COURT OF APPEALS
DECISION
DATED AND FILED

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David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1336-CR **Cir. Ct. No. 2006CM5269**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN RONAN MCNEILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Reversed*.

¶1 FINE, J. John Ronan McNeill appeals the judgment convicting him on his guilty plea of unlawfully having cocaine. *See* WIS. STAT. § 961.41(3g)(c).

He contends that the circuit court erred in not suppressing the cocaine, which a police officer found when the officer searched him.[1] We agree and reverse.

I.

¶2 It was evening and McNeill was in a tavern with some ten to fifteen other patrons when police officers entered for what one of them, John Schott, testified at the suppression hearing was to check the tavern's licenses and for code violations. The circuit court found that ten to fifteen officers were part of the "license check" operation, and neither party challenges that finding. Schott told the circuit court at the suppression hearing that the officers "entered the bar via the front entrance and rear entrance." He also testified that "[w]e keep an eye on the patrons, make sure nobody is trying to obtain or conceal any weapons, make sure nobody is trying to discard any narcotics, basically just to maintain the safety of other officers that are there." The officers also wanted to prevent patrons from "run[ning] out the back door with narcotics and firearms." Schott stood at the tavern's front door.

¶3 According to Schott, "several seconds" after the officers entered the tavern, McNeill, who was sitting some ten feet from Schott, "immediately stood up and walked toward the front door to exit the bar." Schott later revised his estimate of the time to "[w]ithin 30 seconds to a minute," and reiterated that he believed that McNeill was trying to walk out of the tavern. Other than trying to leave, Schott had not seen McNeill "do anything suspicious."

[1] A person may appeal an order denying a motion to suppress even though that person has accepted conviction by pleading guilty. WIS. STAT. § 971.31(10).

¶4 Schott intercepted McNeill after McNeill had walked about five feet in Schott's direction. Schott asked McNeill whether he had any narcotics or other contraband, and, according to the officer: "He said no, you can check me if you want, and while doing so he raised his arms like that (indicating)."[2] According to Schott, McNeill was not "free to walk[] by" him "without answering." Schott then checked McNeill's pockets and found the cocaine.

¶5 Schott conceded on cross-examination that officers are trained to ask questions in a way to get agreement from those questioned:

> Q. And there is a way that you direct questions … with the goal being compliance?
>
> A. That's correct.
>
> Q. … [Y]ou exercised that mode of questioning when you were talking to Mr. McNeill?
>
> A. Yes.

Schott did not tell McNeill that he could just walk out of the tavern and that he did not have to agree to being searched. McNeill testified that he believed "we could not leave." The circuit court found that he was detained, and the State does not challenge that conclusion on appeal.

¶6 The circuit court ruled that although Schott had unlawfully seized McNeill, the search was legal because: McNeill had agreed to it; the officers were

[2] McNeill testified at the suppression hearing that he did not agree to be searched, but, rather that after he told Schott that he did not have "anything illegal on me" Schott "put my arms in the air, and he started to then proceeded [*sic*] to search me." The circuit court accepted the officer's version, and McNeill does not challenge that finding on appeal. *See* WIS. STAT. RULE 805.17(2) (circuit court's findings of fact must be upheld on appeal unless "clearly erroneous") (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)).

not acting in "bad faith"; and there was sufficient attenuation to remove the taint of the illegal seizure from McNeill's consent to be searched.

II.

¶7 The legality of searches and seizures is governed by the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, which have been construed congruently. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794, 801 (1998).

> Generally, a search for evidence is not valid unless law enforcement officers have a lawfully issued warrant. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. One of the exceptions to the requirement that law-enforcement officers get a search warrant is consent to the search by someone able to give consent.

State v. Munroe, 2001 WI App 104, ¶8, 244 Wis. 2d 1, 8, 630 N.W.2d 223, 226. "Consent to a search 'must be freely and voluntarily given.' 'If consent is granted only in acquiescence to an unlawful assertion of authority, the consent is invalid.'" ***Id.***, 2001 WI App 104, ¶10, 244 Wis. 2d at 11, 630 N.W.2d at 227 (quoted sources omitted). Thus, a consent that is tainted by unlawful police conduct is not voluntary. ***Phillips***, 218 Wis. 2d at 204, 577 N.W.2d at 805.

¶8 In evaluating a circuit court's suppression decision we are, as we have seen in footnote 2, bound by the circuit court's findings of fact unless they are "clearly erroneous." We review *de novo*, however, the circuit court's legal analysis and resolution of questions of constitutional fact. *See* ***Phillips***, 218 Wis. 2d at 195, 577 N.W.2d at 801. Although we agree with the circuit court that Schott's seizure of McNeill was unlawful, we disagree that there was sufficient attenuation to remove the illegal taint from McNeill's "consent" to be searched.

¶9 No one disputes that the police were lawfully in the tavern. Checking the tavern's licenses, the licenses of its employees, and whether there were any apparent code violations is an appropriate law-enforcement function. Further, the officers could talk to the patrons. *See* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991) (officer free to walk up to persons and ask them questions). But persons approached by police officers also have the right to walk away. *See* ***State v. Reichl***, 114 Wis. 2d 511, 515, 339 N.W.2d 127, 128 (Ct. App. 1983). There is a seizure when that right to walk away is interfered with by a police "show of authority." ***California v. Hodari D.***, 499 U.S. 621, 625–627 (1991); ***Reichl***, 114 Wis. 2d at 515, 339 N.W.2d at 128–129. Thus, lawful police presence does not give the police the right to seize and search persons who merely happen to be there. ***Ybarra v. Illinois***, 444 U.S. 85, 91 (1979) (Absent an independent reason to search a tavern patron, police may not search him even though the police were lawfully there.); *see also* ***Bostick***, 501 U.S. at 432, 437 (The officers told Bostick that he did not have to agree to let the officers search his luggage.) (There is a "seizure" when police conduct makes a reasonable person believe that he or she is "'not at liberty to ignore the police presence'" and simply walk away.) (quoted source omitted).

¶10 As we have seen, the circuit court concluded that McNeill was unlawfully seized by Schott's approach and question "in the context of again 10 to 15 officers inside a bar with this defendant and others." As the circuit court explained in its oral decision:

> I can I think reasonably infer again from this circumstance from the officers having just arrived, from the number of officers involved, the fact that this defendant is addressed by one officer as he is walking out [and] asked a question … that [McNeill] may feel some compulsion to at least respond to the question and again do something other than just keep walking.

The circuit court, however, concluded that the unlawful seizure was attenuated when McNeill agreed to be searched. We disagree.

¶11 There are three factors that help determine whether the taint of an earlier illegal police activity was attenuated when a person "consents" to a search. ***Phillips***, 218 Wis. 2d at 205, 577 N.W.2d at 805. They are: "(1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." ***Ibid.*** We look at each in turn.

A. *Temporal proximity.*

¶12 The officers violated McNeill's right to be free from unlawful restraint when they prevented him from leaving the tavern. *See* ***Reichl***, 114 Wis. 2d at 515, 339 N.W.2d at 128. Based on the circuit court's finding that McNeill agreed to be searched right after Schott asked him whether he had any contraband, the "temporal proximity" was as close as is possible—it was a fluid continuum, a gradient without any intervening band.

B. *Intervening circumstances.*

¶13 Although nothing happened between the time Schott asked McNeill if he had any contraband and McNeill's consent to be searched, the circuit court viewed McNeill's agreement to be searched as the intervening circumstance. But that begs the question. If nothing intervened between Schott's unlawful seizure of McNeill and his agreement to have Schott search him, the consent was not attenuated. Unlike the situation in ***Phillips***, where there was a short intervening discussion with the defendant informing him of his right to refuse the search, ***id.***,

218 Wis. 2d at 208–209, 577 N.W.2d at 807, there was no taint-cleansing intervention here.

C. *"Flagrancy" of the misconduct.*

¶14 The circuit court specifically opined that the police entry into the tavern the night they arrested McNeill was not a sweep for drugs and weapons, but was a routine check to see if the tavern and its employees had the required licenses and whether there were any apparent code violations. Although checking the validity of licenses and ensuring that there are no apparent code violations is, as we have already recognized, a proper police activity, doing something that would have been prohibited if undertaken alone is not made lawful merely because it is done concurrently with something that is not illegal. As ***Phillips*** recognizes, the underlying rationale of the exclusionary rule is to deter unlawful police activity. ***Id.***, 218 Wis. 2d at 209, 577 N.W.2d at 807. Although it is true that the exclusionary rule benefits only those who have been found to have violated the criminal law (that is, this case would not be here if McNeill were "clean," and McNeill's options to then vindicate the invasion of his constitutional rights would have been realistically non-existent), as an intermediate appellate court, we take the law as higher courts give it to us. In light of all the circumstances found by the circuit court, and under our *de novo* review of the legal issue of whether what the police did that night in not only searching McNeill but also in preventing others from leaving the tavern was lawful, we conclude, contrary to the circuit court's conclusion, that the police action was a flagrant violation of McNeill's rights and those of the other patrons in the tavern that evening.

¶15 In sum, for the reasons set out in this opinion, we agree with McNeill that the cocaine Schott found when he searched McNeill must be suppressed. Accordingly, we reverse the judgment.

By the Court.—Judgment reversed.

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