COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP691-CR **Cir. Ct. No. 2008CM2310**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTE S. WILDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed.*

¶1 BRENNAN, J.[1] Donte S. Wilder appeals from a judgment entered after Wilder pled guilty to carrying a concealed weapon, contrary to WIS. STAT. § 941.23. Wilder challenges the denial of his motion to suppress the weapon,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

which he asserts was discovered during an illegal search. Wilder raises two issues on appeal: (1) whether, under a Fourth Amendment analysis, officers seized Wilder when they asked him to step out of his car and, if so, (2) whether the seizure was properly based upon an anonymous tip. Because I conclude that there was no seizure when the officers asked Wilder to exit his car, I affirm the trial court.

BACKGROUND

¶2 The facts are undisputed. On April 26, 2008, at approximately 8:20 p.m., City of Milwaukee Police Officers Jeffrey Krueger and Paul Martinez, as well as two other officers, were dispatched to investigate a drug complaint. The dispatch was based upon an anonymous 911 call[2] made only three minutes earlier, alleging that multiple individuals were selling drugs out of a tan car located at 3851 North 24th Street, City of Milwaukee.

¶3 Officers Krueger and Martinez approached the scene, heading northbound on North 24th Street. Upon arriving at the address provided by the anonymous tipster, Officer Krueger observed a tan car facing southbound on

[2] In its brief, the State admits that "the prosecutor who handled Mr. Wilder's motion relied, in part, upon factually inaccurate assumptions" concerning the report provided to police, which transmitted the information received from the anonymous tipster. More specifically, the prosecutor indicated that the report told officers the location of the individual making the anonymous tip, when in fact, the report did not contain that information, and the officers did not know the location of the anonymous tipster. While Wilder makes much of the fact that this information was falsely relayed to the trial court and that this information was relied on by the trial court in making its ruling, I find that particular fact to be irrelevant to this court's analysis upon appeal. Therefore, the court rejects any suggestion by Wilder to remand the case back to the trial court to allow the State to explain its error and give the trial court an opportunity to decide the case with more accurate information.

North 24th Street, directly across from 3852 North 24th Street; he observed a single individual inside the car.

¶4 Officer Krueger also observed a second vehicle parked or idled approximately three to four house lengths behind the tan car. Officer Krueger recalled four individuals sitting inside the second vehicle. Immediately after arriving on the scene, Officers Krueger and Martinez approached the tan car. The other two officers on the scene approached the second vehicle.

¶5 As Officers Krueger and Martinez walked toward the tan car, they observed Wilder alone inside. Officer Krueger approached the passenger's side of the car, and Officer Martinez approached the driver's side of the car.

¶6 Officer Martinez then proceeded to ask Wilder a few basic questions. He asked Wilder if he lived in the area and what he was doing sitting in the vehicle. Wilder responded that he did not live in the area and that he was waiting for his brother or another family member. After asking Wilder these basic questions, Officer Martinez asked Wilder if he would step out of the car. Wilder acquiesced to Officer Martinez's request.

¶7 As Wilder stepped out of the car, Officer Krueger walked around the car from the passenger's side to the driver's side, to assist Officer Martinez. When Wilder opened up the driver's side door, Officer Krueger smelled the odor of burnt marijuana coming from inside the car. Based on the smell, Officer Krueger searched the car and found a handgun in a storage compartment located on the front driver's side door.

¶8 Wilder was charged with carrying a concealed weapon, in violation of WIS. STAT. § 941.23. He filed a motion to suppress, challenging the search that

led to the discovery of the weapon. The trial court denied the motion during a hearing on August 26, 2008, finding that it did not believe that the officers had stopped Wilder within the meaning of the Fourth Amendment, but even if they had, the stop was sufficiently justified based upon the anonymous tip. Wilder brought a motion to reconsider the denial of the motion to suppress, and his motion was denied by the trial court after a hearing on October 30, 2008. Wilder entered a guilty plea, was convicted and sentenced. He subsequently filed this appeal.

DISCUSSION

¶9 We review a trial court's denial of a motion to suppress in two steps. First, we examine the trial court's findings of historical fact under the clearly erroneous standard, and then we review the application of constitutional principles to those facts *de novo*. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. Whether police conduct violates the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. Because the parties do not challenge the trial court's findings of fact, only the application of the law to those facts, I begin my review of the trial court's decision at step two.

¶10 Warrantless searches or seizures are *per se* unreasonable under the Fourth Amendment. ***Katz v. United States***, 389 U.S. 347, 357 (1967).[3] But not all encounters with law enforcement officers are "seizures." ***Florida v. Bostick***, 501

[3] The Wisconsin Supreme Court "has consistently and routinely conformed the law of search and seizure under the state constitution to that developed by the United States Supreme Court under the fourth amendment." ***State v. Fry***, 131 Wis. 2d 153, 172, 388 N.W.2d 565 (1986).

U.S. 429, 434 (1991). The general rule is that a seizure has occurred when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980) (quoting ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968)).

¶11 The United States Supreme Court in ***Mendenhall*** set forth the following test for determining whether a particular police contact constitutes a seizure for purposes of the Fourth Amendment:

> We conclude that 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 was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-55 (citations and footnote omitted).

¶12 Questioning by law enforcement officers alone is unlikely to effectuate a seizure. *See* ***Immigration & Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984). A seizure requires the conditions surrounding the questioning to be "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded." ***Id.*** "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." ***Mendenhall***, 446 U.S. at 554.

¶13 The test is an objective one, focusing not on whether the defendant himself felt free to leave but whether a reasonable person, under all the circumstances, would have felt free to leave. ***California v. Hodari D.***, 499 U.S. 621, 627-28 (1991). "[T]he 'reasonable person' test presupposes an *innocent* person." ***Bostick***, 501 U.S. at 438. While it is true that "most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." ***Delgado***, 466 U.S. at 216.

¶14 The question on appeal is whether a reasonable person in Wilder's position would have felt he could have refused the police officer's request to exit the car. The trial court denied the motion to suppress but did so based on the fact that although it doubted that the officers stopped Wilder prior to smelling burnt marijuana in his car, if a stop had occurred, it was justified by the anonymous tip. The trial court found that the tip was sufficiently reliable and that the officers had sufficiently corroborated the tip, thereby creating reasonable suspicion with which to justify any stop that may have occurred. I do not find it necessary to determine whether the trial court was correct in that regard, because it is clear from the record that no seizure occurred in this case until after the officers smelled the odor of burnt marijuana emanating from the inside of Wilder's car. And "[a]n appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985).

¶15 The parties' arguments at the motion hearing and the trial court's findings focused on the sufficiency of the anonymous tip as a basis for the search. On appeal, the State argues that there was no seizure of Wilder at the point when the officers asked him to exit the car. Wilder, in his appellate response brief,

disagreed and contended that the fact that the two police officers were on either side of his car when the officer asked him to exit created a seizure because no reasonable person in Wilder's position would have felt free to say "no" to the officer's request and then drive away from the scene. Wilder does not claim that there was a seizure when the officers first approached the car and talked to him nor does he claim that there was any constitutional infirmity to their search of the car *after* the officers smelled the odor of burnt marijuana coming out of it when Wilder exited.

¶16 Wilder relies on two cases to support his argument that the seizure occurred when he was asked to exit the car, ***Mendenhall*** and ***State v. Jones***, 2005 WI App 26, 278 Wis. 2d 774, 693 N.W.2d 104. Wilder's reliance on each is misplaced. First, Wilder argues that ***Mendenhall***'s definition of a seizure, to wit, "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *see* ***id.***, 446 U.S. at 554, supports his argument that a seizure occurred when the officers asked him to exit his car. But the next sentence in ***Mendenhall***, which lists examples of circumstances that might indicate that a seizure has occurred, demonstrates that Wilder was not seized when asked to exit his car:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

See ***id.***

¶17 None of the ***Mendenhall*** seizure examples were present here. Wilder has offered no evidence that he was threatened by the officers, that the

officers displayed their weapons, physically touched Wilder, or used a tone of voice indicating that compliance was compelled. *See* ***id.*** To the contrary, the trial court at the post conviction hearing found that the officers could not "have been more civil and respectful" and that they were "as gentle as possible and as respectful as possible." Under the ***Mendenhall*** analysis, there was no evidence of a seizure when Wilder was asked to exit his car.

¶18 Wilder's second argument relies on ***Jones*** for the proposition that a seizure occurs unless an officer clearly tells an individual that he or she is free to leave. ***Jones*** is easily distinguished from this case because the defendants in ***Jones*** had been stopped by police for a traffic violation first. The defendants did not challenge the traffic stop but argued that the subsequent police questioning and request for consent to search was an impermissible seizure. We agreed and held that the circumstances showed that a reasonable person in the defendants' position would not have known that he or she was free to leave. ***Id.***, 278 Wis. 2d 774, ¶21. But our holding in ***Jones*** was based on the fact the police did not clearly indicate that the traffic stop was over before they requested permission to search the car. In that regard, ***Jones*** is completely distinguishable from the case here, because here there was no traffic stop to begin with.

¶19 Our holding in ***Jones*** was based on a key difference between the facts in ***Jones*** and those in ***State v. Williams***, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834, namely that in ***Jones*** the police officer did not clearly end the traffic stop, ***id.***, 278 Wis. 2d 774, ¶¶17-18, whereas in ***Williams*** the officer did, ***id.***, 255 Wis. 2d 1, ¶29. Because of this key difference, the holding in ***Jones*** fails to support Wilder's argument. Wilder's circumstances are different from the circumstances in either ***Jones*** or ***Williams*** in that there was no traffic stop in

Wilder's case. Instead, the officers had merely approached Wilder, who was sitting in his car, to ask him a few basic questions.

¶20 The Wisconsin Supreme Court's reasoning and holding in ***Williams***, on the other hand, does support the State's argument that Wilder was not seized when the police asked him if he would exit his car. In ***Williams***, the court held that the mere presence of two police officers after a traffic stop was over and the fact that those police officers asked if they could search the car was not enough to constitute a seizure under the Fourth Amendment. *See* ***id.***, 255 Wis. 2d 1, ¶¶32-34. In ***Williams***, a state trooper, after pulling Williams over for speeding, issued a warning citation and returned Williams's driver's license to him. The trooper then said, "[we]'ll let you get on your way then," shook Williams's hand, and began heading back to his squad car. ***Id.***, ¶¶6-12. After taking two steps, the trooper abruptly turned around and began to question Williams, asking Williams whether he had any guns, knives, drugs or large amounts of money in the car. ***Id.***, ¶12. He then asked Williams for permission to search Williams's vehicle. ***Id.*** Williams denied having any of the items in question and consented to the vehicle search. ***Id.*** During the vehicle search, the trooper uncovered heroin and a gun. ***Id.***, ¶13.

¶21 The supreme court found that the traffic stop ended after the trooper issued the citation and invited Williams to "get on [his] way." ***Id.***, ¶29. The court applied the reasonable person test to the events that transpired after the traffic stop and found that "questioning alone does not a seizure make." ***Id.***, ¶28. The court noted that the "the officer essentially continued to maintain a normal speaking voice. The questions were not accusatory in nature. The exchange was largely non-confrontational." ***Id.***, ¶31. The court concluded that the change in tone and tenor of the officer's voice "was not so significant in degree that the officer's

questions took on the character of an official command, suggesting that compliance was required." ***Id.***

¶22 As to whether a second officer's presence made the incident intimidating, the supreme court concluded that the presence and behavior of the back-up officer, who did not display a weapon or physically touch Williams, was not so intimidating as to convert the exchange into a seizure. ***Id.***, ¶32. The arresting officer was standing with Williams at the rear of the car, and the back-up officer was on the passenger's side of the car. Despite the presence of the two officers and the preceding traffic stop, the court in ***Williams*** concluded that under the objective, reasonable person test there was no seizure.

¶23 The challenged conversation that began after the traffic stop ended in ***Williams*** is analogous to the officer's request that Wilder exit his car. In both cases, two police officers, standing at different locations around the car, were having general conversation in non-accusatory tones with an individual who was not under arrest or even the subject of a ***Terry*** investigatory stop.[4] Just as the supreme court found that there was no seizure in ***Williams***, I conclude there was no seizure when Wilder was asked to exit his car. A reasonable person in Wilder's position would have believed that he was free to decline to exit his car and drive away.

¶24 Finally, Wilder challenges the State's conclusion that Wilder could have simply denied Officer Martinez's request that he step out of his vehicle and driven away based on two cases, ***State v. Anderson***, 155 Wis. 2d 77, 454 N.W.2d

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

763 (1990), and ***State v. Goyer***, 157 Wis. 2d 532, 460 N.W.2d 424 (Ct. App. 1990). Wilder argues that he was not free to say "no" to the police because under the holdings of ***Anderson*** and ***Goyer***, if he had said "no" and driven away, the police would then have had justification for seizing him. Wilder argues in his reply brief that had he driven off, "[u]ndoubtedly Officers Krueger and Martinez would have considered [his] conduct, at best, evasive and suspicious; or at worst, a flight from police contact; thus justifying an investigatory stop under [***Terry***, 392 U.S. 1,] … and [WIS. STAT. § 968.24]."

¶25 Under the long-recognized ***Mendenhall*** objective test, a seizure occurs if a reasonable person believes he or she is not free to leave. The focus of that analysis is on the mind of the reasonable person in the subject's position. But Wilder's argument creates a new test, focusing instead on whether the subject's actions create legal grounds for a ***Terry*** stop. In other words, Wilder seems to argue that even if a reasonable person would have felt free to say "no" to an officer's request to step out of the car, a seizure nevertheless occurs if the act of refusing to exit the car would have justified a lawful ***Terry*** stop and seizure. This is not the long-recognized ***Mendenhall*** test for determining whether a seizure has occurred and neither case cited by Wilder states otherwise.

¶26 Both ***Anderson*** and ***Goyer*** are factually distinguishable from Wilder's case in two significant ways. In both ***Anderson*** and ***Goyer***, the courts held that the police had grounds for a lawful ***Terry*** stop before the subjects fled, one on foot and the other by car. Neither case is analogous to the facts here. In Wilder's case, the officers did not subject Wilder to a ***Terry*** investigative stop, and Wilder did not attempt to flee from the officers. Wilder hypothesizes that if he had driven away the police would have considered it a flight and that ***Anderson*** and ***Goyer*** support that argument. But he is incorrect. Driving away after saying

"no" to a simple request by police to exit the car is not the same as making a profane gesture and running away or speeding away down alleys and streets when the police are trying to conduct a ***Terry*** investigative stop.

¶27 The circumstances surrounding Wilder's contact with the police demonstrate that a reasonable person in Wilder's position would have felt free to say "no" to the police request to exit the car. The police did not engage Wilder in a ***Terry*** investigative stop. Instead, they merely approached Wilder's already stopped vehicle and asked him some basic background questions, and then they simply asked him to exit his car. The police officers did not behave in any intimidating fashion. The trial court found that the officers were "gentle," "civil" and "respectful." And Wilder has not challenged those findings. In fact, he has presented the court with no evidence demonstrating that the circumstances surrounding the officers' questioning of Wilder was "so intimidating … that a reasonable person would have believed he was not free to leave." *See* ***Delgado***, 466 U.S. at 216.

¶28 Because I find that Wilder was not seized at the time Officer Martinez asked him to step out of the car, I need not determine whether any such seizure was properly based upon an anonymous tip. Therefore, I affirm the trial court's decisions to deny both Wilder's motion to suppress and the subsequent motion for reconsideration.

By the Court.—Judgment affirmed.

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