COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2023-CR **Cir. Ct. No. 2005CF4434**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUFUS RONNIE BELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY and M. JOSEPH DONALD, Judges.[1] *Reversed and cause remanded for further proceedings.*

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

[1] The Honorable Dennis P. Moroney presided over the motion to suppress, the guilty plea and the sentencing. The Honorable M. Joseph Donald presided over the postconviction motion.

¶1 KESSLER, J. Rufus Ronnie Bell appeals from a judgment of conviction for possession of narcotics, and from an order denying his motion for postconviction relief. Bell, who pled guilty after his motion to suppress narcotics seized from his person was denied, argues the narcotics should have been suppressed as fruit of an illegal stop. In the alternative, Bell argues he is entitled to relief because he was given ineffective assistance of counsel at the suppression hearing. We conclude that the drugs should have been suppressed and, therefore, reverse the conviction and remand for further proceedings. Because the suppression issue is dispositive, we do not address Bell's ineffective assistance claim.

BACKGROUND

¶2 After denial of a motion to suppress narcotics seized from Bell's person, he entered a guilty plea to two counts of possession of controlled substances (heroin and cocaine) both as second or subsequent offense, contrary to WIS. STAT. §§ 961.41(3g)(am), 961.41(3g)(c) and 961.48(2) (2005-06).[2] This appeal concerns only the facts and circumstances surrounding the police encounter with Bell and two ensuing searches of his person, the second of which yielded the narcotics at issue.

¶3 At the suppression hearing, Officer Zebdee Wilson testified about what occurred on August 5, 2005, when he was on patrol alone in the area around the 3100 block of North 8th Street in Milwaukee. He was wearing plain clothes

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

and driving an unmarked vehicle. Wilson drove past a residence at 3145 N. 8th Street, with which he was familiar because he had made undercover narcotics buys there and had arrested people for dealing drugs outside the house and in the area. As Wilson drove past the house he noticed three men "standing around" outside. One of those men was Bell, who was at the top of the stairs leading from the sidewalk toward the house. The other two men were on the sidewalk. Wilson did not see the men engaging in any kind of a transaction. He saw the two men other than Bell talking, but did not see Bell talking. Wilson never heard the men talking, about drugs or anything else.

¶4 Wilson drove around the block. When he came back, Bell had moved down the stairs to the sidewalk. Bell began to walk away as Wilson was about to park his vehicle in front of the house. Wilson walked toward the other two men, and said to Bell, "[S]ir, can I talk to you" as Bell walked away. Bell came back. Wilson had his badge and identification on his shirt and said he was a police officer. He started talking to all three men. Wilson said he "probably" asked Bell for his name and address. He asked "why he [Bell] was in the area." Bell responded that he "was passing through." Wilson talked to all three "in regards to the drug dealing in front of the house and in [that] area." Wilson testified that the men "said they weren't dealing no drugs and they wasn't like that" and that he did not believe them.

¶5 Wilson then asked Bell for permission to search his person. Wilson described his first request to search Bell in response to the following inquiry by Bell's counsel:

> [DEFENSE COUNSEL]: [A]t some point in time did you ask for permission to search him?
>
> [WILSON]: Yes, I did.

> [DEFENSE COUNSEL]: How did you ask him?
>
> [WILSON]: I said, guys, this area is known for drug dealing and do you mind do [sic] I search you for drugs or weapons, and they said yes."
>
> [DEFENSE COUNSEL]: Mr. Bell said yes?
>
> [WILSON]: Yes.
>
> [DEFENSE COUNSEL]: He said that he minded?
>
> [WILSON]: Yes. I said, do you mind.
>
> [DEFENSE COUNSEL]: And he said yes?
>
> [WILSON]: He said yes.

Shortly thereafter, the trial court intervened, suggested there was a problem with the way the question was worded, and spoke directly to Wilson, stating: "So the way you answered it when you said, do you mind if I search you and he says yes, that would indicate, yes, you do mind if I search you." Wilson then told the court that Bell's response was: "He said I can search him."

¶6 Wilson said he asked the men if he could search them "[b]ecause the initial time I was there by myself, and I didn't know if anybody had guns or anything. So I just did a quick one and kind of like backed up off to keep an eye on all three." Wilson described the results of his initial search of Bell:

> WILSON: It was just patting him on his pockets, in the back pockets and the front.
>
> [DEFENSE COUNSEL]: And did you feel anything that led you to believe that he was possessing any illegal drugs?
>
> WILSON: No, not at that time.

¶7 After searching the men, Wilson stepped back, remained in full view of the three men, and used the radio on his person to call for another squad for backup "just in case." A marked squad car with uniformed officers arrived within

a "[c]ouple of minutes." In the presence of uniformed officers, and a marked squad car, Wilson then announced: "[G]uys, I want to do a more detailed search[.] [I]s it okay if I search you[?]" Wilson said all three men agreed to the second search.

¶8 For the second search of Bell, Wilson instructed him to go up the stairs above the sidewalk. Wilson then began his search at Bell's ankle, working his way up to Bell's crotch, where Wilson felt what he believed to be a plastic bag with hard objects, which Wilson further believed to be narcotics. Wilson instructed Bell to remove the bag, which Bell did. The cocaine and heroin that were the subject of Bell's conviction were found in the bag.

¶9 The trial court denied the motion to suppress and made numerous factual findings at the suppression hearing. It accepted Wilson's version of events (the only one offered at the hearing). It found that the three men were not in custody when Wilson spoke to them and searched them. It also observed that when the officer first called out to Bell, the officer did not necessarily have sufficient reason to stop Bell. However, the trial court found, without identifying exactly when, that the three men were stopped, and that they were not free to leave "until the investigatory stop is completed." The trial court discussed the officer's actions:

> [H]ere you have an officer go past a known drug house where arrests have been made, where undercover buys have been made. You have three guys sitting out in front of the drug house. You know, that peaks the interest of any would-be officer to determine, well, why are they there, are they there for business, or are they there just for –
>
> ….
>
> There's nothing in the Fourth or Fifth Amendment that is intended to hamper on-the-scene questioning by police officers under the circumstances of a case. That's their job

> … to ferret out crime. What they see are three guys standing in front of a drug house.

¶10 After the motion to suppress was denied, Bell pled guilty. He filed a postconviction motion in which he relied on the trial court's finding that Bell had been temporarily seized at the time the drugs were found. He argued that because he was seized, there had to have been reasonable suspicion to justify the seizure, and there were not sufficient facts in the record from which one could find reasonable suspicion.[3]

¶11 The postconviction court rejected Bell's argument, concluding, "based on the findings inherent in Judge Moroney's ruling, that Officer Wilson had reasonable suspicion to perform a ***Terry***[4] stop due to the high volume of drug dealing known to have occurred at that location and the prior arrests made there." This appeal followed.

LEGAL STANDARDS

¶12 "'Whether evidence should be suppressed is a question of constitutional fact.'" ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899 (citation omitted). "A finding of constitutional fact consists of the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles. We review the former under the clearly erroneous standard, and the latter independently." ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182 (citation omitted).

[3] Bell also argued that he was denied the effective assistance of counsel. This argument was rejected by the postconviction court. Because we do not address that issue on appeal, we will not discuss the details of that issue.

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

¶13 At issue in this case is the warrantless search of Bell's person. "Warrantless searches are per se unreasonable under the Fourth Amendment." ***State v. Jones***, 2005 WI App 26, ¶9, 278 Wis. 2d 774, 693 N.W.2d 104. "However, a search authorized by consent is wholly valid *unless that consent is given while an individual is illegally seized*." ***Id.*** (emphasis added). Bell contends that he was seized at the time he gave consent for the search of his person that yielded the drugs, and that his seizure was illegal because the officer lacked reasonable suspicion that Bell had committed, was committing, or was about to commit a crime.

¶14 Whether Bell "was in fact seized for purposes of the Fourth Amendment requires the application of an objective test as to whether, 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave.'" ***Id.*** (citation omitted; bracketing supplied by ***Jones***). "'[A] person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave.'" ***State v. Williams***, 2002 WI 94, ¶4, 255 Wis. 2d 1, 646 N.W.2d 834 (citation and internal quotation marks omitted; first set of brackets in original).

¶15 If Bell was seized, the next question is whether the officer had reasonable suspicion to stop him. This "reasonable suspicion" standard, established in ***Terry v. Ohio***, 392 U.S. 1 (1968), provides that "[a] law enforcement officer may lawfully stop an individual if, based upon the officer's experience, she or he reasonably suspects 'that criminal activity may be afoot.'" ***State v. Williams***, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting ***Terry***, 392 U.S. at 30). "A ***Terry*** stop is not an arrest, and the standard for the stop is less than probable cause." ***State v. Patton***, 2006 WI App 235, ¶9, 297 Wis. 2d

415, 724 N.W.2d 347. "Instead, the standard is reasonable suspicion, which is 'a particularized and objective basis for suspecting the person stopped of criminal activity.'" ***Id.*** (quoting ***Ornelas v. United States***, 517 U.S. 690, 696 (1996) (citation omitted)).

¶16 The reasonable suspicion standard has been codified in WIS. STAT. § 968.24, titled "Temporary questioning without arrest." The statute authorizes a law enforcement officer to "stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime." ***Id.*** On appeal, we review *de novo* a trial court's determination of whether there was the requisite reasonable suspicion to justify a seizure. ***Williams***, 241 Wis. 2d 631, ¶18 ("[T]he determination of reasonable suspicion for an investigatory stop and subsequent protective search is a question of constitutional fact.").

DISCUSSION

¶17 The threshold issue is whether Bell was seized at the time he consented to the second search of his person. We conclude, like the trial court, that Bell was seized at that time. The next issue is whether the seizure was lawful. Specifically, did the officer have reasonable suspicion to seize Bell? We conclude the officer did not. Because the seizure was unlawful, Bell's consent to the second search – the only basis offered as justification for the search – was invalid, and the fruits of that search must be suppressed.

I. Bell was seized at the time he consented to the second search

¶18 The parties do not dispute the trial court's findings of historical fact, but they spend considerable time interpreting the trial and postconviction courts'

application of these historical facts to constitutional principles. Given the *de novo* standard of review that applies, we will limit our discussion to application of the undisputed historical facts to the constitutional principles at issue.

¶19 The key historical facts are that Wilson called out to Bell as Bell was walking away from the house, Bell returned and spoke with Wilson, and Wilson obtained Bell's permission to conduct the first search of Bell's person. During that first search, Wilson did not feel anything that led him to believe Bell possessed weapons or drugs. After searching all three men, Wilson stepped back and used his radio to request a backup squad car. When that car arrived a few minutes later, Wilson asked the three men if he could "do a more detailed search" and the men consented. During this second search, Wilson found the drugs in Bell's pants.

¶20 The crucial inquiry is whether Bell was "seized" at the time he consented to the second search. "The test for whether a person is seized is whether, considering the totality of the circumstances, a reasonable person would believe that he or she is free to leave or otherwise terminate the encounter." ***State v. Kolk***, 2006 WI App 261, ¶20, 298 Wis. 2d 99, 726 N.W.2d 337.

¶21 We conclude that a reasonable person under the circumstances presented here would not believe he or she was free to leave. At the time Wilson asked to search Bell a second time, he had already been searched and had been asked about drugs. Wilson had called for backup in the men's presence, and officers in a marked squad had arrived a "[c]ouple of minutes" later. It was at this time that Wilson asked the men if he could search them again. A reasonable person in that situation would not have felt free to leave. Bell had been seized in a

constitutional sense when the backup arrived, and he was not free to leave at the time he gave consent for the second search.

II. There was no reasonable suspicion to justify the seizure.

¶22 Focusing on the circumstances as they existed at the time the second consent was given, we conclude that there was not a reasonable suspicion that Bell had committed, was committing or was about to commit a crime. Therefore, the seizure was unlawful.

¶23 The reasonable suspicion standard requires the officer to have "a particularized and objective basis for suspecting the person stopped of criminal activity." ***Patton***, 297 Wis. 2d 415, ¶9 (citation and internal quotation marks omitted). Thus,

> reasonable suspicion cannot be based merely on an inchoate and unparticularized suspicion or hunch. When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the circumstances. Stated otherwise, to justify an investigatory stop, the police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.

State v. Washington, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305 (citations, internal quotation marks, and two sets of brackets omitted).

¶24 The State argues that under the circumstances in this case, there was reasonable suspicion because "an officer could reasonably suspect that Bell was involved in illegal drug activity." The State explains:

> The officer knew from personal experience that drugs were sold at and in front of the residence. He saw Bell and two other men in front of the house, Bell on the stairs leading to the house. When he returned a short while later, the men

> were still there. When he pulled up in his vehicle, Bell began to walk away. When he asked Bell why he was there, Bell answered that he was passing through.
>
> Bell term[s] his explanation for his presence at the house as "innocent"…. However, Officer Wilson could reasonably suspect that Bell's explanation was also untrue. Officer Wilson had witnessed Bell not merely "passing through," but on the stairs of what Officer Wilson knew was a drug house. He had witnessed Bell still at the residence when the officer returned.

The State argues that although Bell did not run away, he did begin to walk away when the officer approached. The State concludes:

> With this information, Officer Wilson could reasonably suspect that Bell was involved in drug activity in front of the residence. While an innocent person could plausibly have behaved in the same manner Bell did, Officer Wilson could still reasonably suspect that Bell was involved in illegal activity.

¶25 The State further asserts that Bell's statement to Wilson that he was "passing through" was untrue because Bell was standing by the house for longer than it would take to pass through.

¶26 We conclude that Wilson lacked reasonable suspicion to seize Bell, prior to and through the time he consented to the second search. Our reasons are similar to those addressed in ***Washington***, where the circumstances did not provide reasonable suspicion for an investigative stop. ***Id.***, ¶17. In ***Washington***, the officers were on patrol, investigating a complaint of loitering and drug sales at an allegedly vacant house. ***Id.***, ¶2. The following summarizes the facts leading to Washington's arrest:

> Washington was in front of the house that the police were investigating, and after one of the officers recognized him from past encounters, they ordered him to stop. Washington stopped initially, but also took a few steps backwards and allegedly looked nervous. He then threw his hands up and a towel flew out of his hand. At that

> point, Washington was pushed to the ground and subdued. One of the officers retrieved the towel and discovered the cocaine, which was in a baggie that had been wrapped in the towel.

Id. Washington challenged the stop. On appeal, we held the officer lacked reasonable suspicion to stop him, explaining:

> Investigating a vague complaint of loitering and observing Washington in the area near a house that the officer believed to be vacant, even taken in combination with the officer's past experiences with Washington and his knowledge of the area, does not supply the requisite reasonable suspicion for a valid investigatory stop. People, even convicted felons, have a right to walk down the street without being subjected to unjustified police stops.

Id., ¶17.

¶27 Our holding in ***Washington*** applies with equal force to the facts here. Standing with other people, and walking on the sidewalk in a high crime area with which the officer is familiar, is not enough to provide an objective, reasonable, articulable suspicion that the individual observed standing or walking probably committed a crime. Indeed, Bell walked back toward the officer when the officer asked him to return, and answered the officer's questions. The circumstances do not indicate Bell was involved in criminal activity.

¶28 Further, we are unconvinced by the State's suggestion that because Bell stood in front of the house longer than necessary, Bell was lying when he told Wilson that he was "passing through." A precise definition of "passing through" eludes us. We are unconvinced that without additional information it is reasonable to immediately conclude that Bell was lying and that he therefore must be committing a crime. The State seems to fault Bell for not moving away quickly enough so that he would be "passing through," but then suggests that by walking

away at all, Bell hinted at criminal activity. We reject the State's argument and its assertion that there was reasonable suspicion to seize Bell.

III. Bell's consent to the second search was invalid because he was illegally seized at the time.

¶29 We have concluded that at the time of the second search, Bell was illegally seized because a reasonable person would not have felt free to leave, and there was no reasonable suspicion that Bell had, was or would commit a crime. Because he was illegally seized, Bell's consent to the second search was invalid. *See* ***Jones***, 278 Wis. 2d 774, ¶9; *see also* ***State v. Luebeck***, 2006 WI App 87, ¶17, 292 Wis. 2d 748, 715 N.W.2d 639 (holding that where defendant was unlawfully seized at time consent to search was given, consent was tainted by the illegal seizure and evidence must be suppressed). Further, the State does not suggest that, absent Bell's consent, there was an independent basis to justify the search. Lacking a legal basis for the search, the search was unlawful and the evidence seized from Bell's person should have been suppressed. Therefore, we reverse the conviction and remand for further proceedings.

By the Court.— Judgment and order reversed and cause remanded for further proceedings.

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