COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP959-CR **Cir. Ct. No. 2013CF3731**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC DURRAN HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Judgment reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Eric Durran Howard appeals a judgment of conviction for one count of possession of a firearm by a felon. Howard argues that the police illegally seized and subsequently frisked him. He also argues that his motion to suppress the gun evidence on which his conviction was based should have been granted. He argues that there was no probable cause or reasonable suspicion to detain him, and there was no particularized suspicion to justify a pat-down.

¶2 In order to resolve the question of whether police had reasonable suspicion of criminal activity that justified the seizure and search of Howard, we need to know what police saw on the stoop and inside the house, and what they did with Howard and why. Because the trial court did not make clear its factual findings about what happened on the stoop and whom to believe, this court cannot reach the legal question of the lawfulness of the seizure and search of Howard. We reverse the judgment and remand for further proceedings in which the trial court is to make the findings of fact and articulate how the facts support a legal conclusion on the validity of this seizure and search.

BACKGROUND

¶3 Police encountered Howard in the course of an unscheduled home visit of Michael Moss, who was on probation. Police seized Howard and found a gun in his back pocket when they frisked him. Howard was charged with one count of felon in possession of a firearm. At the suppression hearing, there was testimony from Howard; from Trina Hill, an eyewitness; and from Officer Christopher McBride, an officer who was at the scene.

¶4 The testimony at the hearing presented two different versions of what occurred on August 9, 2013, during the encounter, which occurred at Hill's

residence on 24th and Hopkins, and involved three officers and Moss's probation agent.

¶5 Howard's testimony was that he came to be at the residence because he had brought food to his grandmother's house, and she was not home. He then was invited by Hill, a family friend who lived across the street, to come in and warm the plate of food in her microwave. He testified that he was inside the house when the police arrived. He testified that he did not see the police until they entered the residence. He testified that he was warming up the food when an officer came in and told him to put his hands up. He testified that another officer grabbed him by the arm and led him outside. He said that, contrary to the officer's representations, he did not trip but that the officer took him down to the ground and handcuffed him.

¶6 Hill's testimony was also that Howard was there to warm up food and was inside the house at the time of the police arrival. She testified that Moss, who is her grandson, was standing in the doorway when police arrived.

¶7 Officer McBride testified that when police approached the residence, he observed three people in the doorway. Hill was seated, and her grandson Moss was standing near the third person. He testified that it appeared that Moss handed something to the third person before noticing the police arriving. Based on his experience, McBride testified he believed that it was a hand-to-hand drug transaction. He testified that when Moss saw the police arriving, he looked alarmed and threw items, later determined to be a cell phone and currency, at Hill. He testified that the third person "fled into the residence" at that point and he believed that person to be Howard because Howard was the only person found in the house. He testified that when the officer who brought Howard out of the house

attempted to pat him down for weapons, Howard "attempted to flee into the street and fell on the ground." As Howard fell, McBride saw a gun in Howard's back pocket.

¶8 The trial court denied the suppression motion. The trial court specifically found Howard's testimony "credible in that he was, in fact, apprehended in the home." The trial court did not explain further what it meant about the part of Howard's testimony that was credible. While the trial court summarized how McBride had described the events, the trial court did not state this as findings of fact or rule on McBride's credibility, except that it found the officer's testimony credible "with respect to what occurred on the street." The trial court did not mention any findings about what happened on the stoop, specifically. It is not made clear whether the trial court was repeating and summarizing McBride's version or was separately making factual findings.

DISCUSSION

Standard of review.

¶9 Trial courts are required to make findings of fact and conclusions of law in support of their decisions on motions to suppress. ***State v. Fillyaw***, 104 Wis. 2d 700, 726, 312 N.W.2d 795 (1981). This court is precluded from making findings of fact where the facts are in dispute. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). If the seizure of Howard and the subsequent search were based on an invalid investigatory stop, the evidence derived from the search must be excluded. *See* ***State v. Washington***, 2005 WI App 123, ¶19, 284 Wis. 2d 456, 700 N.W.2d 305.

¶10 To execute a valid investigatory stop, ***Terry v. Ohio***, 392 U.S. 1, 30 (1968), and its progeny require that a law enforcement officer reasonably suspect,

in light of his or her experience, that some kind of criminal activity has taken place or is taking place. *See* ***Terry***, 392 U.S. at 30; *see also* WIS. STAT. § 968.24 (2015-16).[1] Such reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry***, 392 U.S. at 21. These facts must be "judged against an objective standard: would the facts available to the officer at the moment of the seizure ... 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" ***Id.*** at 21-22 (citation omitted).

The record contains disputed facts without factual findings.

¶11 There was conflicting testimony about the circumstances under which Howard came to be face down on the ground. Here, the trial court failed to make any findings of fact regarding the disputed facts of whether Howard was on the stoop when police arrived, whether he had something put in his hand by Moss, and most importantly, whether Howard *fled* into the house or was already inside.

¶12 Howard argues to this court that the most reasonable way to read the trial court's ruling is that it was finding that Howard was credible as to his testimony that he was inside the house, not on the stoop, and that requires the legal conclusion that there was no reasonable suspicion to support the seizure as required by ***Terry***.

¶13 The State argues that the most reasonable way to read the trial court's ruling is that McBride's testimony was credible as to where Howard was at the time police arrived, i.e. he must have been the third person on the stoop who

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

received a hand-off and "fled" into the house. If this testimony is credited, the State argues, then it is reasonable to infer that Howard could have a gun. These articulable facts would then satisfy the ***Terry*** analysis.

¶14 The trial court found:

> The court at this time finds Mr. Howard's testimony at least credible in that he was in fact apprehended in the home. The issue becomes what was -- what took place out on the stoop and there are various versions as to what happened.
>
> Mr. Howard's version is that the police essentially took him down. Officer McBride's version is that Mr. Howard tried to break free and flee.
>
> This court finds that the testimony of Officer McBride with respect to what occurred on the street given the chaotic scene in terms of Mr. Howard being apprehended in the house and brought out is credible.

¶15 Because "on the street" does not clarify whether the trial court was referring to the stoop part of the incident, or the apprehension part, or both, we are unable to complete our review.

¶16 Where material facts are in dispute and the circuit court has made no findings of fact, "the only appropriate course … is to remand the cause to the trial court for the necessary findings." ***Wurtz***, 97 Wis. 2d at 108.

¶17 We therefore reverse the judgment and remand, directing that the trial court make the necessary findings of fact and legal conclusion as to the validity of the seizure and search of Howard, and consequently whether the gun evidence is required to be suppressed. *See* ***Washington***, 284 Wis. 2d 456, ¶10.

By the Court.—Judgment reversed and cause remanded with directions.

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