COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0161-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SEAN SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Reversed.*

Before Eich, C.J., Vergeront, and Deininger, JJ.

EICH, C.J. Sean Smith appeals from a judgment convicting him of possession of cocaine with intent to deliver contrary to § 161.41(1m)(cm)1, STATS., 1993-94. He argues that police did not have reasonable grounds to stop and detain him and that evidence obtained as a result of a subsequent search should have been suppressed. We agree and reverse.

The facts are not disputed. Officer Christian Paulson, a member of the Dane County Narcotics and Gang Task Force, received information from a confidential informant regarding drug activity in two apartments located in a twenty-unit building. At approximately nine o'clock that evening, Paulson was watching the building when he saw Smith riding his bicycle slowly down the street while looking around. Smith parked his bicycle and crossed the street, walking toward the entryway of the building. From his vantage point, Paulson could not tell whether Smith actually entered the building, although he believed he had.[1] Paulson then called for backup assistance, believing that Smith's actions were consistent with what he called "short-term" drug trafficking—short contacts between two people in which drugs are sold. Approximately five minutes later, when Paulson saw Smith jogging back toward his bicycle and looking around again, he stopped him, handcuffed him and asked whether he would consent to be searched. Smith agreed, and Paulson found cocaine in his coat pocket.

Smith moved to suppress the fruits of the search, arguing that Paulson did not have reasonable grounds to detain and question him.[2] The circuit court denied the motion, concluding that Paulson properly stopped and interrogated Smith. The court reasoned that the "totality of the circumstances"—including the information Paulson received regarding drug activity in the building, and Paulson's observation that Smith parked his bicycle across the street, was looking around as he approached the building, presumably entered the building,

[1] Paulson testified that the entryway blocked a direct view of the door—he observed Smith near a door of the building, but was not "100 percent sure whether or not he went in the door."

[2] In the circuit court, Smith argued that he did not voluntarily consent to the search. The circuit court found that he gave his consent, and Smith does not challenge that ruling on appeal.

and left a few minutes later—were sufficient to raise a reasonable suspicion that Smith was involved in drug-related activity that evening. Smith pleaded no contest to the cocaine-possession charge, preserving for appeal his argument that he was improperly stopped by Paulson.

Both the Fourth Amendment of the United States Constitution and Article I, Section 11, of the Wisconsin Constitution guarantee to all citizens the right to be free from unreasonable searches and seizures. Because an investigatory stop is a "seizure" within the meaning of the Constitution, a law enforcement officer, before stopping an individual, must reasonably suspect, in light of his or her training and experience, that the individual is, or has been, involved in criminal activity. ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968); ***State v. King***, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993); § 968.24, STATS. For a stop to be constitutionally valid, the officer's suspicion must be based on "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion [on the citizen's liberty].'" ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990) (quoting ***Terry***, 392 U.S. at 21). It is a common-sense test; what is reasonable in a given situation depends upon the totality of the circumstances. ***Id.***; ***State v. Anderson***, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990).

In reviewing the denial of a motion to suppress, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence, ***State v. Waldner***, 206 Wis.2d 51, 54, 556 N.W.2d 681, 683 (1996), that is, unless they are clearly erroneous. Section 805.17(2), STATS; ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). However, whether a stop passes constitutional muster is a question of

law which we review *de novo*. ***Richardson***, 156 Wis.2d at 137-38, 456 N.W.2d at 833.

Smith challenges the propriety of the stop, arguing that the factors the State relies upon to validate the stop are insufficient to create a reasonable articulable suspicion that he had committed, or was committing, a crime. According to the State, the "series of suspicious behaviors" in which Smith was engaged—and which, taken together, justify the stop—are that (1) he "circuitously" approached the apartment building, looking around the area, at 9:00 p.m.; (2) he parked his bicycle across the street from the building; (3) he was believed to have entered the building where Paulson had reason to believe there was drug activity; and (4) a short time later, he jogged back to his bicycle, looking around the area while doing so. The State maintains that the "cumulative effect" of these facts is sufficient to provide an experienced police officer with a reasonable suspicion of criminal activity on Smith's part.

Smith, on the other hand, says there was "nothing inherently suspicious" about his actions, and that being out at 9:00 p.m. is not indicative of criminal activity but "is something that law-abiding citizens do." He asserts, as he told Paulson at the scene, that he parked his bicycle across the street to lessen the likelihood of its being stolen, and he notes Paulson's own testimony that looking around while walking or jogging does not necessarily indicate that an individual is, or has just been, involved in the purchase of drugs. Smith stresses that the police had no independent knowledge connecting him with the suspected drug activity in the area other than his entry into the building. At the scene, Smith explained to Paulson that he entered the building to visit one of the eighteen apartments in the twenty-unit building that were not under suspicion. Indeed, as we noted above, Paulson could not say definitely whether Smith entered the

building, much less visited one of the two apartments in which drug activity was said to be taking place.

It is true that presence in an area known for drug trafficking is a factor that may be taken into account in determining whether reasonable suspicion exists to detain a person, but that factor alone will not suffice. ***State v. Young***, No. 97-0034-CR, slip op. at 8-9 (Wis. Ct. App. July 17, 1997, ordered published Aug. 26, 1997). In ***Young***, we reversed an order denying a motion to suppress evidence that the defendant possessed marijuana on grounds that the officer had no reasonable suspicion of criminal activity to justify stopping him on the street. The officer in ***Young*** was, like Paulson, engaged in a surveillance operation in an area known to be one in which drugs were sold—coincidentally, the same neighborhood in which Smith was stopped. After another officer advised him by radio that there was "a black male subject in the … area that had just made short-term contact with another subject," the officer stopped Young, who appeared to match the description he heard over the radio. ***Id***. at 3. Young, again like Smith, was cooperative, acknowledging that he had a marijuana pipe in his pocket and consenting to be searched.

On the basis of the officer's testimony that he understood the term "short-term contact" to mean an exchange of money for drugs, and the area's reputation for drug trafficking, the trial court ruled that the police had reasonable grounds to stop and detain Young and denied Young's motion to suppress evidence of the pipe. We reversed, concluding that the factors giving rise to the officer's suspicion—Young's presence in a high drug-trafficking area, his brief meeting with another man on a sidewalk, and the officer's experience that drug transactions in the neighborhood take place on the street and involve brief meetings—were insufficient. We observed that

> stopping briefly on the street when meeting another person is an ordinary, everyday occurrence during daytime hours in a residential neighborhood. There is nothing in the record to suggest that that is not the case in this residential neighborhood, or in high drug-trafficking residential neighborhoods in general. The conduct that [the officer] considered suspicious, then, is conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes, even in residential neighborhoods where drug trafficking occurs. We give full weight to the training and expertise of [the officers] and to the knowledge they acquired thereby that in this neighborhood drug transactions occur on the street and involve very short contacts between individuals. However, we cannot agree with the trial court that this is sufficient to give rise to a reasonable suspicion that two individuals who meet briefly on the sidewalk in this neighborhood in the daytime are engaging in a drug transaction.

Id. at 11.

Much the same may be said here. Smith's actions—riding a bicycle in a residential neighborhood at nine o'clock in the evening, looking at his surroundings, parking the bicycle and entering an apartment building across the street, and leaving the building a few minutes later, looking around again as he returned to his bicycle—are everyday events in the lives of persons wholly unconnected with any illegal activity, even in neighborhoods in which criminal activity is not uncommon.

We realize that conduct that has innocent explanations may also give rise to a reasonable suspicion of criminal activity. ***Waldner***, 206 Wis.2d at 58, 556 N.W.2d at 685. "If a reasonable inference of unlawful conduct can be objectively discerned, the officers may temporarily detain the individual to investigate, notwithstanding the existence of innocent inference[s] which could be drawn." ***Young***, slip op. at 11. It is also true that a series of acts, each of which is innocent in itself, taken together may give rise to a reasonable suspicion of criminal conduct. ***Id***. But the test in any case is whether all the facts—including

those which, individually, are consistent with innocent behavior—taken together are indicative of criminal behavior. ***United States v. Sokolow***, 490 U.S. 1, 9-10 (1989); ***Anderson***, 155 Wis.2d at 84, 454 N.W.2d at 766.

Here, as in ***Young***, we have not a series of acts but only one act—Smith's brief visit to an apartment building in a high-crime area—"which describes the conduct of large numbers of law-abiding citizens in a residential neighborhood, even in [one] that has a high incidence of drug trafficking." ***Young***, slip op. at 12. Additionally, Smith has referred us to several cases holding, on similar facts, that officers had no basis on which to form a reasonable suspicion of criminal conduct.

In ***United States v. Sprinkle***, 106 F.3d 613 (4th Cir. 1997), police officers in a high-crime neighborhood saw the defendant get into a car with a convicted drug dealer and observed the two men "huddling and talking" with their hands close together as if they were passing something between them. ***Id.*** at 616, 617. As the officers walked by the car, they did not see anything in the men's hands or in the car, but the driver shielded his face as if to avoid recognition and pulled away as soon as they passed. The ***Sprinkle*** court held that under these facts "no reasonable articulable suspicion" justified the officers' stop of the defendant: "[I]t would take more for this ... to qualify as a reasonable suspicion." ***Id.*** at 615, 617. The court of appeals for the third circuit reached a similar result in ***United States v. Roberson***, 90 F.3d 75 (3d Cir. 1996). In ***Roberson***, officers relied on an uncorroborated anonymous tip that a certain person was selling drugs on a corner known for sales to passing motorists. ***Id***. at 75-76. After observing the defendant standing on the specified corner and walking to a parked car where he leaned in as if to speak to the occupants, the police stopped him. For similar results on very similar facts, *see* ***Childs v. State***, 671 So.2d 781, 782-83 (Ala. Crim. App. 1995)

(police observed an individual, in a high drug-trafficking area, leaning into the defendant's car and talking to him); ***State v. Harris***, 206 Wis.2d 242, 246, 260, 557 N.W.2d 245, 247, 253 (1997) (car with several men inside parked in front of a robbery suspect's home pulled away when police approached).[3]

We are mindful of the problems faced by law enforcement agencies trying to deal with the growing traffic in drugs—particularly in areas known for such traffic. And detaining people for questioning and investigation where suspicious circumstances exist is recognized as a valid enforcement tool—but only where the officers "possess[] specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." ***Waldner***, 206 Wis.2d at 55, 556 N.W.2d at 684. The State has not satisfied us that, on the facts of this case, that standard was met.

[3] As we noted in ***Young***, slip op. at 12, some federal cases have found reasonable suspicion to exist where the suspect was observed in a high-crime area, but those cases involved other factors that were "unusual" or forged a connection to an identified drug-seller, together with other "conduct suggesting a drug transaction," or indicated a transfer of goods coupled with evasive action once police officers were spotted. *See, e.g.,* ***United States v. Lender***, 985 F.2d 151, 154 (4th Cir. 1993); ***United States v. Garret***, 959 F.2d 1005, 1007 (D.C. Cir. 1992); ***United States v. Stanley***, 915 F.2d 54, 56 (1st Cir. 1990); ***United States v. Trullo***, 809 F.2d 108, 111-12 (1st Cir. 1987); ***Wilson v. Indiana***, 670 N.E.2d 27, 31 (Ind. Ct. App. 1996); ***People v. Batista***, 210 A.D.2d 59, 60 (N.Y. App. Div. 1994).

Therefore, we conclude that the circuit court erred when it denied Smith's motion to suppress the evidence it seized after stopping him on the street. Accordingly, we reverse his conviction for possession of a controlled substance.

By the Court.—Judgment reversed.

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