COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1111-FT **Cir. Ct. No. 01-JV-327**

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

IN THE INTEREST OF DUSTIN W. B.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DUSTIN W. B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] We affirm the trial court's denial of Dustin W. B.'s motions challenging the legality of his stop and temporary

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

detention and seeking to suppress physical evidence seized during a frisk because, under the totality of the circumstances, the arresting officer provided specific and articulable facts to support the temporary investigative stop and subsequent frisk and seizure of contraband.

BACKGROUND

¶2 In a juvenile delinquency petition, Dustin was charged with possession of marijuana in violation of WIS. STAT. § 961.41(3g)(e). Dustin filed motions challenging the legality of his stop and temporary detention and seeking to suppress physical evidence seized during a frisk. After the motions were denied, Dustin entered a plea of no contest and was found guilty of the charge. Dustin appeals from the denial of his motions.

¶3 The only witness at the motion hearing was City of Sheboygan Police Officer John P. Samuels, an eight-year veteran. Samuels testified that he was assisting another officer in the apprehension of a suspect at a well-known residence at approximately 10:00 p.m. Samuels and the other officer approached the porch of the residence and asked an unidentified female if the suspect was inside. She responded that he was and she went into the house to get the suspect. While waiting for the suspect to come out onto the porch, the other officer mentioned that he had just observed an individual leave the residence from a side of the house that does not have any doors, only windows.

¶4 Samuels got into his squad car and began to follow the individual, who was the only pedestrian in the area. Samuels watched as the individual stopped at an intersection and "look[ed] north and south as if he was going to cross" the street. The individual stopped at the intersection and after looking in the direction of the officer, the individual continued in a northerly direction. This

aroused the officer's suspicion because if a person was to continue in a northerly direction, there would be no need to stop at an intersection and check for cross traffic. The officer was concerned that the individual would attempt to evade him by taking an alley that the pedestrian was approaching, so the officer made a U-turn and went into a convenient parking lot. When the individual saw the squad car in the parking lot, he suddenly crossed in midblock. This further aroused Samuels' suspicions because someone who has just stopped at an intersection to check for cross traffic usually does not cross midblock after passing up a marked cross walk.

¶5 With his suspicions aroused, Samuels stopped the individual and identified him as Dustin. Because Dustin had his hands in his pockets, Samuels thought he might be armed and he frisked him for weapons.

> Q. And at that point what happened?
>
> A. I didn't feel any weapons, but I did feel what I recognized as [a] disposable butane lighter in his left front pant's pocket and something else in the pocket. Because of its consistency and the noise it made when I touched it, I thought it might be contraband, drugs.
>
> Q. What did you do at that point?
>
> A. I asked if he had anything in his pocket such as contraband, and he said he didn't.
>
> Q. What did you do at that point?
>
> A. I asked if I could take what was in his pockets and he said yes.
>
> Q. What happened then?
>
> A. I pulled out a butane lighter and a cigarette wrapper with green leafy substance which I thought to be marijuana.

¶6 Based on this testimony, the trial court denied both motions. The court reasoned that Dustin's leaving the residence through a window gave the officer reasonable suspicion to follow and stop Dustin. While it found that the frisk was a "harder issue," the court concluded that along with Dustin's flight from the residence, the time of day supported the officer's belief that Dustin could be armed. The court ultimately held that Dustin consented to Samuels removing the butane lighter and contraband from Dustin's pocket and that this was a recognized exception to the general warrant requirement.

¶7 On appeal, Dustin concedes that it was reasonable for Samuels to infer that by his behavior—leaving the residence through a window and altering his course of travel twice—Dustin sought to avoid contact with law enforcement. However, Dustin cites to ***Florida v. Bostick***, 501 U.S. 429, 437 (1991), for the proposition that "a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention and seizure." He asserts that under the totality of the circumstances, there was no constitutionally permissible basis for a ***Terry***[2] stop. He contends that the trial court erred when it upheld the frisk "based on three factors: It was dark, the officer was alone, and Dustin was 'fleeing.'"

DISCUSSION

¶8 This appeal involves the application of constitutional standards to undisputed facts, a question of law which we review de novo. ***State v. Foust***, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997). The temporary detention of a citizen constitutes a seizure within the meaning of the Fourth Amendment and

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

triggers Fourth Amendment protections. ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). A police officer may, in the appropriate circumstances, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). When police make an investigative stop of a person, it is not an arrest and the standard for the stop is less than probable cause. ***State v. Allen***, 226 Wis. 2d 66, 70-71, 593 N.W.2d 504 (Ct. App. 1999). The standard is reasonable suspicion, "a particularized and objective basis" for suspecting the person stopped of criminal activity. ***Ornelas v. United States***, 517 U.S. 690, 696 (1996). When determining if the standard of reasonable suspicion was met, those facts known to the officer must be considered together as a totality of circumstances. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990).

¶9 In the present case, we find sufficient facts to give rise to a reasonable suspicion that Dustin wanted to avoid contact with law enforcement because he had committed a crime or was about to commit a crime. ***State v. Rutzinski***, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. Samuels did not just stumble across Dustin; he attracted attention to himself when he left a residence through a window at 10:00 p.m. while the officers were in front waiting for a suspect to come out. After he left his residence, Dustin altered his course of travel twice after, it can reasonably be assumed, he saw Samuels in a squad car tailing him.

¶10 While we agree with Dustin that avoidance of the police and refusal to cooperate may be founded in wholly innocent intentions and without more do not create reasonable suspicion, ***Bostick***, 501 U.S. at 437, we are aware that "cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." ***Illinois v. Wardlow***, 528 U.S. 119, 124

(2000). In Wisconsin, evasion of the police may indicate a guilty mind and may, by itself, raise sufficient reasonable suspicion to justify a brief investigative detention. ***State v. Amos***, 220 Wis. 2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998). In addition to specific facts, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." ***Wardlow***, 528 U.S. at 125. While Samuels' suspicions pertaining to Dustin's behavior were not the only explanations, they were reasonable, and Samuels was entitled to investigate them in order to confirm or dispel his suspicions. ***Id.***

¶11 Samuels testified that after stopping Dustin, he conducted a frisk for weapons because Dustin had his hands in his pockets and he thought Dustin might be armed. The trial court upheld the frisk because Dustin's evasive behavior, the time of day and the officer being alone created a reasonable suspicion that the officer could be in danger. On appeal, Dustin argues that these three factors are not enough to create a reasonable suspicion.

¶12 This court applies a two-step standard of review to constitutional search and seizure inquiries. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. The trial court's findings of evidentiary or historical fact will be upheld unless they are clearly erroneous. ***Id.*** This court independently evaluates those facts against the constitutional standard to determine whether the search was lawful. ***Id.*** In order to justify a frisk, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry***, 392 U.S. at 21. Once the officer has articulated the facts which caused him or her to act, those facts are assessed against an objective standard: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate?" ***Id.*** at 21-22. There is no set

standard for what constitutes a reasonable police reaction in all situations. Rather, the reasonableness of the reaction depends upon the circumstances facing the officer. ***Bies v. State***, 76 Wis. 2d 457, 468 n.7, 251 N.W.2d 461 (1977).

¶13 Dustin's arguments run afoul of a basic principle: whether an officer had a requisite reasonable suspicion to conduct a frisk must be based on the totality of the circumstances. "[A]ll of the circumstances ... are to be considered in determining what was reasonable police procedure in the particular situation." ***State v. Williamson***, 58 Wis. 2d 514, 520, 206 N.W.2d 613 (1973) (quoting ***State v. Chambers***, 55 Wis. 2d 289, 297, 198 N.W.2d 377 (1972)).

> Any one of [the] facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

State v. Waldner, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). The officer provided specific, articulable facts that, when added together, equal a reasonable suspicion to justify the frisk of Dustin.

¶14 Dustin seeks suppression of the marijuana based on his argument that the frisk was not supported by reasonable suspicion; he does not and cannot challenge the seizure of the cigarette wrapper containing a green leafy substance. The trial court found that after detecting the package, Samuels asked Dustin if he could go into the pocket and retrieve the package and Dustin consented. A person's consent to a search or seizure is a recognized exception to the reasonableness requirement of the warrant provisions of the federal and state constitutions. Dustin's consent was voluntary if the consent was not exploited by a prior illegal stop and frisk. *See* ***Florida v. Royer***, 460 U.S. 491, 507-08 (1983).

We conclude that the prior stop and frisk was warranted and legal. Where a stop and frisk is legal, an accompanying consent to search is not tainted.

By the Court.—Order affirmed.

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