate and unparticularized suspicion or hunch." ***Id.*** (quoted source and internal quotation marks omitted).

¶18 Dixon acknowledges that he and the woman were in a "high prostitution" area, but, Dixon argues, there was nothing else to suggest that they were engaged in prostitution-related activity. We agree. There was nothing to suggest that the officer recognized Dixon or the woman as being involved in prostitution previously; nothing to suggest that they matched the description of anyone involved in prostitution; nothing to suggest that the woman beckoned to Dixon or talked to any other man; nothing to suggest that the woman's age or appearance was what police thought was typical for prostitutes in the area; and nothing to suggest that the two had exchanged money, drugs, or any other item. Notably, the officer did not provide information suggesting that few other people were out and about in this area, so that the mere presence of the two was somehow suspicious or unusual. We are not talking about 3, 4, or even 5:00 in the morning, but rather just prior to 6:00 when, obviously, people do start to move about for various reasons. Simply put, nothing in the officer's testimony objectively connected Dixon's and the woman's behaviors or the time of day to prostitution-related activity.

¶19 We disagree with the State's assertion on appeal that the officer's testimony supported a finding that there were prior complaints of prostitution occurring at this "exact time." At most, the pertinent testimony might be read to suggest that the officer was sometimes directed to start his shift at 3:00 or 4:00 a.m. instead of 7:00 a.m. because 7:00 a.m. was too late to patrol for prostitution-related activity. Indeed, the officer testified that, when he was assigned to patrol for such activity, it was "not a specific time frame" but was "when we felt that the prostitutes were out there." Nothing in the officer's testimony supports a finding

that prostitution activity is higher around 6:00 a.m. than it is at other times of the day.

¶20 Without more, we fail to discern why these circumstances support a reasonable inference that Dixon was engaged in offering to pay the woman for sex or was engaged in "pimping." *Compare* ***id.***, ¶¶2, 17 (no reasonable suspicion when police observed suspect, who they recognized from prior contacts, standing near a vacant house that the police were investigating in response to a complaint regarding loitering and drug sales).

¶21 Thus, boiled down, at best from the State's point of view, given that the officer was on the lookout for prostitution activity, the officer had cause to watch the couple for a time to see whether they engaged in an activity that might be associated with prostitution. The officer did that, but, so far as the record discloses, the officer did not observe anything except two people, for a relatively short time, walking back and forth and talking in an apparently friendly manner. If the officer made incriminating observations about the situation or interactions, he did not share them with the circuit court. In this respect, Dixon's case brings to mind others in which courts concluded that reasonable suspicion was lacking when the facts consisted of little to nothing more than innocuous behaviors taking place in "high crime" areas. *See* ***Brown v. Texas***, 443 U.S. 47, 48-50, 52 (1979); ***State v. Gordon***, 2014 WI App 44, ¶¶3-5, 9, 14-15, 353 Wis. 2d 468, 846 N.W.2d 483; ***State v. Young***, 212 Wis. 2d 417, 419-23, 429-30, 433, 569 N.W.2d 84 (Ct. App. 1997). As we stated in ***Gordon***: "[T]he routine mantra of 'high crime area' has the tendency to condemn a whole population to police intrusion that, with the same additional facts, would not happen in other parts of our community." ***Gordon***, 353 Wis. 2d 468, ¶15. The "circumstances must not be so general that

they risk sweeping into valid law-enforcement concerns persons on whom the requisite individualized suspicion has not focused." ***Id.***, ¶12.

¶22 In light of this case law, the State, sensibly, does not argue that reasonable suspicion would generally be present when a man and a woman are walking around and talking in a "high prostitution" area. Rather, the State appears to take the position that there were two additional suspicious factors present here.

¶23 First, the State points out that, as the circuit court found, the liquor store nearby had "no loitering" signs posted. We fail to see how such signs add to suspicion of prostitution-related activity. And, we note, the circuit court did not conclude, and the State does not argue, that the police had reasonable suspicion to stop Dixon for loitering.

¶24 Second, the State points to the officer's many years of experience on the police force. However, the officer never explained why his experience told him that anything he observed was more suspicious than might be perceived by someone without his experience. The State might point to the officer's testimony that Dixon was "well dressed, clean cut, and we had been having complaints that, you know, guys in the area had been trying to pick up young girls and have them prostitute." But the officer did no more than suggest that there is significance to Dixon's appearance. He did not provide experience-based information supporting an inculpatory inference, and the circuit court did not appear to rely on the factor.

¶25 In sum, taking all of the circumstances together, we conclude that the facts here fall short of reasonable suspicion of prostitution-related activity; rather, the circumstances are more accurately characterized as supporting an inchoate "hunch" that Dixon and the woman were engaged in such activity based largely on their location in a "high prostitution" area.

Conclusion

¶26 For the reasons stated above, we reverse the judgment of conviction and remand for further 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)5. (2013-14).