COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP274-CR **Cir. Ct. No. 2014CF82**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HAKEEM DONTRAIL HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Hakeem Dontrail Harris appeals a judgment of conviction for possession of a firearm by a felon. He argues the seizure that led to the discovery of the gun was unlawful. First, he argues that the vehicle's location within fifteen feet of a crosswalk is insufficient absent additional facts to provide reasonable suspicion that it was illegally parked. Second, he argues that even if the seizure had a lawful basis, the manner in which the investigatory stop was conducted constituted a Fourth Amendment violation—that it was overly intrusive under the circumstances—such that the evidence obtained must be suppressed. We affirm.

BACKGROUND

¶2 The gun evidence that Harris seeks to have suppressed was discovered during a search that occurred as police investigated a possible parking violation. The following facts are taken from testimony at the pretrial suppression hearing and at trial.

¶3 Five officers were traveling together in two marked squads as is standard police practice for patrols in a high-crime area. As the squads approached an intersection, police saw a vehicle parked seven to ten feet away from a crosswalk; the vehicle was running (its exhaust was visible because the weather was extremely cold) and nobody was in the driver's seat. One squad pulled up next to the vehicle and one pulled up behind it. The officers testified that the reason they stopped was that the vehicle was parked too close to the crosswalk. WISCONSIN STAT. § 346.53 (2015-16)[1] prohibits "stop[ping] or

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

leav[ing] any vehicle standing" in several places, including "[c]loser than 15 feet to the near limits of a crosswalk." The statute has an exception, permitting parking near a crosswalk "temporarily for the purpose of and while actually engaged in loading or unloading or in receiving or discharging passengers and while the vehicle is attended by a licensed operator so that it may promptly be moved in case of an emergency or to avoid obstruction of traffic[.]" WIS. STAT. § 346.53.

¶4 The officers testified that the following happened within the space of about ten seconds.

- Officer Kaiser approached the vehicle and opened the driver's door to speak with the front passenger. At that point he saw Harris, who was in the second row seat behind the passenger, turn toward the door and reach between the seat and the door. When Kaiser saw these movements, he yelled at Harris to show his hands.

- Officer Molina was in the squad that parked behind the vehicle. He approached the vehicle from the rear on the passenger side, saw Harris dip his right shoulder down, and immediately guessed that Harris might be arming himself. He heard Kaiser yell, "Show your hands!" Molina then approached the rear passenger-side door, intending to surprise Harris. He heard an officer yelling "C1" at the same time he was opening the door. At that point, he saw a firearm between the seat and the rear passenger door. He ordered Harris out and placed him in handcuffs.

- As a third officer, Officer Conway, was approaching the driver's side rear door, he saw the man sitting beside that door with a "large black handgun" and he saw the man "basically trying to hide" the gun under the driver's

> seat in front of him. Conway immediately opened the door, ordered the man out, and saw the gun on the floor underneath the driver's seat in the place toward which the officer had seen him reaching. As he was placing that man in handcuffs, Conway repeatedly yelled, "C1, C1, C1," a reference to an adult arrest, to signal the other officers to arrest all of the occupants of the vehicle.

¶5 Harris was charged with one count of possession of a firearm by a felon.

Motion to suppress evidence.

¶6 Harris moved to suppress the evidence obtained as a result of the search. The court found that the vehicle was parked between seven and ten feet from the crosswalk. The circuit court found that "a parking violation did occur." It therefore concluded that officers had "the right to approach and investigate[.]" The circuit court denied the motion to suppress.

Conviction, sentencing, and appeal.

¶7 The jury convicted Harris. The trial court imposed a six-year sentence, bifurcated as three years of initial confinement and three years of extended supervision. This appeal follows.

DISCUSSION

I. Standard of review and relevant law.

¶8 Harris's first argument concerns the lawfulness of the seizure of the vehicle and its occupants. Whether a person has been seized is a question of constitutional fact. ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646

N.W.2d 834. In reviewing a motion to suppress, we employ a two-step analysis. ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. We will uphold the circuit court's findings of fact unless clearly erroneous. ***Id.*** Whether those facts constitute reasonable suspicion is a question of law we review *de novo*. ***Id.***

¶9 "The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. For Fourth Amendment purposes, police-citizen contact is not a seizure until an officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen[.]" ***Id.*** (quoting ***Williams***, 255 Wis. 2d 1, ¶20).

¶10 One type of seizure is an investigative or ***Terry***[2] stop, which "usually involves only temporary questioning and thus constitutes only a minor infringement on personal liberty." *See* ***Young***, 294 Wis. 2d 1, ¶20. "An investigatory stop is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." ***Id.*** "An investigatory stop, though a seizure, allows police officers to briefly 'detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.'" ***Id.*** (citation omitted). "Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." ***Id.***, ¶21. "On the other

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

hand, 'police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.'" ***Id.*** (citation omitted).

¶11 An officer may conduct an investigatory stop of a vehicle based on a reasonable suspicion of a non-traffic civil forfeiture offense. *See* ***State v. Iverson***, 2015 WI 101, ¶¶54-55, 365 Wis. 2d 302, 871 N.W.2d 661. "In at least some circumstances, reasonable suspicion that a non-traffic-related law has been broken may also justify a traffic stop." ***Id.***, ¶52 (citation omitted). The reason is that "the public interest in safe roads" outweighs the minimal burden of "brief" traffic stops. ***Id.*** (citation omitted).

¶12 The test for 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 or experience[?]" ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶13 Harris's second argument is premised on language from ***Florida v. Royer***, 460 U.S. 491 (1983), stating that a seizure is reasonable for Fourth Amendment purposes only when it is conducted with "the least intrusive means reasonably available[.]" ***Id.*** at 500. The conclusion in ***Royer*** was as follows:

> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case…. [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

Id.

II. The seizure of the vehicle was lawful based on the observation of the vehicle being seven to ten feet from the crosswalk.

¶14 We first note that the State accepts Harris's assertion that he was seized "when the squad cars parked alongside and behind the [vehicle] and illuminated it with spot lamps."[3] The parties disagree about whether the officers had "specific and articulable facts that warrant a reasonable belief that criminal activity is afoot" before the seizure. *See* ***Young***, 294 Wis. 2d 1, ¶21.

¶15 Harris explains that he "is not contesting the police's right to seize the occupants of the [vehicle] for this parking infraction" but rather is arguing that reasonable suspicion did not exist at the moment the officers saw the vehicle parked too close to the crosswalk and that they acted before they had enough facts to support reasonable suspicion.[4] Specifically, he argues that the testimony at the suppression hearing established "objective facts [that] support the reasonable inference that the vehicle was temporarily standing pursuant to WIS. STAT. § 346.53[.]" He argues that there are no "reasonable inferences from the facts in the record that the [vehicle] was violating the law."

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[3] ***United States v. Mendenhall***, 446 U.S. 544 (1980), sets forth the test for a seizure for purposes of the Fourth Amendment: "a person has been 'seized' … 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.

[4] Both parties draw our attention to the fact that one of the other occupants of the vehicle, Randy Johnson, was charged in federal court for illegally possessing a firearm. He challenged the search there on the same grounds as Harris. His motion to suppress was denied, and on appeal, the Seventh Circuit affirmed. *See* ***U.S. v. Johnson***, 823 F.3d 408 (7th Cir. 2016). Johnson's petition for a rehearing *en banc* was granted. After briefing in Harris's case was complete before this court, the Seventh Circuit issued its decision, again affirming the denial of Johnson's suppression motion on the grounds that reasonable suspicion supported the stop because the vehicle was parked within fifteen feet of the crosswalk. *See* ***U.S. v. Johnson***, 874 F.3d 571 (7th Cir. 2017).

¶16 Harris's argument is based on the premise that the elements of a violation of law must all be present for purposes of reasonable inferences—and that "specific and articulable facts" supporting only one element of an offense cannot be the basis for a reasonable inference. It would follow that it cannot provide reasonable suspicion for an investigative stop for that offense.

¶17 That premise is flawed. There is no legal authority supporting it. This court has stated that an officer's brief stop—that is, a seizure—is "entirely reasonable" when it is done "in order to preserve the status quo" *until more information can be obtained*. *See* ***State v. Begicevic***, 2004 WI App 57, ¶7, 270 Wis. 2d 675, 678 N.W.2d 293. Further, it is "proper" for an officer "to investigate to determine if she could confirm her observations" of what might or might not have been unlawful conduct. ***Id.*** In short, "sort[ing] out the ambiguity" in such a situation is the point of an investigatory stop. ***Id.***

¶18 The circuit court made a factual finding that the vehicle was parked seven to ten feet from the crosswalk. Harris does not challenge that finding as erroneous. That fact is sufficient for an investigatory stop to determine whether the vehicle's driver was violating WIS. STAT. § 346.53. There is no basis in law that obligates officers to "put in the effort of determining whether the [vehicle] was in fact parked, or if it was legally standing, while letting occupants in or out, or loading or unloading," as Harris argues.

III. Opening the doors of the vehicle was not an unreasonable intrusion that constituted a Fourth Amendment violation.

¶19 Harris argues in the alternative that even if the vehicle's proximity to the crosswalk provided reasonable suspicion for the seizure of the vehicle, the manner of the investigation violated his Fourth Amendment rights because it was

"highly intrusive, fast-paced, and overwhelming" and the intrusion was disproportionate to the government's legitimate interests in enforcement of parking violations. For this proposition, he cites to the language of ***Royer*** that police must use the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *See* ***Royer***, 460 U.S. at 500. Harris describes the means used in this case as follows: "Two marked squads pulled up on the [vehicle], shining squad spotlights into it from two directions; five officers sprang out of the squads, surrounded the [vehicle], began shouting orders for occupants to put their hands up, and opening car doors."

¶20 As the State points out, ***Royer*** also notes that "[t]he scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case." ***Id.*** It is well settled that in the context of an investigatory stop of a vehicle—***Royer*** was not a vehicle search case[5]—an order to the driver to get out of the vehicle after a lawful investigatory stop is not unreasonably intrusive for purposes of applying the Fourth Amendment. In ***Pennsylvania v. Mimms***, 434 U.S. 106 (1977), the United States Supreme Court explicitly held that officer safety outweighed other considerations in this calculation:

> [W]e are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to

[5] "In [***Florida v. Royer***], two officers stopped Royer in an airport because he fit the profile of a drug courier." ***State v. Vorburger***, 2002 WI 105, ¶75, 255 Wis. 2d 537, 648 N.W.2d 829 (citation omitted). "They asked him for identification and his airline ticket, and when he gave them his driver's license and ticket, they took him into a police interrogation room 40 feet away for questioning." ***Id.*** "They retrieved his luggage without consent, then searched his suitcases with consent and found drugs." ***Id.*** "Royer's detention lasted approximately 15 minutes." ***Id.*** "[The Supreme Court] concluded that, '[a]s a practical matter, Royer was under arrest.'" ***Id.***, ¶76.

> get out of the car. We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed.… Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity." What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Mimms, 434 U.S. at 111 (citation and one set of quotation marks omitted). In ***Maryland v. Wilson***, 519 U.S. 408, 413-15 (1997), the Court applied the same rule to passengers.

¶21 As for Harris's argument that police opening the door to investigate was too intrusive, the State points out that opening a car door is nothing more than what has to happen when police order passengers out of a vehicle; it is an action that is a part of the conduct explicitly accepted by the court in the context of a ***Terry*** stop of a vehicle. We agree. The holdings of ***Mimms*** and ***Wilson*** compel the conclusion that the intrusion of opening the car doors is not so intrusive that it violates the Fourth Amendment's reasonableness requirement because it is *de minimus* and justifiable for officer safety reasons. Additionally, as the testimony here established, as Officer Kaiser opened the door to investigate, Officer Molina was approaching and saw Harris dip down and suspected he was arming himself. Molina's observations occurred before he opened the door. Under well-established ***Terry*** principles, these observations, added to the totality of the circumstances, created the officer's reasonable suspicions and further weakened Harris's unreasonable intrusion argument.

For all of the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

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