COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1690-FT

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

IN THE INTEREST OF MARCUS M.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARCUS M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

BROWN, P.J. Marcus M. appeals a dispositional order entered after he admitted to possession with intent to deliver cocaine. He asserts that the officer who apprehended him had no reasonable suspicion to stop him and exceeded the scope of a constitutionally permissible search when he inspected the

inside of Marcus's mouth. We conclude that the officer had reason to stop Marcus and that Marcus consented to the search of his mouth. We affirm.

The facts are as follows. At about 7:00 p.m. on January 7, 1999, six to eight people were standing in the foyer of an apartment building. Police officers driving past the apartment building observed the group of people in the lobby, including Marcus. The assistant manager of the building had previously given the police keys to the security locked doors so that they could "do routine walk-throughs to curb narcotics violations, sales and ongoing trespassing that he identified as a major problem." Two officers entered the back door of the building and two stood out front. When the people in the foyer saw the officers enter, they "scattered." Officer Todd Terry, who testified at the dispositional hearing, caught up with Marcus outside the building. Marcus stopped when Terry asked him to, and responded "no" when Terry asked him if he lived in the building or knew anyone who did. At that point Terry handcuffed Marcus, fearing that he might have a weapon. Terry testified as follows:

> I felt it rather suspicious that he fled immediately upon seeing us. Like I said, I was trying to determine if he was in fact trespassing. The clothing he had on was very baggy. If he indeed was involved in narcotics sales, based on my training and experience, weapons certainly accompany narcotics …. So it was for my safety [that I handcuffed Marcus]."

Terry, who had encountered Marcus on a previous occasion and thus was familiar with his normal speaking voice, noticed that Marcus's speech was slurred. So he asked Marcus "if he would mind opening [his mouth]?" Marcus opened his mouth. Based on his experience, Terry knew that people sometimes hide narcotics under their tongues, so he asked Marcus to lift up his tongue. At this request, Marcus closed his mouth. Terry then asked Marcus again if he would open his mouth, he did, and this time he also lifted his tongue. Underneath Marcus's

tongue, Terry saw what appeared to be packaged rocks of crack cocaine. Terry bent Marcus over and had him spit out the substance, which later tested positive for cocaine. After the court denied Marcus's motion to suppress this evidence, Marcus entered an admission to possession with intent to deliver cocaine.

Marcus claims the court erred in denying his motion to suppress. First, he claims Terry had no reasonable suspicion to stop him. Second, he asserts that even if the stop was lawful, the search of his mouth was beyond the scope of a permissible search. Because the stop and search were constitutionally infirm, Marcus asserts, the evidence should have been suppressed. The State responds that Terry did have reasonable suspicion that Marcus was committing or was about to commit a crime, so the stop was reasonable. Furthermore, the State contends, Marcus consented to the search of his mouth by opening it upon request.

Both the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution protect individuals from unreasonable searches and seizures. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11; ***State v. Morgan***, 197 Wis.2d 200, 207, 539 N.W.2d 887, 890 (1995). Our standard of review when a trial court has refused to suppress evidence the accused claims was obtained in violation of his or her constitutional rights is two-tiered. We will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***Morgan***, 197 Wis.2d at 208, 539 N.W.2d at 891. But, given those facts, the question whether the stop and search were reasonable is one we review de novo. *See* ***id.*** Using these standards, we review first the stop and then the search.

Stop

A police officer may stop an individual for inquiry when there are specific and articulable facts that warrant a reasonable belief that a crime has been, is being or is about to be committed. *See* ***Terry v. Ohio***, 392 U.S. 1, 21 (1968) (codified in Wisconsin at § 968.24, STATS.); ***State v. Waldner***, 206 Wis.2d 51, 55, 556 N.W.2d 681, 684 (1996). The test is objective and the focus is on reasonableness. *See* ***Waldner***, 206 Wis.2d at 56, 556 N.W.2d at 684. For the stop to be permissible, the officer must have more than a hunch that criminal activity is afoot; he or she must have a reasonable suspicion that such is the case. *See* ***id.*** at 57, 556 N.W.2d at 685. When deciding whether a stop was reasonable, we look to the totality of the circumstances. *See* ***id.*** at 58, 556 N.W.2d at 685. In our commonsense approach we must strike a balance between the individual's privacy interest and society's interest in allowing law enforcement to do its job. *See* ***id.*** at 56, 556 N.W.2d at 684.

We first examine the initial stop in this case, which Marcus claims is similar to the stop invalidated in ***State v. Young***, 212 Wis.2d 417, 569 N.W.2d 84 (Ct. App. 1997). There, Young met briefly with another individual on the sidewalk in a high drug-trafficking area in the early afternoon. *See* ***id.*** at 433, 569 N.W.2d at 92. According to the arresting officer's experience, drug transactions in that area took place on that street and involved brief meetings. *See* ***id.*** The majority in ***Young*** found that those two factors, absent any other suspicious circumstances, were "not sufficient to give rise to the reasonable, articulable suspicion of criminal activity that justifies the intrusion of an investigative stop." ***Id.***

Marcus's reliance on ***Young*** is misplaced because here the police had more information to cause them pause than in ***Young***. When the police first

saw Marcus he was hanging around not on a residential street but in the lobby of an apartment building known to be a drug market. It was not in the early afternoon, but at 7:00 p.m., which in January in Racine is well after dark. Furthermore, when the police pulled their squad car up alongside Young, Young "asked if there was a problem" and "was cooperative." ***Id.*** at 421, 569 N.W.2d at 87. While we acknowledge that Marcus cooperated with the police after he was stopped, his initial reaction to their presence was to flee.[1] "[B]ehavior 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." ***State v. Anderson***, 155 Wis.2d 77, 79, 454 N.W.2d 763, 764 (1990). So, unlike in ***Young***, we do not have merely the defendant's presence in a high-crime area plus a brief encounter in broad daylight on a public street. Instead, we have a group loitering in the lobby of an apartment building known for drug sales, after dark, in a high-crime area, coupled with the scattering of the group as soon as the police arrived. These factors, taken together, were enough to give rise to a reasonable suspicion that Marcus had been trespassing in the building and possibly selling narcotics. The stop was justified.

Search

We now turn our attention to Terry's inquiry about what Marcus had in his mouth. Marcus argues that the officer's request that he open his mouth went beyond the scope of a search authorized under ***Terry***, 392 U.S. at 25-26, as that

[1] There is some dispute between Marcus and the State as to what constitutes flight. We agree with the trial court that "there's no requirement that leaving a scene has to be at a particular rate of locomotion." When asked what he meant by saying that Marcus "[f]led out the front door," Terry responded, "Rapidly exited the front door."

case only authorizes a limited pat down for weapons if the officer has a reasonable suspicion that the individual may be armed. *See* ***Morgan***, 197 Wis.2d at 209, 539 N.W.2d at 891. Here, according to Marcus, there were no articulable, specific facts that could have led Terry to think he was armed. Furthermore, even if the officer did have reason to believe Marcus was armed, a search of his mouth went beyond the scope of a weapons search. The State responds that Marcus consented to the search, and thus it did not violate the Fourth Amendment. We agree with the State.

A warrantless search does not violate constitutional safeguards if it is conducted pursuant to consent. *See* ***State v. Phillips***, 218 Wis.2d 180, 196, 577 N.W.2d 794, 801-02 (1998). There are two steps in our analysis of the voluntary nature of a consent to a warrantless search: was consent given and was the consent voluntary. *See* ***id.*** at 196-97, 577 N.W.2d at 802. In ***Phillips***, police entered Phillips's basement after announcing themselves and then asked if they could enter Phillips's bedroom. Phillips did not answer, but opened the door to his bedroom and walked into it, retrieved a bag of marijuana and handed it to the police. *See* ***id.*** at 197, 577 N.W.2d at 802. The trial court found, and the supreme court did not upset the finding, that Phillips's conduct "provide[d] a sufficient basis on which to find that the defendant consented to the search of his bedroom." ***Id.***

Here, Marcus said nothing when Terry asked him if he "would mind opening [his mouth]?" In Terry's words, "He opened his mouth, so I assumed he didn't mind." Although the officer had to ask Marcus twice to lift his tongue, he did so. The trial court found that Marcus did in fact consent and Terry's uncontroverted testimony supports that finding.

Not only must consent be given, it must be voluntary. *See* ***id.*** The State bears the burden of proving by clear and convincing evidence that consent was voluntarily given. *See* ***id.*** The test is whether consent was given "in the absence of duress or coercion, either expressed or implied." ***Id.*** This determination must be made viewing the totality of the circumstances, including the facts surrounding the consent and the characteristics of the defendant. *See* ***id.*** at 198, 577 N.W.2d at 802.

Here, Terry did not physically coerce Marcus into opening his mouth or lifting his tongue. Terry asked him to do so and he did it. Terry did not pry his mouth open. Nor was there any evidence of any threat of violence. Viewing the totality of the circumstances, we conclude that Marcus voluntarily consented to allow Terry to look inside his mouth.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.