COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP817-CR **Cir. Ct. No. 2005CM1158**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC L. KING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: ANTHONY MILISAUSKAS, Judge. *Affirmed*.

¶1 BROWN, J.[1] Eric L. King appeals from his conviction for misdemeanor possession of marijuana. King argues that the arresting officer had seized him illegally prior to discovering the marijuana in his hat, and that the circuit court should therefore have suppressed the drug. We disagree with King and affirm the circuit court because we find that the officer had reasonable suspicion to temporarily detain King and that King thereafter consented to the search which uncovered the marijuana.

¶2 Just after midnight on May 24, 2005, a Kenosha police officer patrolling in his squad car noticed a truck blocking an alley. The officer saw a person in the driver's seat who crouched down as the officer drew nearer. The officer stopped his car, exited, and approached the parked truck. The occupant of the truck identified himself and said that he had given his friend Eric a ride to the location so that Eric could speak to another friend.

¶3 As the officer and the truck's driver were speaking, King came out of a nearby house, which the officer stated that he knew by "anonymous information" to be a "drug house." The officer testified that King appeared startled on seeing the officer talking to the truck's driver. The officer approached King and asked what he was doing in the house. King responded that he was there to borrow money. The officer then asked King who was inside the truck. King responded that he did not know the name of the truck's occupant.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 The officer said "Mr. King, I'm going to have you have a seat in the back of my police car." He patted King down, finding nothing; he then placed King inside the car and shut the door, thereby locking King inside.

¶5 The officer then returned to the truck and asked the driver to get out. When the driver complied, the officer saw three white objects that appeared to be crack cocaine on the driver's seat. The officer then arrested the driver and placed him in the back of another patrol car that had arrived on the scene.

¶6 Returning to his own patrol car, the officer opened the door and asked King whether he had drugs on him and whether he had come to the house to buy drugs. King responded that he had not. The officer stated that he asked King "[H]ey, Mr. King, can I see your hat?" King handed the officer the baseball cap he was wearing, and the officer discovered marijuana inside the brim and arrested King.

¶7 King moved to suppress the marijuana, claiming that the officer detained him in violation of the Fourth Amendment. The trial court disagreed and rejected King's suppression motion, and King pled no contest to the drug possession charge. On appeal, King renews his Fourth Amendment claim before this court.

¶8 Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee the right to be free from unreasonable search and seizure. ***State v. Washington***, 2005 WI App 123, ¶12, 284 Wis. 2d 456, 700 N.W.2d 305. Wisconsin courts generally follow the United States Supreme Court's interpretations of the federal constitution's search and seizure provision in construing the same provision of the state constitution. ***Id.*** When we review the denial of a suppression motion, we must uphold the trial

court's findings of fact unless they are clearly erroneous. ***Id.***, ¶11. Whether the facts as found constitute a search or seizure and whether the search or seizure satisfies constitutional requirements are questions of law that we review de novo. ***Id.*** Whether consent to a search is voluntary is likewise a mixed question of fact and law. ***State v. Vorburger***, 2002 WI 105, ¶88, 255 Wis. 2d 537, 648 N.W.2d 829.

¶9 A seizure occurs when an officer, by means of physical force or a show of authority, restrains a person's liberty. ***State v. Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777. A police officer need not have probable cause to arrest in order to make a brief investigatory stop. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). However, such a stop must be justified by "suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed … a crime." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted).[2]

¶10 A ***Terry*** stop must at all times be temporary and last no longer than necessary to effectuate the purposes of the stop. ***State v. Quartana***, 213 Wis. 2d 440, 448, 570 N.W.2d 618 (Ct. App. 1997). Courts reviewing the length and conditions of a stop must determine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person. ***Id.*** Wisconsin courts have recognized that under some circumstances, a person may be physically restrained by a variety of means and even moved around pursuant to an

[2] Wisconsin's legislature has authorized and codified the investigatory stop at WIS. STAT. § 968.24. We must interpret that statute in view of ***Terry*** and its progeny. *See* ***State v. Jackson***, 147 Wis. 2d 824, 830-31, 434 N.W.2d 386 (1989).

investigatory stop without turning that stop into a custodial arrest. *See*, e.g., ***State v. Wilkens***, 159 Wis. 2d 618, 628, 465 N.W.2d 206 (Ct. App. 1990) (detention did not ripen into arrest where officers handcuffed suspects and placed them in squad cars for over an hour while locating and questioning victim); ***State v. Washington,*** 120 Wis. 2d 654, 661-62, 358 N.W.2d 304 (Ct. App. 1984) (no arrest where four officers stopped vehicle using drawn weapons); ***Quartana***, 213 Wis. 2d at 443-44, 449-50 (no arrest where suspect was placed in the rear of a squad car and driven approximately one mile to scene of automobile accident); ***Vorburger***, 255 Wis. 2d 537, ¶64 (no arrest where suspects were held handcuffed outside hotel room for over an hour while police obtained warrant).

¶11 We hold that King's detention was an investigatory stop, rather than an arrest. The officer confronted King and asked him questions intended to determine whether he was involved with buying or selling drugs. When King failed to give satisfactory answers, arousing further suspicion, the officer decided to continue detaining him while investigating further. Since it was late at night and the officer was alone and dealing with two suspects, at least one of whom as large as or larger than the officer, he put one in the rear seat of his squad car while continuing his investigation of the other.[3] The cases cited above make clear that this did not change King's detention into an arrest.

[3] We note that the officer testified that he did not have any particular reason to believe that King was armed but that he frisked King because "[O]n every call that I go to I believe that someone may be carrying a weapon." Such a blanket policy of frisking without any specific, articulable justification is contrary to the Fourth Amendment. *See* ***State v. Kelsey C.R.***, 2001 WI 54, ¶50, 243 Wis. 2d 422, 626 N.W.2d 777 (refusing to adopt blanket rule that officer may frisk a person when lawfully placing that person into a squad car and restating "totality of the circumstances" test). However, since this search did not lead to the officer's finding of the marijuana, it does not affect the drug's admissibility or King's confession.

¶12 King argues, however, that this officer lacked even the reasonable suspicion to justify stopping him. King contends that the officer's only basis for suspicion was the "anonymous information" that the house King exited was a drug house. Relying on ***Florida v. J.L.***, 529 U.S. 266, 270 (2000), King notes that such anonymous, uncorroborated tips may not form the sole basis of reasonable suspicion without some indicia of reliability.

¶13 King's argument is off the mark because the officer in this case, unlike the one in ***J.L.***, was not relying solely on anonymous tips. He had much more to go on from the very beginning of his contact with King. The officer knew that the occupant of an illegally parked truck had ducked down as his squad car approached. When questioned, that occupant had told the officer that he was giving a ride to his friend Eric. When King came out of the alleged drug house, he had looked startled and then denied that he knew the name of the man who had just told the officer he was giving his "friend" a ride. Of course, there are many possible explanations for this contradiction, but one possibility that immediately comes to mind is that King, the occupant of the truck, or both, were not telling the truth. Under the totality of these circumstances, it was quite reasonable for the officer to suspect that the people with whom he was dealing were attempting to conceal some sort of wrongdoing. This suspicion justified the officer's decision to keep both of them on the scene and investigate further.

¶14 Since King's detention was reasonable, the only remaining issue is whether he validly consented to the search of his hat. Detention does not preclude a finding of consent to search, though it is a factor to be considered. ***State v. Wallace***, 2002 WI App 61, ¶18, 251 Wis. 2d 625, 642 N.W.2d 549. Here, the officer testified that he said "[H]ey Mr. King, can I see your hat?" and that King handed it over. This testimony was uncontroverted, and we see no evidence of

improper coercive police tactics. *See* ***State v. Hughes***, 2000 WI 24, ¶41, 233 Wis. 2d 280, 607 N.W.2d 621. We therefore uphold the circuit court's finding that King's consent was voluntary and accordingly affirm the conviction.

By the Court.—Judgment affirmed.

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