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DISTRICT I

December 26, 2024

To:

Hon. Danielle L. Shelton
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Christopher P. August
Electronic Notice

Sarah Burgundy
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP2074-CR State of Wisconsin v. Montrael S. Hudson (L.C. # 2020CF704)

Before White, C.J., Donald, P.J., and Geenen, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Montrael S. Hudson appeals from a judgment of conviction on one count of possession of a firearm by a felon and from an order denying his postconviction motion for sentence modification. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In the late night hours of February 11, 2020, Milwaukee Police Officer Chad Boyack and his partner, Officer Mark Dillman, were on patrol and parked on the street when Boyack heard four to five rapid gunshots. He reported the shots to dispatch, which shortly thereafter provided a ShotSpotter alert that three gunshots had been detected at an address less than four blocks away. The officers arrived at the address minutes later, and the only person in the area was Hudson, who was across the street from the address.

Boyack stepped out of the police cruiser and approached Hudson, stopping in front of him and asking if he had heard the gunshots. Hudson said no. Boyack had noticed, however, that Hudson had a bulge under his coat at his right side waistband and that, when Hudson answered, he moved his hand down and brushed the bulge. Boyack later described the movement as consistent with a "security check"[2] that can occur when someone is armed.

Concerned that Hudson had a weapon, Boyack raised his hand in what Hudson describes as "a 'stop' signal" and asked Hudson if he was armed. Hudson said no. Boyack instructed Hudson to put his hands up. Boyack also signaled to Dillman, who was approaching Hudson from behind, that they would likely arrest Hudson. Boyack asked Hudson again whether he was armed; this time, Hudson said yes, and Dillman retrieved a silver gun from Hudson's right side. Hudson was arrested for possession of a firearm by a felon.

[2] Boyack described a "security check" as "a conscious or unconscious movement of a person towards a certain part of their body where they might be armed or concealing an object that could be a weapon."

Hudson moved to suppress the gun, claiming a Fourth Amendment violation and alleging that the police had stopped him without reasonable suspicion.[3] The circuit court conducted a hearing on the motion, at which only Boyack testified. The circuit court concluded that Boyack's encounter with Hudson did not violate the Fourth Amendment and denied the suppression motion.

Hudson subsequently entered a guilty plea. At sentencing, Hudson argued, as a mitigating circumstance, that he had the gun because he, his sister, and his mother were being harassed by his sister's ex-boyfriend, Jacorey Chapman. Hudson's mother also wrote a letter to the court describing the harassment. The circuit court sentenced Hudson to eighteen months of initial confinement and forty-two months of extended supervision.

Hudson filed a postconviction motion, renewing his claim that police lacked reasonable suspicion to stop him. He further claimed that trial counsel was ineffective by arguably conceding the legality of the stop at the suppression hearing, and he argued that sentence modification was warranted based on "new" information about Chapman and the threat he posed. The postconviction court[4] denied the motion without a hearing, concluding that police had reasonable suspicion, trial counsel did not concede the legality of the stop, and the "new" information about Chapman did not warrant sentence modification. Hudson appeals.

[3] Hudson also alleged that police lacked reasonable suspicion to frisk him and that they improperly interrogated him when they asked if he had a gun without properly giving ***Miranda*** warnings. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). However, these issues are not renewed on appeal.

[4] The Honorable Joseph A. Wall denied the suppression motion, accepted Hudson's plea, and imposed sentence, and will be referred to as the circuit court. The Honorable Danielle L. Shelton reviewed and denied the postconviction motion and will be referred to as the postconviction court.

We start with a review of the suppression motion.[5] Review of the circuit court's decision denying a motion to suppress evidence presents a question of constitutional fact that is subject to a two-step inquiry. ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. We uphold the circuit court's findings of historical fact unless clearly erroneous, then independently apply constitutional principles to those facts. ***Id.*** Whether a person has been seized also presents a question of constitutional fact. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729.

There are two types of seizure: the investigatory stop and the arrest. *See* ***id.***, ¶¶20, 22. An investigatory stop must be supported by reasonable suspicion, the "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). "Reasonable suspicion is a fairly low standard to meet," and a determination thereof "is made based on the totality of the circumstances." ***State v. Anderson***, 2019 WI 97, ¶33, 389 Wis. 2d 106, 935 N.W.2d 285. When a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

The parties disagree over when, precisely, the investigatory stop occurred; as the circuit court observed, the police contact with Hudson unfolded "very quickly … really seconds and

[5] An order denying a motion to suppress is reviewable notwithstanding the defendant's guilty plea. WIS. STAT. § 971.31(10).

some half seconds." Hudson notes in his reply brief, however, that his Fourth Amendment claim "remains viable even under the State's view, so long as this [c]ourt accepts its concession that a cognizable seizure occurred before Mr. Hudson admitted to criminal wrongdoing"—that is, before he admitted he was armed. Even fixing the time of the seizure at the point when Boyack raised his hand to give a nonverbal stop command, however, there was reasonable suspicion for an investigatory stop.

While Hudson maintains that his "mere presence in the vicinity of an area where a hypothetical crime may have occurred, without more, does not constitute reasonable suspicion," his "mere presence" was not the only fact in play. At the moment Boyack raised his hand, the circumstances were as follows: (1) Boyack and Dillman were patrolling "the most dangerous area in the city of Milwaukee"; (2) it was just before midnight and darkness increases risk of danger; (3) Boyack heard four or five shots; (4) moments later, ShotSpotter indicated nearby gunfire; (5) the only person anywhere near the area of the ShotSpotter alert was Hudson; (6) Boyack had observed a bulge in Hudson's jacket near the waistband but a little lower than a coat pocket; (7) Boyack also observed Hudson conducting a "security check" of the bulge as he exited his car; and (8) years of experience had taught Boyack that a security check often accompanied discovery of a firearm.

Any one of those facts, standing alone, might well be insufficient. ***Waldner***, 206 Wis. 2d at 58. But we do not examine individual facts. *See* ***id.*** The above facts, considered as a whole, gave rise to a reasonable suspicion that something unlawful might be afoot such that a temporary stop and further investigation was justified. The circuit court did not err in denying the motion to suppress the gun.

Hudson next raises a claim that his trial attorney was ineffective. At the suppression hearing, trial counsel argued that "the stop to talk to a citizen about a crime or an investigation is justified, but to go beyond that and frisk him" was not appropriate. Hudson asserts that if this court "concludes that trial counsel's comments at the suppression hearing constitute a concession that the stop was justified, trial counsel was ineffective for conceding the legality of the underlying stop."

The postconviction court determined that trial counsel "did not concede the legality of the stop." We agree that this was not a concession; the circuit court did not treat it as such and neither have we. We thus reject any claim of ineffective assistance of trial counsel because neither deficient performance nor prejudice has been shown. *See* ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334.

Finally, Hudson moved for resentencing on the basis of a new factor. A new factor is a fact or set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. Whether a fact or set of facts is a "new factor" is a question of law. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court then determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

At sentencing, Hudson argued in mitigation that he carried a gun because he had a reasonable fear of his sister's ex-boyfriend, Chapman, who had threatened and harassed

Hudson's sister and family, including Hudson. The circuit court was skeptical of the explanation because, among other things, Hudson was nowhere near his sister's residence. In his postconviction motion, Hudson argued that the circuit court "was not presented with important contextual information" or "sufficient evidence" about Chapman's "extremely violent character" and specific threats against Hudson which were not "place-specific." The postconviction court "disagree[d] with the proposition that a more developed explanation as to why the defendant knowingly flouted his lifetime firearm ban justifies sentence modification." That is, the postconviction court determined that even if Hudson had identified new factors, sentence modification was not warranted.

While we conclude that the postconviction court properly exercised its discretion in determining that sentence modification was not warranted even if there were new information, we conclude that Hudson has failed to establish a new factor in the first place. Nearly all of the "new" information about Chapman appears to be information Hudson was already aware of at the time he was sentenced. A fact in existence at the time of sentencing, however, is new only if it has been overlooked by *all* of the parties; information known by the defendant at the time of sentencing is not a new factor. ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673; ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997).

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals