COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP234-CR **Cir. Ct. No. 2014CM2916**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVAIL L. LEWIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. HANRAHAN, Judge. *Reversed and cause remanded with directions.*

¶1 KESSLER, J.[1] On July 27, 2014, Travail L. Lewis was charged with one count of misdemeanor carrying a concealed weapon. The charges

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

followed an investigatory stop and seizure by Milwaukee police officers. Lewis filed a motion to suppress evidence recovered as a result of the seizure. The motion alleged that on July 24, 2014, Lewis was walking in an alleyway in the City of Milwaukee when he was stopped by police officers investigating a gunshot complaint. The motion alleged that officers observed Lewis "'holding his waistband'" a few blocks from where the complaint was made. Officers yelled for Lewis to stop, Lewis complied, and officers arrested Lewis.

¶2 At a hearing on the motion, the circuit court heard testimony from Milwaukee Police Officer Robert Crawley. Crawley testified that on the afternoon of July 24, 2014, he was dispatched to the area of 4877 West Fond du Lac Avenue to investigate shots fired in the area. Crawley was looking for multiple "actors that were fleeing southbound." Crawley and his partner observed Lewis walking in an alley in the area. The officers saw Lewis walking from behind and noticed that Lewis was holding the waistband of his pants. Officers told Lewis to stop and show his hands. Crawley stated that the position of Lewis's hands suggested that Lewis might have been "trying to hide an object." Lewis complied with the officers' demands. Both officers drew their guns. Lewis told the officers that he was carrying a concealed weapon and did not have a permit. Crawley admitted that he did not see a weapon protruding from the top of Lewis's pants, nor did he see a holster in Lewis's waistband. Crawley also testified that Lewis did not appear to have been running. Crawley stated that one of the suspects was described as a black male wearing red shorts and a white t-shirt. The record lacks a description of the other two suspects. Lewis's clothing did not match that of the described suspect. Crawley did not know that Lewis was a felon when he and his partner ordered Lewis to stop. Crawley also admitted that once Lewis was told to show his hands, Lewis was not free to leave.

¶3 The circuit court denied Lewis's motion, finding that officers had reasonable suspicion to stop Lewis based on the manner in which Lewis was walking and Lewis's proximity to the scene of where the shots were allegedly fired. Lewis pled guilty to carrying a concealed weapon in violation of WIS. STAT. § 941.23(2).[2] This appeal follows.[3]

DISCUSSION

¶4 On appeal, Lewis argues that the circuit court erred in denying his suppression motion because "officers violated [his] Fourth Amendment rights when they seized him at gunpoint without any objectively reasonable basis to believe he was engaged in any criminal activity." (Some capitalization omitted.) Relying on ***State v. Gordon***, 2014 WI App 44, 353 Wis. 2d 468, 846 N.W.2d 483, the State concedes that officers lacked reasonable suspicion to stop Lewis. We agree with both parties and reverse the circuit court.

¶5 The determination of reasonable suspicion for an investigatory stop is a question of constitutional fact. ***State v. Powers***, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. Findings of fact are upheld unless clearly erroneous, but we review the determination of reasonable suspicion *de novo*. *See* ***id.*** At the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the

[2] Lewis filed a reconsideration motion requesting that the circuit court reconsider its denial of Lewis's suppression motion. The circuit court declined to address the merits of Lewis's motion, finding that the standards for reconsideration had not been met.

[3] Ordinarily, a guilty plea waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). A narrowly crafted exception to this rule exists in WIS. STAT. § 971.31(10), which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea.

officer to believe that criminal activity is afoot. ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). An "inchoate and unparticularized suspicion or 'hunch'... will not suffice." ***Id.***, (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968); quotation marks omitted; ellipses in original). When determining whether a set of facts gives rise to reasonable suspicion, "courts should apply a commonsense approach to strike a balance between the interests of the individual being stopped to be free from unnecessary or unduly intrusive searches and seizures, and the interests of the State to effectively prevent, detect, and investigate crimes." ***State v. Rutzinski***, 2001 WI 22, ¶15, 241 Wis. 2d 729, 623 N.W.2d 516.

¶6 We agree with Lewis and the State that Lewis's stop was not based on specific and articulable facts sufficient to raise an inference that Lewis had engaged in wrongful activity. As the State correctly notes, the facts of this case mirror the facts of ***Gordon***. In that case, Patrick Gordon was walking with his friends in a high crime area, when officers noticed Gordon do a "security adjustment." ***Id.***, 353 Wis. 2d 468, ¶4. In essence, Gordon placed his hand over his waistband. ***Id.*** At Gordon's suppression hearing, the arresting officer admitted that people often place their hands over their waistbands to not only make sure that their weapons are secure, but also to check that their phones and wallets are in place. ***Id.*** The arresting officer admitted that the officers had no information about Gordon prior to the stop and had no reason to suspect that Gordon had done anything wrong, but that Gordon did a "'security adjustment'" after seeing the squad car and looked too young to be carrying a concealed weapon. ***Id.***, ¶¶4-5. The circuit court denied Gordon's suppression motion, stating that Gordon was present in a high crime area, patted his waistband after noticing a squad car, and looked too young to legally carry a concealed weapon. ***Id.***, ¶9.

¶7 We concluded that the officers lacked reasonable suspicion to stop Gordon. We concluded: "[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." ***Id.***, ¶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. We also concluded that Gordon's "security adjustment" was insufficient to justify an investigatory stop on its own because the "most innocent of any nefarious purpose, may occasionally pat the outside of their clothing to ensure that they have not lost their possessions. Indeed, this makes even more sense in a high crime area than it might in other less crime-ridden parts of our community." ***Id.***, ¶17.

¶8 As the State concedes, officers stopped Lewis simply based on the fact that he was walking in a high crime area shortly after receiving an alert of "shots fired" and that Lewis touched his waistband. Lewis was not running, was not looking over his shoulder for police, and did not match the description of the one suspect police had information about. Under our holding in ***Gordon***, the facts of this case do not justify an investigatory stop. We agree with Lewis and the State that Lewis's motion to suppress should have been granted. Accordingly, we reverse the circuit court and remand with directions to suppress any evidence obtained pursuant to the investigatory stop.

By the Court—Reversed and cause remanded with directions.

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