COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP357-CR **Cir. Ct. No. 2009CF5180**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANUEL R. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Judgment affirmed; order reversed, and cause remanded with directions*.

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

¶1 FINE, J. Manuel R. Williams appeals the judgment entered on his guilty plea to being a felon in possession of a firearm as a repeat offender, *see* WIS. STAT. §§ 941.29(2) & 939.62(1)(b), and the order denying his motion for

postconviction relief. Williams claims: (1) the police did not have reasonable suspicion to stop him and, therefore, the circuit court should have suppressed evidence of the gun he was carrying; (2) the circuit court did not sufficiently explain why he should pay a DNA surcharge, *see* ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393; and (3) he is entitled to twenty-two days of sentence credit.[1] We affirm the circuit court's ruling upholding the stop, but reverse and remand with directions on the DNA surcharge and sentence credit.

I.

¶2 The only witness testifying at the suppression hearing was one of the arresting officers, Milwaukee police officer Dwight Copeland. He told the circuit court that in November of 2009, he and his partner, Angela Ware, were sent to a shooting at the 3300 block of West Hampton Avenue. Copeland said that this was a "high risk area" for "drug or gun related arrests." When the officers arrived, they saw a group of people but were drawn to Williams because "[h]e had a big jacket on" and was "holding something" in an "odd" way: "His hand was underneath. His other hand was outside … like [he was] cradling a child, but it wasn't a child. … It was out of order. It was out of character." Copeland heard someone yell out "'They got a gun over there,'" pointing in Williams's direction.

¶3 Copeland testified that he thought Williams was "going to run" because he "was looking around. He was looking back and forth for a path to run." Copeland stopped the squad car, the officers got out with guns drawn, and

[1] "An order denying a motion to suppress evidence … may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty[.]" WIS. STAT. § 971.31(10).

asked Williams to "'Come here'" and "'What [do] you have on you?'" According to Copeland, Williams answered, "'I have a gun'" and then dropped a shotgun and ran.

¶4 After Williams pled guilty, the circuit court sentenced him to seven years' imprisonment (four years of initial confinement followed by three years of extended supervision), concurrent to the sentence he was serving following the revocation of his extended supervision in connection with other crimes. The circuit court also ordered him to give a DNA sample and pay a surcharge "based on the seriousness of the offense and the fact that a weapon was involved." The circuit court granted Williams's request for 110 days sentence credit for the days he was in jail from the date of his arrest on November 7, 2009, to the date his extended supervision in connection with the earlier crimes was revoked on February 25, 2010. In its ruling on Wlliams's postconviction motion, the circuit court denied Williams sentence credit for the twenty-two days he spent in jail from February 25, 2010, until he arrived at Dodge Correctional Institution on March 19, 2010.

II.

A. *The stop*.

¶5 In reviewing a circuit court's order refusing to suppress evidence, we uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995); *see also* WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Whether a stop violates the Fourth Amendment, however, is a question of law that we review *de novo*. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137–138, 456 N.W.2d 830, 833 (1990).

¶6 "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior." ***Terry v. Ohio***, 392 U.S.1, 22 (1968). An investigatory stop is lawful when police have "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." ***State v. Young***, 2006 WI 98, ¶20, 294 Wis. 2d 1, 16–17, 717 N.W.2d 729, 737. An officer has reasonable suspicion when the facts and rational inferences from those facts create a reasonable belief that criminal activity "'may be afoot'." ***State v. Matthews***, 2011 WI App 92, ¶11, 334 Wis. 2d 455, 462, 799 N.W.2d 911, 914 (quoting ***Terry***, 392 Wis. 2d at 21–22).

¶7 Here, the circuit court found:

- the officers were sent to a shooting in "a high risk area";
- when police arrived, they noticed Williams "because of the way he was holding or cradling something"; "because of the jacket and the placement of his hands"; and because "he looked like he planned to run";
- "someone called out that there was a gun";
- when the police asked Williams "'What do you got,'" Williams answered "'A gun,' and dropped it."

¶8 These findings are supported by the testimony at the suppression hearing and are therefore not clearly erroneous. Based on these findings, the circuit court ruled "the officer had a reasonable suspicion" to stop and question Williams. We agree. *See* ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000) ("[T]he fact that the stop occurred in a 'high crime area' [is] among the relevant contextual

considerations in a ***Terry*** analysis.") ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.").

B. *DNA surcharge*.

¶9 Williams next claims that the circuit court erred when it ordered him to pay a DNA surcharge because, according to Williams, the circuit court's explanation was insufficient under ***Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393.

¶10 WISCONSIN STAT. § 973.046(1g) gives the circuit court the discretion to make a defendant sentenced on any "felony conviction" pay a "deoxyribonucleic acid analysis surcharge of $250." In ***Cherry***, we noted that this requires the circuit court to "do something more than stating it is imposing the DNA surcharge simply because it can." ***Id.***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 395. "To reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning." ***Id.*** at 395–396**.** To properly exercise its discretion, the circuit court must: (1) "consider any and all factors pertinent to the case"; (2) "set forth in the record the factors it considered"; and (3) state "the rationale underlying its decision for imposing the DNA surcharge." ***Id.***, 2008 WI App 80, ¶9, 312 Wis. 2d at 208–209, 752 N.W.2d at 395. ***Cherry*** listed "some factors to be considered" by the circuit courts in deciding whether to order the DNA surcharge: "(1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the

trial court finds pertinent." ***Id.***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208–209, 752 N.W.2d at 396.

¶11 As we have seen, the circuit court here ordered the DNA surcharge merely: "based on the seriousness of the offense and the fact that a weapon was involved." This does not satisfy the ***Cherry*** requirements because it is not specific to this case, it could apply to every felon in possession of a firearm case, and all felonies are serious. Accordingly, we reverse the order on the DNA surcharge and remand to the circuit court "to conduct proceedings necessary to reassess whether the $250 DNA surcharge should be imposed in this case and to set forth the factors and rationale it considered in making such a determination." *See* ***id.***, 2008 WI App 80, ¶11, 312 Wis. 2d at 209, 752 N.W.2d at 396.

C. *Sentence credit.*

¶12 Williams's last complaint is that the circuit court denied him twenty-two days of sentence credit for the time between the date his extended supervision in connection with earlier crimes was revoked and the day he entered the Dodge Correctional Institution to serve his sentence—for this crime and as a result of the revocation of his extended supervision (as we have seen, the circuit court ordered that the sentence in this case be concurrent with the sentence imposed on the revocation of Williams's extended supervision).

¶13 WISCONSIN STAT. § 973.155 requires "[a] convicted offender" "be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." "[A]n offender who has had his or her extended supervision revoked is entitled to sentence credit on any new charges until the trial court 'resentences' him or her from the available remaining term of extended supervision." ***State v. Presley***,

2006 WI App 82, ¶13, 292 Wis. 2d 734, 745, 715 N.W.2d 713, 719. "The sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution." WIS. STAT. § 304.072(4). Our review of the application of statutes to undisputed facts is a question of law reviewed *de novo*. ***Presley***, 2006 WI App 82, ¶4, 292 Wis. 2d at 738, 715 N.W.2d at 716. The dispositive issue is what date severed the connection between the old conviction and the new crime. Was it the revocation date (February 25, 2010) or was it the date he arrived at Dodge Correctional Institution (March 19, 2010)? The circuit court ruled it was the revocation date. We disagree.

¶14 Williams's sentence imposed following the revocation of his extended supervision did not "resume" until he was "received at a correctional institution." *See* WIS. STAT. § 304.072(4). Thus, on the date he was received at Dodge Correctional—March 19, 2010—he was no longer "in custody in connection with" the new crime. Until then, he was entitled to sentence credit for the new crime. The circuit court erred in denying the twenty-two days sentence credit. We reverse and remand with directions to amend the order to credit the extra days.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

Publication in the official reports is not recommended.