COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1583-CR **Cir. Ct. No. 2016CM2516**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MARQUE D. CUMMINGS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: HANNAH C. DUGAN, Judge. *Affirmed*.

¶1 BRASH, J.[1] The State appeals the trial court's grant of a motion to suppress evidence relating to charges brought against Marque D. Cummings for

[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.

possession of tetrahydrocannabinols (THC). Cummings successfully argued to the trial court that the evidence was seized as the result of an unlawful search and was therefore in violation of the Fourth Amendment.

¶2 In contrast, the State maintains that the initial stop of Cummings was not a seizure, and thus the constitutional protections of the Fourth Amendment are not applicable. The State further asserts that even if the stop of Cummings is deemed to be a seizure, the police officers had reasonable suspicion that Cummings had engaged in, or was about to engage in, criminal activity. We affirm.

BACKGROUND

¶3 In the early morning hours of July 27, 2016, two Milwaukee police officers, Officer Joseph Lanza and Officer Francisco Cartagena, were patrolling near 15th Street and Greenfield Avenue in Milwaukee. That neighborhood is considered to be a high-crime area with issues such as prostitution, drug-trafficking, vehicle break-ins, and numerous incidents of shots being fired. The officers were pulled over on the side of the street at the intersection, monitoring the area from their marked squad car.

¶4 The officers observed Cummings walking with his chin tucked into his chest, wearing a sweatshirt and a bandana around his neck. He was also carrying a backpack. The officers stated that when Cummings saw the squad car, he changed directions so that he was walking away from the squad.

¶5 Based on their observations of Cummings—that he was wearing a sweatshirt although it was a warm night, that he was wearing the bandana around his neck that could be used to conceal his face, that he was walking with his chin

down, which could also be an attempt to conceal his face, that he was carrying a backpack that could be carrying narcotics or burglary tools, that he changed the direction he was walking when he saw the squad car, and that they were located in a high crime area late at night—the officers pulled the squad up next to Cummings to make contact with him.

¶6 The officers exited the vehicle to speak with Cummings. They asked Cummings his name, which he provided. They asked if he was from that area, and he indicated that he was homeless. They had Cummings put his backpack down on the ground so that he could not access it; they requested to search it, but Cummings declined.

¶7 The officers ran a check on Cummings and discovered that he had a felony warrant against him. The officers then placed Cummings under arrest and searched the backpack, where they found twenty-three grams of marijuana. Cummings was subsequently charged with possession of THC.

¶8 Cummings filed a motion to suppress the evidence from the search of the backpack on grounds that it was an illegal search. Specifically, Cummings argued that the officers' reasons for stopping him were not sufficient to establish reasonable suspicion to justify the stop. The State, on the other hand, argued that the officers' questioning of Cummings was not a stop because the officers did not draw their weapons or physically restrain Cummings in any way. Based on the officers' testimony, the State maintained that Cummings was free to go until the officers learned of the warrant against him. Furthermore, the State asserted that even if the initial contact with Cummings was considered a seizure, it was lawful because the officers had a reasonable suspicion that Cummings had, or was about to, commit a crime.

¶9 Both Officer Lanza and Officer Cartagena testified at the suppression hearing to the description of the events as described above. Additionally, Officer Cartagena testified that they had told Cummings to empty his pockets onto the hood of the squad car, although he did not remember whether that was before or after they discovered the warrant. Both officers testified that Cummings was wearing a bandana, but there were inconsistencies in their descriptions as to whether it was covering his face. Neither officer recalled whether the lights or siren were activated when they pulled up next to Cummings, although Officer Lanza testified that it is common practice to activate the lights when making contact with citizens.

¶10 The trial court granted Cummings's motion to suppress. It stated that there was no testimony articulating facts relating to a crime that had been, or was about to be, committed. In fact, Officer Lanza had testified that there was no one else in the area who could have been a potential crime victim.

¶11 The trial court also noted that although Cummings had changed direction when he saw the squad,[2] he had not fled the officers, and had cooperated with them. It further pointed to inconsistencies and gaps in the officers' testimony with regard to when Cummings emptied his pockets, whether the bandana was covering his face, and whether the lights or siren on the squad were activated.

[2] Cummings argued that he did not change direction, but merely turned the corner at the intersection.

Finally, the trial court noted that pursuant to the standard set forth in ***Brown v. Texas***,[3] walking in a high-crime area is not sufficient justification for a stop.

¶12 Based on the totality of those circumstances, the trial court concluded that suppression of the evidence was warranted. The State appeals that decision.

DISCUSSION

¶13 On appeal, both Cummings and the State reiterate the arguments they presented for the suppression motion. In our review of a motion to suppress, we apply a two-step standard of review: (1) we first review the trial court's findings of fact, and will uphold them unless they are clearly erroneous; and (2) we then "review the application of constitutional principles to those facts *de novo*." ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

¶14 "The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution establish the right of persons to be secure from unreasonable searches and seizures." ***State v. Secrist***, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). Indeed, this court "consistently follows the United States Supreme Court's interpretation of the search and seizure provision of the [F]ourth [A]mendment in construing the same provision of the state constitution." ***State v. Kiper***, 193 Wis. 2d 69, 80, 532 N.W.2d 698 (1995) (citation omitted). As a result, search and seizure law in Wisconsin essentially "parallels"

[3] ***Brown v. Texas***, 443 U.S. 47, 52-53 (1979) (where the United States Supreme Court held that police officers lacked reasonable suspicion to stop Brown simply because he "was in a neighborhood frequented by drug users, standing alone" because that is not a sufficient basis "for concluding that [Brown] himself was engaged in criminal conduct").

search and seizure law established by the United States Supreme Court. ***Secrist***, 224 Wis. 2d at 208-09.

I. The initial encounter between the police officers and Cummings was a seizure.

¶15 The State first argues that the initial contact made with Cummings by the officers was not a seizure because the officers contend that until they discovered the outstanding warrant for Cummings, he was free to go. Thus, the State asserts that the constitutional protections for seizures under the Fourth Amendment are not applicable.[4]

¶16 "Not all police-citizen encounters are seizures." ***State v. Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777. The courts have determined that a seizure occurs "when an officer, by means of physical force or a show of authority, restrains a person's liberty." ***Id.*** (citation omitted). Under that test, it must be demonstrated that the citizen "yield[ed] to th[e] show of authority" by the police officer. ***Id.*** In other words, if "a reasonable person would have believed he was free to disregard the police presence and go about his business,

[4] In his response, Cummings contends that the State, during the suppression motion hearing, conceded that the investigative stop was a seizure. Specifically, Cummings points to a statement by the prosecutor that "if this [c]ourt is going to find that it was a seizure, which seems reasonable based on … not being sure whether the lights or sirens were activated …." Nevertheless, the prosecutor stated just prior to this statement that he "[did not] know for certain whether this can even be considered seizure under the Fourth Amendment …." Furthermore, the State had addressed this issue in detail in its response brief to Cummings's motion. Therefore, Cummings had sufficient notice that the State was pursuing this argument. We thus find that the State has not waived this argument. *See* ***State v. Huebner,*** 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727 (noting the objectives of the waiver rule, including the need to give notice of an issue to the other party and the trial court).

there is no seizure and the Fourth Amendment does not apply." ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729.

¶17 The State focuses on the fact that the officers did not draw their weapons or physically restrain Cummings in any way. Additionally, some of the details of the initial contact with Cummings are unclear, such as whether the officers activated the lights on the squad, and whether Cummings was asked to empty his pockets before or after the warrant was discovered.

¶18 However, Cummings points out that it was likely *before* the discovery of the warrant that he was asked to empty his pockets. Officer Cartagena testified that he believed that Cummings had provided identification. The likely scenario is that Cummings was asked to empty his pockets, did so on the hood of the squad car, and his identification was taken to check for warrants. Furthermore, once the warrant was discovered, the officers took Cummings into custody; they would have searched his pockets at that point if they had not already been emptied.

¶19 Moreover, it is clear that the police officers immediately requested that Cummings set down his backpack so that he was not able to get access to it. This demonstrates that Cummings yielded to the officers' authority. *See* ***Kelsey C.R.***, 243 Wis. 2d 422, ¶30.

¶20 Given the fact the officers had directed Cummings put down his backpack where he could not access it, and that he had likely surrendered his identification, it is not reasonable to conclude that Cummings believed that he was free to leave the scene. *See* ***Young***, 294 Wis. 2d 1, ¶18; *see also* ***United States v. Johnson***, 326 F.3d 1018, 1022 (8th Cir. 2003) (an officer's retention of personal

property is indicative of a seizure). Therefore, we find that the officers' contact with Cummings was a seizure pursuant to the Fourth Amendment.

II. The police officers did not have the requisite reasonable suspicion for the seizure.

¶21 Because we find that the initial contact with Cummings was a seizure by the police officers, we thus turn to the question of whether the police officers were compliant with the Fourth Amendment when they made that initial contact with Cummings. An investigative stop is valid only if a police officer "reasonably suspect[s], in light of his or her experience, that some kind of criminal activity has taken or is taking place." ***State v. Williams***, 2002 WI App 306, ¶12, 258 Wis. 2d 395, 655 N.W.2d 462. Reasonable suspicion should be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). This standard for determining reasonableness is a "common sense test," ***State v. Allen***, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999), where the "totality of the circumstances" is considered. ***Williams***, 258 Wis. 2d 395, ¶12.

¶22 The State maintains that the observations made by the officers prior to making contact with Cummings are sufficient to establish reasonable suspicion: that he was wearing a sweatshirt although it was a warm night, that he was wearing a bandana around his neck that could be used to conceal his face, that he was walking with his chin down, which could also be construed as an attempt to conceal his face, that he was carrying a backpack that could be carrying narcotics or burglary tools, that he changed the direction he was walking when he saw the squad car, and that they were located in a high crime area late at night.

¶23 However, these observations, even when considered together, do not establish a reasonable suspicion that Cummings had just committed or was about to commit a crime. In the first place, this court has recognized that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." ***State v. Gordon***, 2014 WI App 44, ¶15, 353 Wis. 2d 468, 846 N.W.2d 483 (citation omitted). Additionally, although the officers believed that Cummings changed the direction he was walking upon seeing their squad car, he did not flee from them. *Cf.* ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000) (while "unprovoked flight upon noticing the police" is "not necessarily indicative of wrongdoing … it is certainly suggestive of such.") The remainder of the officers' observations of Cummings—wearing the bandana, carrying a backpack, and walking with his chin down—describe "the conduct of large numbers of law-abiding citizens in a residential neighborhood, even in a residential neighborhood that has a high incidence of drug trafficking." ***State v. Young***, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997). Furthermore, there was no one else in the vicinity of Cummings—no one who could have been a potential crime victim or drug-deal counterpart—and the officers did not observe Cummings make contact with anyone.

¶24 While we recognize that "conduct which has innocent explanations may also give rise to a reasonable suspicion of criminal activity," the "inference of unlawful conduct must be a reasonable one." ***Id.*** Indeed, the officers must demonstrate that they had more than just "an inchoate and unparticularized suspicion" that criminal activity has taken or is taking place in order for an investigatory stop to be valid. ***State v. Waldner***, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996); *see also* ***Williams***, 258 Wis. 2d 395, ¶12. That was not achieved here.

¶25 When an investigative stop is deemed to be unlawful, the proper remedy is to suppress the evidence that it produced. *See* ***State v. Washington***, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305. Therefore, we affirm the trial court's grant of Cummings's motion to suppress.

By the Court.—Order affirmed.

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