

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 30, 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. 95-0942-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTRAUN JORDAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Reversed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

FINE, J. Antraun Jordan appeals from a judgment, entered on a guilty plea, convicting him of possessing cocaine with intent to deliver, see §§ 161.16(2)(b)1 and 161.41(1m)(cm)1, STATS., and from the trial court's order denying his motion for postconviction relief. Jordan claims that the trial court

should have granted his motion to suppress the cocaine because it was discovered during the course of an illegal arrest.¹ We agree and reverse.²

I.

The Milwaukee police officer who arrested Jordan testified at the suppression hearing that he, the officer, was investigating complaints that there was drug activity in certain specified areas in the City of Milwaukee. As the officer and his partner drove towards 2476 North 9th Street in Milwaukee in the afternoon, they saw three or four young men standing in front of that house. The officer told the trial court that he knew there had been complaints about illegal drugs being sold in that area, and that he explained that to the young men:

I remember specifically I advised them of the loitering ordinance.

I advised them that the house they were standing in front of is known as having illegal drug activity and that it was illegal to be there and you don't have to have any drugs on you. You just, loitering was enough to get you a ticket and go to jail.

Jordan told the officers that he lived in a house around the block, which he did, and he explained that he and the others were, according to the officer, "just chilling out or just hanging out."

Approximately five to ten minutes after the officers first confronted Jordan and the other young men, the officers returned to the 9th Street address and saw that the young men were still there. As the officers approached, Jordan placed his hands in his pockets and started to walk away,

¹ A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. Section 971.31(10), STATS.

² Jordan also raises a number of other challenges to the judgment and to the trial court's order that, in light of our decision, we do not discuss. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

“frantically” according to the officer. The arresting officer called out to Jordan, who stopped only after the officer called to him a second time. The officer asked Jordan to remove his hands from his pockets, which Jordan did. The officer then arrested Jordan for violating Milwaukee's drug loitering ordinance, MILWAUKEE CITY ORD. § 106-35.6.³ The officer searched Jordan, and found the drugs.

³ The ordinance provides:

1. In this section:

- a. “Illegal drug activity” means unlawful conduct contrary to any provision of ch. 161, Wis. Stats., or any substantially similar federal statute, statute of a foreign state, or ordinance of any political subdivision.
- b. “Known area of illegal drug activity” means a public place where, within 3 years previous to the date of arrest for violation of this section, and within the collective knowledge of the police department, a person has been arrested for a violation which led to a conviction in any municipal, state or federal court of an offense involving illegal drug activity.
- c. “Known drug seller or purchaser” means a person who, within 3 years previous to the date of arrest for violation of this section, had within the collective knowledge of the police department been convicted in any municipal, state or federal court of an offense involving illegal drug activity.
- d. “Public place” means an area generally visible to public view and includes, but is not limited to, streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots and buildings open to the general public including those which serve food or drink or provide entertainment, and the doorways and entrances to buildings or dwellings and the grounds surrounding them.

2. Any person who loiters or drives in any public place in a manner and under circumstances manifesting the purpose of inducing,

Jordan testified at the suppression hearing that his cousin's mother lived at the North 9th Street address and that they "were just over there visiting." He also told the trial court that the officers only got out of the car once and never explained the ordinance to them or told them to leave the area. Rather, Jordan testified that the officers arrested him immediately as he was walking away.

The trial court accepted the officer's version of the incident, denied the motion to suppress, and explained that in its view the officers had probable cause to believe that Jordan was violating the ordinance:

[The arresting officer] went up to [the group] and said, "Look, you guys are in an area of known drug activity at this very location and you're subject to being arrested if you hang around here."

(.continued)

enticing, soliciting or procuring another to engage in illegal drug activity shall forfeit not less than \$500 nor more than \$5,000 or upon default of payment be imprisoned for not more than 90 days. Among the circumstances which may be considered in determining whether such purpose is manifested are the following: that the person frequents, either on foot or in a motor vehicle, a known area of illegal drug activity; repeatedly beckons to stop or attempts to stop known drug sellers or purchasers or engages known drug sellers or purchasers in conversation; stops the motor vehicle the person is the operator of and sells or purchases or attempts to sell or purchase illegal drugs to or from a known drug seller or purchaser; transfers small objects or packages for currency in a furtive fashion or manifestly endeavors to conceal himself, herself or any object or package which reasonably could be involved in illegal drug activity; takes flight upon appearance of a police officer. The violator's conduct must be such as to demonstrate a specific intent to induce, entice, solicit or procure another to engage in illegal drug activity. No arrest may be made for a violation of this section unless the arresting officer first affords the person an opportunity to explain the person's presence and conduct, unless flight by the person or other circumstances make it impracticable to afford such an opportunity, and no one shall be convicted of violating this section if it appears at trial that the explanation given was true and disclosed a lawful purpose.

....

Mr. Jordan's actions when the officer came back 15 minutes later.

A: He's still there. B: He starts walking away in a manner that makes the officer think he's going to start running. Doesn't come back initially....

Put his hands in his pockets and took off walking in a frantic or panicky or quick manner and I think all of those things, in conjunction with having been warned this is a drug area, and he shouldn't be there unless he's got a reason for being there and no reason was given to the officer contrary to that, I think gives the officer a basis for making an arrest under this ordinance.

We accept the trial court's credibility determination. *See* RULE 805.17(2), STATS. (trial court's findings of fact must be upheld on appeal unless "clearly erroneous"), made applicable to criminal proceedings by § 972.11(1), STATS.

II.

The issue of whether the Milwaukee police officers had probable cause to arrest Jordan, and, therefore, whether the search was lawful, presents an issue of law that we review *de novo*. See *State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). “Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant probably committed a crime,” *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161, *cert. denied*, 114 S. Ct. 221 (1993), or, in the context of this case, an ordinance violation.

A person violates MILWAUKEE CITY ORD. § 106-35.6 if he or she “loiters or drives in any public place in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to engage in illegal drug activity.” Among the circumstances that may be considered “in determining whether such purpose is manifested” are:

[T]hat the person frequents, either on foot or in a motor vehicle, a known area of illegal drug activity; repeatedly beckons to stop or attempts to stop known drug sellers or purchasers or engages known drug sellers or purchasers in conversation; stops the motor vehicle the person is the operator of and sells or purchases or attempts to sell or purchase illegal drugs to or from a known drug seller or purchaser; transfers small objects or packages for currency in a furtive fashion or manifestly endeavors to conceal himself, herself or any object or package which reasonably could be involved in illegal drug activity; takes flight upon appearance of a police officer.

MILWAUKEE CITY ORD. § 106-35.6(2). Mere hanging around, however, is not enough—nor could it be. See *Brown v. Texas*, 443 U.S. 47, 51–52 (1979) (police may not stop a citizen unless the officers have “a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity”; “look[ing] suspicious” in area frequented by drug users not sufficient); *Papachristou v.*

City of Jacksonville, 405 U.S. 156, 169 (1972) (“A direction by a legislature to the police to arrest all ‘suspicious’ persons would not pass constitutional muster.”) (footnote omitted). Thus, an arrest under the ordinance is not lawful unless the suspect’s conduct “demonstrate[s] a specific intent to induce, entice, solicit or procure another to engage in illegal drug activity.” MILWAUKEE CITY ORD. § 106-35.6(2).⁴ There is no evidence here that Jordan was doing anything else than “chilling out” in his neighborhood.

When the police first saw Jordan and his friends they were doing nothing that “demonstrate[d] a specific intent” by either Jordan or his friends “to induce, entice, solicit or procure another to engage in illegal drug activity.” See MILWAUKEE CITY ORD. § 106-35.6(2). Jordan and the others thus had every right to remain where they were. The officer’s direction to move on was unwarranted and not authorized by the ordinance. That Jordan and the others were still on the corner ten to fifteen minutes later also did not “demonstrate a specific intent to induce, entice, solicit or procure another to engage in illegal drug activity.” Indeed, the only facts that the dissent points to as supporting Jordan’s arrest were that the group was standing in a “drug area,” that the group had not obeyed the officers’ direction to leave the area, and that when the officers returned, Jordan “put his hands in his pockets as if he was hiding something,” and that “he walked furtively away as if he was going to flee.” Dissent at 2. Walking away, of course, was precisely what the officers had ordered. Jordan, however, did not flee; he stopped when called to by one of the officers.⁵ All this hardly adds up to probable cause to arrest under the ordinance.

Although drugs are a serious problem in our communities, that problem will not be solved by the causeless rousting and arrest of those whose actions betray no illegal activity. In essence, Jordan was arrested because he

⁴ The full sentence reads: “The violator’s conduct must be such as to demonstrate a specific intent to induce, entice, solicit or procure another to engage in illegal drug activity.” MILWAUKEE CITY ORD. § 106-35.6(2).

⁵ Thus, we do not have “flight,” as in *State v. Anderson*, 155 Wis.2d 77, 88, 454 N.W.2d 763, 768 (1990). See *Kolender v. Lawson*, 461 U.S. 352, 366 n.4 (1983) (Brennan, J., concurring) (Flight, in reaction to a properly limited encounter authorized by *Terry v. Ohio*, 392 U.S. 1 (1968), “may often provide the necessary information, in addition to that the officers already possess, to constitute probable cause.”).

was in the wrong place at the wrong time; yet, he had every right to be in that place at that time. As Professor Charles A. Reich has written: "If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight." Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1172 (1966) (quoted in *Papachristou*, 405 U.S. at 164 n.6). Mere hanging out, whether, in the words of the song, "watching all the girls go by," FRANK LOESSER, *STANDING ON THE CORNER* (Frank Music Co. 1956), or just shooting the breeze with one's pals is similarly protected activity.

By the Court.—Judgment and order reversed.

Publication in the official reports is recommended.

No. 95-0942-CR(D)

WEDEMEYER, P.J. (*dissenting*). In my view, the record is sufficient to support the trial court's denial of Jordan's motion to suppress. The ordinance violation at issue in the instant case was the drug loitering ordinance. A person violates that ordinance if he "loiters or drives in any public place in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to engage in illegal drug activity."

Therefore, the issue is whether the arresting officer had knowledge of facts sufficient to make the reasonable conclusion that: (1) Jordan was loitering in a public place; and (2) the circumstances manifested some type of illegal drug activity.

First, was Jordan loitering in a public place? I conclude that the answer to this question is yes. The ordinance definition for "public place" clearly contemplates a city street corner. Regarding "loitering," Jordan was warned fifteen minutes earlier that the area in which he was standing was a known drug trafficking area and that if he didn't want the officers to consider him a loiterer, that he should move on. Jordan did not. Accordingly, a reasonable officer would believe that a violation of the first element of the ordinance existed.

The second question is whether circumstances existed which manifested some type of illegal drug activity. Although this is a closer question, I again conclude that the officer was reasonable in concluding that the answer to this question was yes. Jordan was told that he was in an area known for illegal drug activity. In response to the officer's inquiry as to what the group was doing, they responded "just chilling out." In the absence of a legitimate explanation for standing on a notorious "drug" corner for a period of time, despite being warned that it was a drug area, it is not unreasonable for the officer to conclude that the group was involved in some type of drug activity. Further, Jordan engaged in additional suspicious activity: (1) when upon seeing the police again, he put his hands in his pockets as if he was hiding something, *see State v. Grandberry*, 156 Wis.2d 218, 224-25, 456 N.W.2d 615, 618 (Ct. App. 1990) (suspect's effort to conceal an object at the approach of police recognized as a factor police assess in determining whether violation has occurred); and (2) when upon seeing the police again, he walked furtively away as if he was going to flee. *See State v. Anderson*, 155 Wis.2d 77, 88, 454 N.W.2d 763, 768

(1990) (flight upon seeing police indicates that some sort of wrongful activity may be occurring).

Accordingly, I conclude that under the totality of the circumstances, the arresting officer did possess probable cause to arrest Jordan for loitering. Therefore, in this author's opinion, the custodial search was legal and the motion to suppress was properly denied. I respectfully dissent.