COURT OF APPEALS
DECISION
DATED AND RELEASED

March 28, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-2617-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ALEXANDER DEJESUS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Reversed and cause remanded with directions*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(f), STATS. Alexander Dejesus appeals from a judgment convicting him of one count of possession of marijuana, contrary to § 161.41(3r), STATS.[1] Dejesus pleaded no contest after the trial court denied his motion to suppress evidence discovered in a search of his pockets. He contends that the seizure violated the Fourth Amendment to the United States Constitution because

[1] Dejesus was also convicted of one count of resisting or obstructing an officer, contrary to § 946.41(1), STATS. That conviction is not a subject of this appeal.

Police Officer John Fahrney lacked reasonable suspicion to stop him. Because we conclude that there are insufficient facts of record to determine whether the police contact and the subsequent search were a seizure within the meaning of the Fourth Amendment, we reverse the trial court's order and remand for a factual determination of this issue.

BACKGROUND

Dejesus and two other males were walking northbound in the 900 block of Wisconsin Avenue in Beloit at about 2:30 a.m. on January 6, 1995, when they were observed by Officer Fahrney. According to Officer Fahrney, some businesses and cars in the area had been broken into within the last year.

Officer Fahrney stopped his squad car, approached the three males, and asked them for identification and why they were out at that time of night. Dejesus gave Officer Fahrney a false name. Officer Fahrney asked them if they had any drugs or weapons and if he could search their pockets or persons for these items. Dejesus agreed and Officer Fahrney found a partially smoked marijuana cigarette in his pockets. Officer Fahrney subsequently arrested him and the prosecutor charged Dejesus with obstructing an officer and possession of marijuana.

Dejesus filed a motion to suppress evidence of the marijuana. The trial court found Officer Fahrney's testimony that Dejesus consented to the search to be credible, thereby making the evidence seized from the pat down search admissible. Furthermore, the court found it reasonable for an officer to be "stopping people at that hour of the day, in an area where they are, and asking them to identify themselves." Dejesus appeals.

STANDARD OF REVIEW

In reviewing a trial court's denial of a motion to suppress evidence, we will uphold the court's findings of fact unless they are clearly erroneous. Section 805.17, STATS.; ***State v. Roberts,*** 196 Wis.2d 445, 452, 538

N.W.2d 825, 828 (Ct. App. 1995). However, whether a search passes constitutional muster is a question of law which this court reviews *de novo*. ***Id.***

WAS THERE A SEIZURE?

Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee the right of citizens to be free from unreasonable searches and seizures. But not all contact between police officers and citizens are seizures for Fourth Amendment purposes: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a `seizure' has occurred." ***Terry v. Ohio,*** 392 U.S. 1, 19 n.16 (1968).

The totality of the circumstances must be considered to determine whether the police conveyed a message that they required compliance with their request. ***Florida v. Bostick***, 501 U.S. 429, 437 (1991). The Supreme Court has consistently repeated: "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would `have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" ***Id.*** (quoted source omitted). An individual may decline an officer's request without fearing prosecution. ***Id.***

Since ***Terry***, the Supreme Court has consistently held that questioning alone does not constitute a seizure. For example, in ***Florida v. Royer***, 460 U.S. 491, 497 (1983), the Court wrote:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Relying on ***Royer***, the Court later determined that an officer may generally ask a person who he or she is and examine his or her identification even when the police have no basis for suspecting that particular individual of any wrongdoing. ***INS v. Delgado***, 466 U.S. 210, 216 (1984).

Dejesus insists that Officer Fahrney's actions conveyed a message that compliance was necessary. He contends that when a police officer pulls up in a marked squad car in front of three pedestrians on a city street at 2:30 a.m., and requests identification, an explanation of where they are going, what they are doing, how old they are, and whether they are carrying drugs or weapons, compliance is unquestionable.

But we believe that the facts of this case leave open the question of whether a seizure occurred. One police officer, in a marked squad car, approached three males, asked them questions, and obtained consent to search at least one of them. The trial court made no findings of fact as to whether the officer pointed a gun at Dejesus, activated the squad car's lights, used a threatening tone of voice or acted in any other manner which would have communicated to a reasonable person that he or she was not free to leave. Pursuant to ***Bostick***, 501 U.S. at 437-39, we remand this case so that the court may evaluate the seizure question under the totality of the circumstances.

REASONABLE SUSPICION

Should the trial court find that Officer Fahrney's actions required Dejesus to comply with his requests thereby constituting a seizure, we conclude that Officer Fahrney did not have the requisite reasonable suspicion to stop Dejesus. Therefore, the motion to suppress the evidence must be granted.

Officer Fahrney asserts that he stopped Dejesus because he had a concern for the crime problems in the area in which Dejesus was walking. But this fact, alone, does not constitute reasonable suspicion justifying a stop. An officer's perception of an area as "high-crime" may be a factor. ***State v. Morgan***, 197 Wis.2d 200, 211, 539 N.W.2d 887, 892 (1995). The time of day may also be a factor. ***Id.*** In ***Morgan***, the court concluded that the police could search a person for weapons who was driving in and out of alleyways in a high-crime neighborhood, late at night, and who appeared nervous when stopped. ***Id.*** at 215, 539 N.W.2d at 892.

But in this case, no other facts were put into evidence aside from the time of day and the fact that some burglaries had taken place in the area in the last year. We conclude that under the totality of the circumstances, Officer Fahrney lacked reason to suspect that DeJesus was committing a crime.

SUMMARY

In summary, we conclude that we must remand to permit the trial court to determine whether Dejesus was seized within the meaning of the Fourth Amendment to the United States Constitution. The court may, if it chooses, take additional testimony before making this determination. If the court concludes that a seizure took place, then Dejesus's motion to suppress must be granted because we have concluded that Officer Fahrney did not have the requisite reasonable suspicion to conduct a ***Terry*** stop.

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

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.