

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 2011

A. John Voelker
Acting 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. 2010AP2465-CR

Cir. Ct. No. 2008CF4959

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARVIS JERMANE BESTER,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jarvis Jermane Bester appeals from a judgment of conviction entered upon his guilty pleas to possession of a firearm by a felon and possession with intent to deliver tetrahydrocannabinols (marijuana), as a second or

subsequent offense. *See* WIS. STAT. §§ 941.29(2), 961.41(1m)(h)1., 961.48 (2007-08).¹ Bester contends that the circuit court erred when it denied his motion to suppress evidence on grounds that police officers lacked reasonable suspicion to stop his vehicle.² We disagree and affirm.

BACKGROUND

¶2 Bester was charged with possession of a firearm by a felon; carrying a concealed weapon; possession with intent to deliver tetrahydrocannabinols (marijuana), as a second or subsequent offense; and possession with intent to deliver methylenedioxymethamphetamine (MDMA), as a second or subsequent offense. The facts underlying his arrest were set forth during the hearing on Bester's motion to suppress evidence during which he and the two police officers who stopped him testified.

¶3 Officer Bodo Gajevic testified that the investigation of Bester began when he received information from a citizen informant. Officer Gajevic had worked with the informant previously as part of other investigations and believed the informant to be reliable.

¶4 The informant provided Officer Gajevic with a name and a description of Bester along with the make, model, color, and license plate number of the vehicle that Bester drove. According to the informant, Bester carried a

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The Honorable Kevin E. Martens presided over the suppression hearing that is the focus of this appeal. The Honorable Daniel L. Konkol presided over the plea and sentencing hearings and entry of judgment.

handgun and drove a tan Chevrolet Lumina on the east side of Milwaukee selling marijuana. Upon receiving this information, Officer Gajevic took steps to verify it, which included reviewing Milwaukee police department files and Department of Transportation records. In so doing, Officer Gajevic ascertained that Bester had been arrested previously and that the vehicle described by the informant matched the license plate number provided. Officer Gajevic also obtained a booking photograph of Bester and determined that Bester was on supervised release.

¶5 The informant continued to provide information to Officer Gajevic over the two weeks preceding the stop, namely information pertaining to Bester's whereabouts and activities. On the day of the stop, Officer Gajevic was patrolling the east side of Milwaukee in an unmarked squad car with his partner, Officer John Wiesmueller, when he received a call from the informant who advised that Bester was on the east side in the Lumina and was "dirty." Officer Gajevic testified that by this, the informant meant that Bester either had a gun or drugs.

¶6 Officer Gajevic subsequently saw the Lumina stopped in the center of a street about a half block south of his squad car. Only the driver was in the Lumina, and Officer Gajevic observed a pedestrian walk up to the vehicle and lean his head inside so that part of his torso was inside the front passenger compartment. Ten to fifteen seconds later, the pedestrian walked away and the Lumina proceeded northbound directly toward the officers. When the Lumina stopped at a stop sign, Officer Gajevic drove forward and was able to look at the driver and identify him as Bester. Officer Gajevic then did a U-turn to get behind Bester's vehicle and proceeded to effectuate a traffic stop. When Bester refused to get out of the Lumina and instead reached toward his right hip area, he was arrested. The officers found a gun in Bester's pants pocket and marijuana and MDMA pills in his coat pockets.

¶7 In large part, Officer Wiesmueller's testimony mirrored Officer Gajevic's as to the observations leading to Bester's arrest. Officer Wiesmueller, like Officer Gajevic, had a history with the citizen informant: Officer Wiesmueller had known the informant on and off for ten years. In the process of verifying the information provided by the informant, Officer Wiesmueller showed the informant a photograph of Bester and the informant made a positive identification. Both officers testified that based on their experience, their observations of the pedestrian approaching the Lumina were consistent with street dealing of narcotics in a hand-to-hand transaction. However, neither officer witnessed any actual narcotics change hands.

¶8 Bester testified that on the day he was arrested, he stopped the vehicle he was driving to give pedestrians who were standing in the street the opportunity to step aside. While he was stopped, an acquaintance leaned into the vehicle and began talking to Bester. Bester testified that the conversation lasted ten to fifteen seconds. Bester said that while he was stopped, he observed a police car facing his vehicle. After the conversation ended, Bester proceeded northbound and ultimately was arrested.

¶9 The circuit court found the officers' testimony credible and concluded, based on the totality of the circumstances, that the stop was reasonable and denied Bester's motion. Bester later pled guilty to possession of a firearm by a felon and possession with intent to deliver tetrahydrocannabinols (marijuana), as a second or subsequent offense. The other charges against him were dismissed and read in at sentencing.

ANALYSIS

¶10 The sole issue on appeal is whether the arresting officers had reasonable suspicion to initiate a stop of Bester's vehicle. Investigative stops are considered seizures within the meaning of the Fourth Amendment; therefore, the stop must be based on a reasonable suspicion in order to pass constitutional muster. *State v. Harris*, 206 Wis. 2d 243, 258, 557 N.W.2d 245 (1996). Whether evidence obtained following an investigative stop should be suppressed is a question of constitutional fact. *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423. In reviewing questions of constitutional fact, we will uphold a circuit court's factual findings unless they are clearly erroneous, but we will independently decide whether those facts meet the constitutional standard. *Id.*

¶11 To make an investigative stop of a person, the police must have a reasonable suspicion that criminal activity is afoot. *State v. Allen*, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999). Reasonable suspicion must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" on a citizen's liberty. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968). The test is one of common sense: "under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶12 Bester contends that the officers set out to stop him without any corroborating evidence of illegal activity. He writes: "Neither officer on the arrest date observed any criminal transaction occur. A pedestrian sticks his head in the car for 10-30 seconds with no observation of anything exchanging hands." In essence, Bester is arguing that lawful acts cannot form the basis for a

reasonable suspicion justifying a stop. This is not the law. “The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape.” *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). “The law of investigative stops allow police officers to stop a person when they have less than probable cause.” *Id.* Moreover, the fact that innocent inferences could have been drawn does not automatically result in the conclusion that the stop was improper. *See id.* at 60 (“[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.”).

¶13 To the extent that Bester seeks to reduce the circumstances resulting in the stop down to the mere fact that a pedestrian stuck his head into the passenger-side window of the Lumina, he overlooks that this was only one part of the totality of the circumstances that was presented to the officers. On this basis, this case is distinguishable from *Young*, where we held that without more, Young’s presence in a drug-trafficking area, an officer’s observation of a brief meeting between Young and another man on the street, and the officer’s experience that drug deals often occur in brief on-street meetings, did not create reasonable suspicion to stop Young. *Id.*, 212 Wis. 2d at 433.

¶14 In contrast to the circumstances set forth in *Young*, here, an informant, who was known to be reliable, gave police information that Bester carried a handgun and sold marijuana. The informant provided periodic updates as to Bester’s whereabouts and activities over the course of a couple weeks,

including on the day of the stop itself when the informant advised the officers of Bester's general location and that Bester was "dirty."³ Police officers corroborated parts of this information and knew that the informant was accurate in describing the vehicle associated with the license plate number that Bester was said to drive on the east side. They also learned that Bester had been arrested previously and was under supervision. They subsequently corroborated the information provided by the informant on the day of the stop by seeing Bester in the described location driving the Lumina. Next, they observed circumstances that were consistent with street dealing of narcotics in a hand-to-hand transaction. The police officers' suspicion was based on specific, articulable facts and the reasonable inferences drawn from those facts.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ Without citation to any supporting legal authority, Bester argues in his reply brief that the information provided by the informant became stale because it was provided two weeks prior to Bester's arrest. This statement misrepresents the record. As set forth above, the informant provided periodic updates to the police over the course of the two weeks preceding Bester's arrest, which included an update minutes before the stop itself when the informant advised the police officers that Bester was "dirty."

