COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1404-CR **Cir. Ct. No. 2008CM4446**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NAZARUS HUBBERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed.*

¶1 CURLEY, P.J.[1] Nazarus Hubbert appeals the judgment, entered following his guilty plea, convicting him of one count of misdemeanor possession

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

of cocaine, contrary to WIS. STAT. § 961.41(3g)(c) (2007-08).[2] Hubbert contends that the trial court erred in denying his motion to suppress the controlled substances found on his person following his arrest, because the police had no probable cause to arrest him for loitering. Because probable cause existed to arrest Hubbert for violating the loitering ordinance, this court affirms.

I. BACKGROUND.

¶2 According to the testimony taken during the motion to suppress, on July 29, 2008, at approximately 12:30 a.m., an officer assigned to the Tactical Enforcement Unit and on patrol in a high traffic drug area, saw Hubbert "sitting … on the front stoop" of a house located on North 12th Street in the city of Milwaukee. Because the officer had seen him several hours earlier sitting on the same stoop, she decided to investigate why Hubbert was sitting on the stoop. She parked her car and approached Hubbert and asked him what he was doing. He replied that it was his grandfather's house, but when the officer asked Hubbert what his grandfather's name was, Hubbert replied "Mister." Additionally, Hubbert could not produce any identification.

¶3 While talking to Hubbert, the officer saw a woman who was inside the house come to the front door. The woman looked outside, then shut and locked the front door and pulled the blind all the way down so the window was covered. When the officer went up to the door to ask for an explanation and knocked on the door, no one answered. The officer also learned from Hubbert that he lived at 40th Street and Capitol Drive, some distance from the North 12th Street

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

address where he was sitting. The officer then arrested Hubbert for loitering, but he was given a citation for drug loitering when a search of Hubbert produced both marijuana and cocaine in his shoe. Hubbert was later charged with two misdemeanors, possession of marijuana and possession of cocaine.

¶4 Hubbert filed a motion to suppress seeking to exclude the controlled substances found in his shoe. After testimony was taken at the motion to suppress, the trial court determined that the officer was entitled to stop and talk to Hubbert after he had been seen sitting on the same stoop by himself for several hours. Further, the court stated that when Hubbert was unable or unwilling to give the name of his grandfather the officer's suspicions were properly raised, and when a woman came to the front door, looked outside, locked the door, closed the blind and failed to answer the officer's knock, they were further aroused. Finally, the trial court reasoned that this information, coupled with the information that Hubbert, who had no identification, did not live in the neighborhood, constituted circumstances which fell well within the parameters of what constitutes loitering and denied the motion.

¶5 After his motion to suppress the controlled substances was denied, Hubbert entered into a plea bargain. He agreed to plead guilty to possession of cocaine in exchange for the State dismissing the possession of marijuana charge. He was sentenced to six months in the House of Correction. This sentence was stayed and he was placed on probation for one year with various conditions.

II. ANALYSIS.

¶6 Hubbert contends that the trial court erred in denying his motion to suppress the contraband found in his shoe because no probable cause existed to arrest him for violating either the loitering ordinance or the drug loitering

ordinance.[3] He points out that the officer testified that there was nothing unusual in seeing people sitting on a stoop during a summer evening, and that the officer stated that she did not see Hubbert doing anything out of the ordinary. Further, Hubbert contends that he correctly identified himself and he should not be penalized for the odd behavior of the woman who came to the door, looked outside, locked the door and pulled down the blinds. Finally, Hubbert submits that the circumstances that existed at the time of his arrest did not "warrant alarm" as the ordinance requires. This court disagrees.

¶7 When reviewing a trial court's ruling on a motion to suppress evidence, we will uphold a trial court's factual findings unless they are clearly erroneous. ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434. This case requires the court to determine whether the police had probable cause to arrest Hubbert for a municipal ordinance violation. "Whether probable cause to arrest exists based on the facts of a given case is a question of law [that this court] review[s] independently of the trial court." ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). "Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense." ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). It is a common-sense test, not a technical determination, *see* ***id.***, and does not require "'proof beyond a reasonable doubt or even that guilt is more likely than not,'"

[3] Because the officer arrested Hubbert for a violation of the loitering ordinance, not the drug loitering charge, this court will explore only whether probable cause existed for the initial loitering charge.

State v. Babbitt, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (citation omitted). "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 police officer to believe that the defendant probably committed a crime," ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993), or, in the context of this case, an ordinance violation. Additionally, "a law enforcement officer may make a warrantless arrest of a person if the officer has 'probable cause to believe the person was committing ... an ordinance violation.'" ***City of Milwaukee v. Nelson***, 149 Wis. 2d 434, 458, 439 N.W.2d 562 (1989) (citation omitted); *see also* WIS. STAT. § 800.02(6) ("A person may be arrested without a warrant for the violation of a municipal ordinance if the arresting officer has reasonable grounds to believe that the person is violating or has violated the ordinance.").

¶8 Hubbert was initially arrested for loitering. MILWAUKEE, WIS., ORDINANCE § 106-31 (2008) prohibits loitering. It reads:

> **106-31. Loitering or Prowling.** The activities of loitering or prowling set forth in subs. 1 to 9 are unlawful within the limits of the city.
>
> **1.** LOITERING. Loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the

> actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

¶9 Under the totality of the circumstances test, there were ample reasons why probable cause existed to arrest Hubbert for violating the loitering ordinance. First, Hubbert was observed sitting on the stoop late in the evening, presumably for a period of over three hours. This length of time, while not by itself alarming, would raise concerns as it was a high crime area. Second, when asked what he was doing, Hubbert never answered the question. Rather, he stated that it was his grandfather's house; but when asked, he was either unwilling or unable to state his grandfather's name. Third, while talking with Hubbert, the officer saw a woman come to the front door, look outside, lock the door and pull down the blind. When the officer knocked on the door, no one answered. Hubbert claims he should not be penalized for the acts of the unknown woman. He is not being penalized for her acts, but her conduct was but one of many odd circumstances that the officer could add into the equation to see if probable cause existed. While the actions of the unknown woman were somewhat ambiguous, one would expect, if it had truly been his grandfather's house, that the woman would have come to the defense of Hubbert, or at least inquired as to what was going on. Additionally, Hubbert had no identification to prove who he was and he provided the officer with an address some distance away from the North 12th Street address where he was seen.

¶10 Taken collectively, the officer had probable cause to believe that Hubbert was loitering. Hubbert's non-answers to questions posed to him created suspicion and alarm. He was unable to dispel the officer's belief that he had no legitimate reason for sitting on the stoop. He did not live there or nearby. He apparently did not know who did live in the home. The actions of the woman in

the house merely added to the suspicion that something was amiss. In sum, the "circumstances … warrant[ed] alarm for the safety of persons or property in the vicinity." *See* MILWAUKEE, WIS., ORDINANCE § 106-31. For the reasons stated, the judgment is affirmed.

By the Court.—Judgment affirmed.

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