COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0814-CR **Cir. Ct. No. 02CF000755**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANUELE M. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RUSSELL W. STAMPER and JOHN SIEFERT, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

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[1] The Honorable Clare L. Fiorenza presided over the pretrial proceedings, the Honorable Russell W. Stamper presided over the trial, and the Honorable John Siefert presided over the postconviction motion hearing.

¶1 CURLEY, J. Danuele M. Johnson appeals from a judgment convicting him of one count of possession of cocaine, with intent to deliver, five grams or less, in violation of WIS. STAT. § 961.41(1m)(cm)1. (2001-02), and a postconviction order denying his motion to vacate the judgment and suppress evidence. Johnson contends that the cocaine seized by the police must be suppressed as the direct fruit of a ***Terry*** stop unsupported by the requisite reasonable suspicion.[2] Because the cocaine was recovered while the police were conducting a bona fide community caretaker function and the public need outweighed the intrusion upon Johnson's privacy, the seizure was reasonable in light of the facts and circumstances. We affirm.

I. BACKGROUND.

¶2 On the evening of February 4, 2002, Officers Corstan Court and Carmelo Patti, of the Milwaukee Police Department, were on routine patrol in the area of East Brady Street when they came upon a stalled vehicle, with its hazard lights flashing, near the corner of Humboldt Avenue and Brady Street. Officer Patti stopped the squad car behind the stalled vehicle, "to see if they needed any help." According to Officer Patti's testimony, when he and Officer Court began to approach the car, both the driver and the passenger—later identified as Johnson—exited the vehicle. The driver walked away while Johnson began to walk north on Humboldt. Officer Court identified himself and asked Johnson to stop. Johnson allegedly took his hand out of his left pocket, threw a plastic bag, and turned around to face the officer. Officer Court proceeded to perform a pat down search of Johnson, at which time he asked him where he was going. Johnson responded

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

that he was going to catch the bus. After Officer Court placed Johnson in the squad car, he went back to retrieve the plastic bag. Officer Court testified that the plastic bag appeared to contain "a bunch of corner[]cuts of an off-white chunky substance of crack cocaine." It was later determined that the bag contained thirty-three individually wrapped pieces of crack cocaine, totaling just over two grams. Johnson was subsequently charged with one count of possession of cocaine, with intent to deliver.

¶3 Johnson filed a motion to suppress allegedly based on an illegal arrest.[3] At the motion hearing, defense counsel argued that Johnson's position was that he was set up, and that he did not abandon the plastic bag, as the State had argued, because he never had the plastic bag on his person. He argued that the police had no reason to stop him and, therefore, "whatever they found after the stop should be suppressed because there was no basis." He insisted that he "hadn't done anything wrong, the vehicle hadn't basically done anything wrong, there was no problem that existed at the time, therefore he should not have been stopped." He asserted that both the stop and the arrest were illegal and the State should have to proceed "without bringing in whatever it found after the officer put [him] in a squad car and left."

[3] Johnson's original motion to suppress was filed on February 20, 2002 and entitled "Defendant's Motion to Suppress Based on Illegal Arrest." In the motion, it was asserted: "On the date and time of the arrest, the police stopped and detained the defendant, even though he had done nothing wrong. At the Preliminary Hearing the officer admitted that he had no reason to order the defendant to stop, nor to search the defendant. Further, the officer admitted that he had no reason to arrest the defendant and lock him in a police vehicle while he searched for evidence." The State responded to the motion asserting that Johnson had no standing in regard to the bag of cocaine because he had abandoned it, and in any event, the police officer had reasonable suspicion to conduct an investigatory detention. Before a motion hearing was held, however, Johnson's defense counsel withdrew. After successor counsel was appointed and numerous delays, the motion hearing was eventually held on November 19, 2002.

¶4 In discussing the matter, the trial court reasoned:

> Then there is no motion for this Court to hear for suppression, it is clearly a trial issue.
>
> It's going to be a credibility … issue for trial.
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> There is nothing for this Court to suppress, because of an illegal stop, because the defendant is claiming no interest in any of the drugs that were seized.
>
> So the defendant has no standing to challenge the suppression of drugs, he had no interest in [them] by statements on this record.

The trial court then concluded that the real issue was whether Johnson threw the bag: "The defendant says he didn't, knows nothing about it, so with respect to proceeding then, the request to suppress the drugs is being denied based upon the fact that there is no basis to challenge. Defendant is saying that he has no interest in that in any way whatsoever, that he did not throw it down. It's a triable issue for the jury trial."

¶5 On the day of trial, Johnson, with new counsel, was permitted to pursue another motion.[4] He argued that the police had no reason to stop him, because he had done nothing illegal. He insisted that he never abandoned any evidence, and moreover, "if [he] hadn't been ordered to stop for no reason, there never would have been any evidence to recover even under the State's theory of the case." He asserted that his whole defense was that the evidence was not recovered from him, but "the police had no reason to stop him, they had no reason to ask him to come and talk to him, no reason to tell him to submit to a frisk, no

[4] Johnson requested new counsel, and after his second attorney was allowed to withdraw, he was appointed yet another successor counsel. After numerous delays and the substitution of counsel, the trial eventually took place in April of 2003.

reason to tell him to sit in the squad car." The trial court questioned what relief he was seeking, and defense counsel responded that he was seeking dismissal, and not suppression. The trial court concluded that dismissal was not an available remedy, and denied the motion.

¶6 The case then proceeded to a court trial, during which Johnson testified on his own behalf. He testified that he was getting a ride from a friend, when the car stalled. He claimed that he was already out of the car and walking toward the bus stop when the squad car pulled up. An officer asked him where he was going, and he told him that he was going to catch the bus. He said that the police officer was standing near the squad car, and that he eventually walked about fifteen feet back toward the officer. He testified that he was holding a pack of cigarettes, a lighter, and a pair of gloves in his left hand, and his right hand was by his side. He claimed that he never threw anything and that he let the officer pat him down. Johnson testified that the officer did not find anything during the pat down search, but placed him in the squad car without answering Johnson's question as to why he was there. He said he was in the squad car for around forty-five minutes before one of the officers told him that he was under arrest and said that he saw him "throw that dope." He insisted that he asked to see the drugs and have them fingerprinted, but his requests were denied.

¶7 Finding Johnson guilty, the trial court concluded:

> The driver and the defendant were in a vehicle with the hazard lights on attracting attention. Hazard lights mean pay attention, exercise caution. They're designed to get the attention of other persons and they did. They got the attention of the officers. And the driver and the defendant exit the vehicle. Both of them leave the vehicle.
>
> It is suspicious conduct. At least it's an attention-getting conduct when you have hazard lights on and then

> you leave. The amount certainly was consistent with the intent to deliver, 33 rocks. …
>
> ….
>
> The question really boils down to whether or not the defendant threw crack cocaine to the ground. I find that he did. The evidence is persuasive, convincing beyond a reasonable doubt against him. … So I find the defendant guilty here.

Johnson was later sentenced to three years of initial confinement and seven years of extended supervision.

¶8 Johnson subsequently filed a motion to vacate the judgment of conviction and to suppress evidence. In it, he argued that the seized evidence was the direct fruit of a warrantless ***Terry*** stop unsupported by the requisite reasonable suspicion. He insisted that, "[c]ontrary to the argument successfully raised by the government prior to trial, resolution of [his] suppression claim does not turn on the issue of standing." Moreover, he argued that his right to suppression does not, as the State previously argued, "rest on whether he retained a reasonable expectation of privacy in the packet the officer ultimately seized." Instead, he contended that suppression is required because the discovery of the evidence was a direct consequence of an illegal stop. Essentially, he insisted that the officer lacked the requisite reasonable suspicion to justify a stop, Officer Court essentially executed a ***Terry*** stop when Johnson yielded to his command to stop, and therefore, "the conduct described by Officer Court wherein [he] tossed something was a direct product of Officer Court's prior unlawful order to stop." Johnson conceded that, had he discarded the packet as he walked away, but before Officer Court commanded him to stop, then he would have no constitutional basis to seek suppression. However, he insists that he was seized the moment he yielded to the

officer's show of authority and began to turn around, which was when he allegedly tossed the plastic bag.

¶9 The State responded with three arguments: (1) Johnson's argument relied on facts that are "completely contradictory to [his] own previous assertions and as such he has waived the right to make this argument at all"; (2) Johnson abandoned the bag before he submitted to the officer's request to stop, and accordingly lacks standing to challenge the seizure; and (3) in any event, should the court determine that the bag was tossed after the stop was executed, there was reasonable suspicion upon which to base such a stop.

¶10 In denying Johnson's motion, the trial court concluded:

> The defendant claims in his motion that the corner cuts were the direct fruit of a warrantless ***Terry*** stop which was unsupported by reasonable suspicion. Although the State alternatively argues that the defendant had no standing to challenge the seizure, the more important issue is the stop itself. Here, the court concurs with [the court that tried the case] that reasonable suspicion existed for the stop. As [the trial court] stated:
>
> > The driver and the defendant were in a vehicle with the hazard lights on attracting attention. Hazard lights means pay attention, exercise caution. They're designed to get the attention of other persons and they did. They got the attention of the officers. And the driver and the defendant exit the vehicle. Both of them leave the vehicle.
> >
> > It is suspicious conduct. At least it's an attention-getting conduct when you have hazard lights on and then you leave. . . .
>
> The court finds no basis to vacate the conviction, no basis to suppress the corner cuts, and no ineffective assistance of counsel.

Implicitly concluding that the issue was not waived, the trial court determined that there was reasonable suspicion justifying a ***Terry*** stop. Johnson now appeals.

II. ANALYSIS.

¶11 Johnson contends that the plastic bag seized by Officer Court must be suppressed as the direct fruit of a ***Terry*** stop unsupported by the requisite reasonable suspicion. He insists that: (1) Officer Court did not possess reasonable suspicion to stop him as he walked away from the stalled vehicle; (2) he was seized when he yielded to Officer Court's command to stop; and (3) his motion to suppress cannot be rejected on the theory that he abandoned the baggie.[5] The State argues that questioning the inhabitants of the disabled car was proper, even if they had not been acting suspiciously, and, in any event, the police also had reasonable suspicion to stop Johnson and the driver of the disabled car. The State insists that the police were performing a community caretaker function, and Johnson's seizure was reasonable.

¶12 When reviewing a trial court's ruling on a motion to suppress evidence, we will uphold the trial court's factual findings unless they are clearly erroneous. ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434. We independently decide, however, whether the facts establish that a particular search or seizure occurred and, if so, whether it violated constitutional standards. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830

[5] Johnson also argues that "[i]f trial defense counsel somehow waived [his] right to suppression because he requested dismissal of the charges, [he] was denied effective counsel." As the State has not argued waiver in its response brief, we find no need to address this argument, and will focus solely on the suppression issue in our analysis.

(1990).[6] Moreover, after our *de novo* review, if the trial court reached the right result, although for the wrong reason, we will affirm. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).[7]

¶13 "The freedom of the police to act is not limited to cases where there is probable cause as to the commission of crime." ***State v. Anderson***, 142 Wis. 2d 162, 167, 417 N.W.2d 411 (Ct. App. 1987). That is, "[p]olice actions beyond the investigation of crime constitute 'a part of the "community caretaker" function of the police which, while perhaps lacking in some respects the urgency of criminal investigation, is nevertheless an important and essential part of the police role.'" ***Id.*** (citation omitted). Thus, the police may seize citizens without warrants when the police are performing community caretaker functions, but those seizures must still satisfy the reasonableness requirement of the Fourth Amendment. ***State v. Kelsey C.R.***, 2001 WI 54, ¶34, 243 Wis. 2d 422, 626 N.W.2d 777.

¶14 "The key question in such a case is one of prior justification; in other words, did the police have the right to be where they were, make their observations, and take their responsive action." ***Anderson***, 142 Wis. 2d at 167. As the ultimate standard is the reasonableness of the seizure in light of the facts and circumstances, "[i]n a community caretaker case, this requires a balancing of

[6] "When reviewing a suppression ruling, we are not limited to the record before the [trial] court at the time of the suppression ruling. Other information produced before or after the suppression hearing may be used to support the [trial] court's decision." ***State v. Begicevic***, 2004 WI App 57, ¶3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293.

[7] In a similar vein, "[a]n appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985).

the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen." ***Id.*** at 168. As such:

> [a] court must determine: "(1) that a seizure within the meaning of the [F]ourth [A]mendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual."

Kelsey C.R., 243 Wis. 2d 422, ¶35. With respect to the second step, a bona fide community caretaker activity is one that is "'divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" ***State v. Dull***, 211 Wis. 2d 652, 658, 565 N.W.2d 575 (Ct. App. 1997) (citation omitted). In weighing the public need and interest against the privacy intrusion, there are several relevant considerations: "(1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." ***Anderson***, 142 Wis. 2d at 169-70 (footnotes omitted).

¶15 In is undisputed that a seizure occurred. "A seizure occurs 'when an officer, by means of physical force or a show of authority, restrains a person's liberty.'" ***Kelsey C.R.***, 243 Wis. 2d 422, ¶30 (citation omitted). Thus, a seizure occurs at the point when the subject yields to the show of authority. *See* ***California v. Hodari D.***, 499 U.S. 621, 626 (1991) ("The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.") Here, it is undisputed on appeal that Johnson stopped when Officer Court requested that he do so. He allegedly tossed the bag while he was

turning to face the officer, and did not take any more steps after ordered to stop. As such, a seizure undoubtedly occurred.

¶16 In regard to whether the police conduct was a bona fide community caretaker activity, we must consider the circumstances. Here, there was a car stalled on a Milwaukee street with its hazard lights flashing. The State contends that it is undisputed that the police were stopping to assist the people in the disabled vehicle, and claims that Johnson has not challenged the reasonableness of the officers' decision to stop and render aid to the stalled vehicle. It seems reasonable for the police to stop and attempt to assist a disabled vehicle; should a motorist be stranded, it would seemingly be in the public's interest for the police to stop and provide assistance.

¶17 Finally, we must weigh the public need and interest against the privacy intrusion. In regard to the degree of the public interest and the exigency of the situation, it is important that the car in which Johnson was an occupant was stalled in the road near an intersection. It appears that the pubic interest is not only in ensuring that the occupants of the disabled vehicle be assisted, but also in eventually clearing the intersection of a disabled car, if possible, and ensuring that the car had not been stolen or abandoned and vandalized. The degree of the public interest clearly warranted the police to stop, render assistance, and assess the situation. As such, it was reasonable for Officer Court to attempt to question Johnson in regard to the situation.

¶18 The attendant circumstances surrounding the seizure also support its reasonableness—it was nighttime, there was a stalled vehicle near an intersection, and Officer Court simply asked Johnson where he was going, presumably to figure out what had happened to the car, after he exited the car and began to walk away.

Because Johnson and the driver were the only people in the immediate vicinity that likely had relevant information regarding the vehicle, it was reasonable and prudent for the police to attempt to gather information from them. Moreover, there was an automobile involved, and there were really no less intrusive alternatives available to the police officer. The only thing the officers could have done that would have been less intrusive would have been to watch Johnson and the driver walk away.

¶19 Finally, "[o]verriding this entire process is the fundamental consideration that any warrantless intrusion must be as limited as is reasonably possible, consistent with the purpose of justifying it in the first instance." ***Anderson***, 142 Wis. 2d at 169. Here, the intrusion was fairly limited—Officer Court merely asked Johnson to stop, and inquired as to where he was going. Indeed, it is important to emphasize that Officer Court did not just stop and search Johnson—there were intervening factors. Officer Court asked him to stop, and as Johnson turned to face the officer, he removed the plastic bag from his pocket and tossed it onto the ground. It was then that Officer Court proceeded to perform a pat down search. We do not know, nor can we speculate, what would have happened if Johnson had not thrown the plastic bag onto the ground.[8] That is not something we can or need to consider. Instead, we conclude that the police were conducting a bona fide community caretaker function, the public need and interest outweighed the intrusion on Johnson's privacy, and the seizure was reasonable in light of the facts and circumstances. Accordingly, we affirm.

[8] Although Johnson did argue, at times, that the drugs were planted by the police and that they were never actually in his possession, the trial court found that he did in fact throw the drugs to the ground, and there has been no real argument on appeal that that finding was clearly erroneous.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.