COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP469-CR **Cir. Ct. No. 2005CM249**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER E. KONKOL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Reversed*.

¶1 HOOVER, P.J.[1] Christopher Konkol appeals a judgment of conviction for misdemeanor possession of THC. Konkol contends he was seized without reasonable suspicion of criminal activity when an officer summoned

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Konkol to his squad car to check if an outstanding warrant existed. Konkol therefore argues the marijuana he dropped after he was seized should be suppressed as fruit of the illegal seizure. We agree and reverse the judgment.

BACKGROUND

¶2 At approximately 2:45 a.m. on September 17, 2005, Algoma police officer Craig Kolbeck observed a vehicle he knew belonged to Konkol. Kolbeck, in uniform and driving a marked squad car, followed Konkol but did not activate the car's emergency lights. Konkol drove to his apartment building and pulled into the driveway. Kolbeck pulled his squad car behind Konkol's vehicle. Konkol and his girlfriend exited the vehicle and began to walk toward the apartment. Kolbeck then exited his squad car and called Konkol over to him, using Konkol's first name. Konkol and his girlfriend, who were approximately ten feet from the entrance to the apartment, then turned around and approached the squad car.

¶3 After Konkol approached the squad car, Kolbeck asked him if he had an outstanding warrant for his arrest. Konkol said he did not believe so. At some point either before pulling into the parking lot or after summoning Konkol, Kolbeck called in a records check. As Konkol, his girlfriend, and Kolbeck waited for a response from dispatch, Konkol dropped an object on the ground and covered it with his foot. Kolbeck recovered a baggie containing a small amount of marijuana and arrested Konkol and his girlfriend.

¶4 At a suppression hearing, Kolbeck testified that he followed Konkol's vehicle and called out to Konkol because he believed Konkol had an outstanding warrant. Kolbeck testified he believed there was an outstanding warrant because Konkol's name had earlier appeared on an active warrant list

received from the Kewaunee County Sheriff's Department. Kolbeck did not know what the warrant was for and could not recall when he saw the warrant list.

¶5 The court concluded that by coming to the officer when called and responding to his question, Konkol "yielded to the officer's show of authority and was at that point seized…." The circuit court also found that Kolbeck never told Konkol he was free to leave. Additionally, the court determined that the seizure was supported by reasonable suspicion because Kolbeck recalled seeing Konkol's name on a warrant list.

DISCUSSION

¶6 Konkol argues he was seized without reasonable suspicion, and therefore the marijuana he dropped after he was seized should be suppressed as fruit of the illegal seizure. When reviewing a circuit court's denial of a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, the application of constitutional principles to the facts is a question of law we review without deference. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279.

¶7 The State argues Kolbeck did not seize Konkol when he called Konkol over to him. Not all encounters with police constitute seizures under the Fourth Amendment. ***State v. Williams***, 2002 WI 94, ¶20, 255 Wis. 2d 1, 646 N.W.2d 834. A seizure occurs when an officer uses physical force or a show of authority to restrain a person's liberty. ***Id.*** We must determine whether a reasonable person would feel free to leave under all the circumstances. ***Id.***, ¶23.

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to

> leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled….

United States v. Mendenhall, 446 U.S. 544, 554 (1980).

¶8 In this case, the circuit court found that Konkol "yielded to the officer's show of authority" and was seized when he responded to Kolbeck's call. The circuit court also found that Kolbeck never told Konkol he was free to leave and Kolbeck "would not have given Mr. Konkol any reason to believe he was free to leave until [Kolbeck] received a response from Dispatch indicating whether Mr. Konkol had an outstanding warrant."

¶9 In a similar case where officers told an individual that he was suspected of a crime, asked him to accompany them, and did not indicate that the individual was free to depart, the Court found the individual was seized for Fourth Amendment purposes. *See* ***Florida v. Royer***, 460 U.S. 491, 501 (1983). We likewise conclude that Konkol was seized when Kolbeck called him over to the squad car and questioned him about whether he had an outstanding warrant. Kolbeck did not indicate that Konkol could leave, and a reasonable person under the circumstances would not have felt free to leave until the dispatcher responded to Kolbeck's warrant inquiry.

¶10 The next question is whether Kolbeck had a reasonable suspicion to detain Konkol. Detention of a suspect must be based upon a reasonable suspicion of criminal activity. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). Reasonable suspicion is dependent on whether an officer's suspicion is grounded in "specific, articulable facts and reasonable inferences from those facts"

indicating the individual committed a crime. ***Id.*** at 56. What constitutes reasonable suspicion is a common sense test. ***Id.*** We look to what a reasonable police officer would "reasonably suspect in light of his or her training and experience." ***Id.*** An "inchoate and unparticularized suspicion will not support an investigatory stop." ***Id.*** at 57.

¶11 Kolbeck stated he believed Konkol had a warrant because his name "had appeared on an active warrant list earlier that the Algoma Police Department receives regularly in the normal course of its business." Kolbeck also testified he was aware of other warrants that had been issued for Konkol in the past. Kolbeck gave no specific articulable facts to support his belief that Konkol had an active warrant. He did not know when he saw Konkol's name on the warrant list, what the warrant was for, or if it was currently active. The only support Kolbeck gave to support his belief that there was a currently active warrant was his statement that he had "earlier" seen Konkol's name on a warrant list. Reasonable suspicion is more than a mere hunch. *See* ***Henes v. Morrissey***, 194 Wis. 2d 338, 348, 533 N.W.2d 802 (1995). Thus, any hunch he may have entertained that, because there had been past warrants, there may be current warrants does not amount to reasonable suspicion.

¶12 We thus conclude the marijuana was recovered as the result of an unreasonable seizure and must therefore be suppressed. *See* ***State v. Roberson***, 2006 WI 80, ¶34, 292 Wis. 2d 280, 717 N.W.2d 111; *see also* ***Wong Sun v. United States***, 371 U.S. 471 (1963).

By the Court.—Judgment reversed.

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