COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 97-0325-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CELESTE L. HUNT,

DEFENDANT-APPELLANT.

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

Before Dykman, P.J., Vergeront and Deininger, JJ.

DYKMAN, P.J. Celeste L. Hunt appeals from a judgment convicting her of possession of cocaine, contrary to § 161.41(3m), STATS. Hunt argues that the police stopped her without a reasonable suspicion of criminal activity and arrested her without probable cause. She also argues that the warrantless search during which cocaine was found in her pocket was not

justifiable as a search incident to a lawful arrest. We reject her arguments and affirm.

BACKGROUND

The facts are undisputed. On September 15, 1995, at approximately 8:00 p.m., City of Madison Police Officer Christian Paulson observed a white female standing in front of a building at 110 Rosemary Avenue and observed a black female riding a bike toward that location. The female riding the bike was looking back toward Worthington Avenue and scanning the whole area as she rode up to 110 Rosemary. Officer Paulson thought that a drug transaction might take place in front of 110 Rosemary or inside the building because of the way the bike rider looked around as she approached that address and got off the bike. Paulson never saw any contact between the two females.

Officer Paulson continued to patrol the area. Later that evening, at approximately 10:30 p.m., Officer Cory Nelson informed Paulson that a small vehicle had stopped on the corner of Rosemary and Worthington. In at least fifty drug arrests that Paulson had made, the buyer had parked at that corner. Officer Nelson had earlier seen a small white Toyota drop off a black female on Worthington and believed that this was the same vehicle.

Paulson watched the vehicle. He observed a white male sitting in the driver's seat and noticed that the vehicle was running. Paulson radioed in the vehicle's license plate number and learned that the vehicle's owner lived at 110 Rosemary. About three to five minutes later, Paulson observed a black female walk past him and noticed that this was the same female who was previously riding the bike. The female got into the white Toyota, and the vehicle left.

Paulson followed the Toyota. The Toyota pulled into the parking lot behind 110 Rosemary. Paulson observed the vehicle's occupants exit the vehicle and believed that they were inside of 110 Rosemary, which was an old house that had been renovated into apartments. Paulson radioed other officers and informed them that he wished to make contact with the occupants of the white Toyota because he believed that they may have just purchased drugs. Officers Cory Nelson, Trevor Knight and Mike Montie arrived on the scene.

Paulson requested Officers Knight and Montie, who were in full uniform, to go to the rear of the building where the Toyota was parked. Officers Nelson and Paulson, who were both dressed in plain clothes, walked to the front of the building. The front door, which appeared to be the door to a common hallway, was locked. Paulson knocked, and the door was immediately opened by Celeste Hunt. Paulson identified Hunt as the woman who was previously standing outside at that address.

Hunt stepped back from the officers after the door was opened and had a look of shock on her face. Paulson thrust forward his badge, which was attached to a chain around his neck, and identified himself as a Madison police officer. Nelson did the same. Hunt looked back down the hallway toward the rear exit. Paulson believed that she was checking to see if there were police officers at the other end.

Paulson asked Hunt if she knew where the manager's apartment was because he wanted to speak with the manager regarding the white Toyota. Hunt stated that she was just coming from there. Hunt also told Paulson that the manager was sleeping. Hunt then stated that she was at the manager's apartment about an hour ago. When asked where she had been for the past hour, Hunt threw

her arms in the air, became very agitated and told Paulson that "she had a psycho boyfriend that was trying to kill her." Paulson again showed Hunt his badge and said, "We're the police. If you have a psycho boyfriend that's trying to kill you, we need to know what's going on." Hunt repeated that her boyfriend was trying to kill her, but would not give the officers any additional facts. Because Hunt would not give any more details, Paulson believed that Hunt was trying to distract their attention from talking with her about what she was doing inside the building.

Hunt walked down the hallway with the officers to the manager's apartment, which was the last apartment on the left. Paulson knocked on the door, and nobody answered. As Paulson knocked, Hunt stepped out the back door of the building. Hunt saw Officer Montie, who was within ten to twenty feet from the corner of the building, and immediately stepped back inside. After Hunt had reentered, Paulson waved Montie in.

Paulson believed that something was extremely suspicious about Hunt's story and asked her if she had any drugs or weapons on her person. Hunt said "no" and immediately turned and began walking at a very high rate, almost a run, down the hallway toward the front of the apartment. Paulson saw Hunt place her left hand in her pocket and believed that she may be pulling out "dope" to throw or swallow. Officer Nelson caught up to Hunt about half way down the hallway and grabbed her right arm. Hunt tried to pull away. Paulson grabbed Hunt's left hand, told her that they were the police and told her to stop struggling with them. After Hunt struggled for about fifteen seconds, the officers directed her against the wall, got her hands behind her back and handcuffed her. Paulson informed Hunt that she was under arrest for resisting an officer. When Paulson searched her, he located a small piece of tinfoil "bindle" containing cocaine base in the left front pocket of her blue jean shorts.

Hunt was charged with possession of cocaine. She brought a motion to suppress the evidence on several grounds. The trial court denied the motion, and Hunt pleaded no contest pursuant to an agreement with the district attorney. Hunt appeals.

DISCUSSION

Hunt first contends that she was seized by the police upon their entry into the building because she did not consent to remain in their presence and was not free to leave. Because the police had no basis on which to seize Hunt at that time, Hunt argues that the evidence they subsequently obtained must be suppressed. *See* ***Florida v. Royer***, 460 U.S. 491 (1983). Whether a seizure invoking Fourth Amendment protections has occurred is a question of constitutional fact that we examine *de novo*. ***State v. Kramar***, 149 Wis.2d 767, 781, 440 N.W.2d 317, 322 (1989). Hunt has the initial burden to establish that she had been seized for Fourth Amendment purposes. *See* ***State v. Howard***, 176 Wis.2d 921, 926, 501 N.W.2d 9, 11 (1993).

In ***Kramar***, 149 Wis.2d at 781-82, 440 N.W.2d at 322-23, the court set forth the test for determining whether a Fourth Amendment seizure has occurred:

> Whether a person has been seized for fourth amendment purposes is determined by an objective test. A person is seized within the meaning of the fourth amendment only if, in view of all the circumstances, a reasonable person would have believed he was not free to leave. Examples of circumstances that might indicate a seizure 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. Any subjective intention of the officers to detain a person is relevant only to the extent it is conveyed to that person.

(Citations omitted.) "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual ... as long as the police do not convey a message that compliance with their requests is required." ***Florida v. Bostick***, 501 U.S. 429, 434-35 (1991) (citations omitted).

Here, Officer Paulson testified that during his conversation with Hunt, he did not touch her, draw his weapon, or place her in handcuffs. He did not threaten her or promise her anything to get her to talk with him. He did not threaten her to get her to take him to the manager's apartment. Because the officers did not restrict Hunt's liberty by force or show of authority, they did not seize her within the meaning of the Fourth Amendment. We disagree with Hunt's argument that the officers, by thrusting forward their badges, identifying themselves as police officers, and asking her questions in a narrow hallway, showed their authority in such a way as to make the contact nonconsensual. In addition, the officers did not need to tell Hunt that she was free to leave to establish that Hunt's contact with them was voluntary. *See* ***United States v. Mendenhall***, 446 U.S. 544, 555 (1980).

Hunt next argues that the police did not have the reasonable suspicion of criminal activity necessary to stop her when they restrained her as she attempted to leave. All searches and seizures must be reasonable under the Fourth Amendment. *See* ***Terry***, 392 U.S. at 20-22. For a police officer to make an investigative stop, the officer must possess a reasonable suspicion that the person is committing, has committed, or is about to commit an offense. ***State v. Jackson***, 147 Wis.2d 824, 833-34, 434 N.W.2d 386, 390 (1989). The officer's reasonable

suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." ***Terry***, 392 U.S. at 21. The facts must be "judged against an objective standard: would the facts available to the officer at the moment of the seizure ... 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" ***Id.*** at 21-22. If any reasonable inference of wrongful conduct can be objectively discerned, officers have the right to temporarily detain an individual for purposes of inquiry. ***State v. Anderson***, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990).

On September 15, 1995, at approximately 8:00 p.m., Officer Paulson observed events which led him to believe that a drug transaction might take place in front of or inside of the building at 110 Rosemary. Later that evening, he observed a white Toyota whose registered owner lived at 110 Rosemary stopped at an intersection where drug purchasers were known to park. Paulson followed the Toyota to 110 Rosemary and believed that the vehicle's two occupants entered the apartment building at that address. When Hunt answered the door at 110 Rosemary, she had a look of shock on her face upon seeing the officers. Hunt looked down the hallway, appearing to check for additional police officers at the other end. When the officers requested that Hunt take them to the manager's apartment, Hunt answered inconsistently that she was just coming from the office and that she had not been there for about an hour. When asked where she had been for the past hour, Hunt became very agitated and told Paulson a story which, because of its nature and lack of detail, appeared to be an attempt to distract the officers' attention from Hunt's reason for being inside the building. When the officer knocked on the manager's door, Hunt stepped out the back door of the building, but stepped back in immediately upon seeing Officer Montie. And after Hunt denied having any drugs or weapons on her person, she began walking away

at a very high rate, almost a run, and looked like she may be attempting to discard drugs when she placed her left hand in her pocket. These specific and articulable facts would lead a reasonable police officer to believe that criminal activity was afoot. Therefore, the officers appropriately stopped Hunt when she attempted to leave their presence.

Hunt argues that, if she was free to leave prior to the officers stopping her, the fact that she attempted to leave cannot be considered suspicious activity. But Hunt did not simply attempt to leave. After Hunt was asked whether she had any drugs or weapons on her person, Paulson testified that she "immediately turned and began walking at a very high rate, almost a run, down the hallway … towards the front of the building." The trial court found that Hunt "started to walk very fast down the hallway as if she were attempting to get away." Hunt also placed her left hand in her pocket as she was leaving, indicating to Officer Paulson that she may be attempting to discard contraband.

In ***State v. Anderson***, 155 Wis.2d 77, 88, 454 N.W.2d 763, 768 (1990), the court held that "behavior which evinces in the mind of a reasonable police officer an intent to flee from the police is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police." We agree that this case is distinguishable from ***Anderson*** in that Hunt did not flee at the sight of the police, while the defendant in ***Anderson*** did. Therefore, we do not believe that Hunt's attempt to get away, in and of itself, would have provided the reasonable suspicion necessary to stop her. However, considering all of the other facts and circumstances, we believe that Hunt's attempt to get away after Paulson asked her if she possessed drugs was suspicious activity that warranted further investigation.

Hunt next argues that the officers did not have probable cause to arrest her for resisting an officer. Regarding probable cause, the court in ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993), provided:

> Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility ….

(Citation omitted.) Probable cause is "judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

Section 946.41(1), STATS., provides that no person may "knowingly resist[] … an officer while such officer is doing any act in an official capacity and with lawful authority." The elements of resisting an officer are: (1) that the defendant resisted an officer; (2) that the officer was doing an act in an official capacity; (3) that the officer was doing an act with lawful authority; (4) that the defendant knew that she resisted the officer while the officer was acting in an official capacity and with lawful authority. *See* ***State v. Caldwell***, 154 Wis.2d 683, 689-90, 454 N.W.2d 13, 16 (Ct. App. 1990); WIS J I–CRIMINAL 1765. Hunt contends that the officers did not have probable cause to believe that she knew they were acting with lawful authority.

A defendant's knowledge that the police were acting with lawful authority may be inferred from the totality of the circumstances, including what the defendant and police officers said or did and any other objective evidence. *See*

State v. Lossman, 118 Wis.2d 526, 542-43, 348 N.W.2d 159, 167 (1984). Here, we have already concluded that Hunt's behavior gave the officers the reasonable suspicion necessary to stop her for further investigation. Hunt should have known that many of these behaviors—such as telling the officers inconsistent stories, talking about her "psycho" boyfriend trying to kill her, walking out the back door and quickly reentering, and trying to get away from the officers—were suspicious. And it was "more than a possibility" that Hunt knew that the officers could stop her for further inquiry when she was acting so suspiciously. Because it was more than a possibility that Hunt knew the officers were acting with lawful authority, they had probable cause to arrest her for resisting an officer.

Finally, Hunt argues that Officer Paulson exceeded the scope of a search incident to a lawful arrest when he seized the cocaine from her pocket. In her reply brief, Hunt concedes that she "does not challenge the authority of the police to search her if the arrest was legal. Rather the issue is whether during such a search, the officer was entitled to seize the cocaine from [her] pocket without knowing what it was before removing it."

Hunt cites no authority supporting her assertion that a police officer searching a suspect incident to a lawful arrest must know what an object is before removing it from the arrestee's pocket. She contends that ***State v. Betterley***, 191 Wis.2d 406, 424, 529 N.W.2d 216, 222 (1995), requires this knowledge because the court said: "A seizure of an object lawfully encountered is permissible only where the police have probable cause to believe the object is evidence of criminal activity." ***Betterley*** involved the seizure of a ring after Betterley had been picked up on a probation hold. The police retained the ring when Betterley's other property was returned to him. The court noted that Betterley's ring was not seized

until then. The court concluded that when the ring was seized, the police had probable cause to do so.

Thus, while it is correct that property may not be seized by the police unless there is probable cause to believe that it is connected with criminal activity, this principle is inapplicable to a search incident to a lawful arrest. In ***State v. Mabra***, 61 Wis.2d 613, 623-24, 213 N.W.2d 545, 550 (1974), the court noted:

> Given a valid arrest, a search is not limited to weapons or evidence of a crime, nor does the search need to be directed to or related to the purpose of the arrest. A person lawfully arrested for a traffic violation or minor infraction of a criminal law may be searched without a search warrant or probable cause and if the search turns up incriminating evidence of a more serious crime, it may be used against the person. Thus one who has contraband or evidence of crime on him travels at his own risk when he is validly arrested for any reason.

(Citations omitted.)

Section 968.11, STATS., outlines the scope of a search incident to a lawful arrest.[1] This statute, the Fourth Amendment to the United States

[1] Section 968.11, STATS., provides:

> **Scope of search incident to lawful arrest**. When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:
>
> (1) Protecting the officer from attack;
>
> (2) Preventing the person from escaping;
>
> (3) Discovering and seizing the fruits of the crime; or
>
> (4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

Constitution, and Article I, § 11 of the Wisconsin Constitution are identical in their definitions of the scope of a search incident to a lawful arrest. ***State v. Murdock,*** 151 Wis.2d 198, 201-02, 445 N.W.2d 319, 320 (Ct. App. 1989), *aff'd*, 155 Wis.2d 217, 455 N.W.2d 618 (1990). Officer Paulson testified that a razor blade or a needle would have fit in Hunt's pocket. He was constitutionally and statutorily permitted to search Hunt, including her pocket, after he arrested her. Once Officer Paulson determined that the tinfoil from Hunt's pocket contained cocaine, he could lawfully seize the cocaine because he had probable cause to believe that it was evidence of criminal activity.

Our conclusion is consistent with ***Michigan v. DeFillippo***, 443 U.S. 31 (1979). In that case, after DeFillippo was arrested for refusing to identify himself, an officer searched him and found a package of marijuana in one of his shirt pockets and a tinfoil packet secreted inside a cigarette packet in the other. ***Id.*** at 33-34. The tinfoil packet was subsequently opened and found to contain a controlled substance. ***Id.*** at 34. The Supreme Court upheld the search as a search incident to a lawful arrest. ***Id.*** at 35-36. We do not see a distinction between the officer's removal of the tinfoil packet from DeFillippo's pocket and Officer Paulson's removal of the tinfoil bindle from Hunt's pocket. Therefore, we affirm the trial court's denial of Hunt's motion to suppress.

By the Court.—Judgment affirmed.

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