COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2012

Diane M. Fremgen
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. 2011AP2587-CR **Cir. Ct. No. 2010CF2897**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVANTI D. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Travanti D. Schmidt appeals the judgment, entered upon his no-contest plea, convicting him of one count of possession of

cocaine (second or subsequent), contrary to WIS. STAT. § 961.41(3g)(c) (2009-10).[1] Schmidt argues that the circuit court should have suppressed drug evidence because, he claims, police unlawfully searched his shoes during a field investigation.[2] We disagree and affirm.

BACKGROUND

¶2 According to testimony at the suppression hearing, shortly after 6:00 p.m. on the evening of June 9, 2010, several Milwaukee police squads observed five individuals standing on a sidewalk with open cans of beer scattered around them. The officer driving the lead squad car specifically testified that he observed Schmidt holding a can of beer in his hand. As the officers approached the individuals to conduct a field interview, Schmidt was observed backing away, which led to concern that he would flee. An officer asked Schmidt if he had anything illegal on his person and Schmidt responded that he did not.

¶3 The officer then asked Schmidt if he could "check or search him," and Schmidt responded: "Go ahead, check." Following a pat-down search, Schmidt was seated on the curb. The officer testified that he asked Schmidt, "Can I check your shoes? And he—everybody took off their shoes." The officer subsequently discovered a plastic bag containing crack cocaine in one of Schmidt's shoes.

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

[2] A defendant may appeal the denial of a motion to suppress evidence even though he or she has pled no contest. *See* WIS. STAT. § 971.31(10).

The Honorable Jean A. DiMotto denied Schmidt's suppression motion; the Honorable Paul R. Van Grunsven handled the plea hearing and entered the judgment.

¶4 Schmidt testified that after the officer conducted a pat-down search, he and the other individuals who were present were told "to take their shoes off." Schmidt took his shoes off, testifying that he "never said yes or no" to doing so. He stated, "I just did what I saw everybody else do."

¶5 Schmidt was arrested and later charged with possession of cocaine (second or subsequent). He moved to suppress the drug evidence, claiming that the officers acted unlawfully.[3] Based on the testimony presented during the suppression hearing, the circuit court found that one officer had observed Schmidt with a can of beer in his hand and another saw a can of beer near Schmidt's foot. The circuit court concluded that there was sufficient probable cause to believe that a violation of the city ordinance against public drinking had occurred and that the stop was appropriate.

¶6 Regarding the search of Schmidt's shoes, the circuit court made the following findings:

> The five individuals apparently … were then told to sit on the curb and the defendant did that. The evidence is not clear to me as to the next thing that happened.
>
> I don't know, and accordingly, I'm not persuaded at the level of preponderance of the evidence on this fact, whether [the officer] asked if he could check the defendant's shoes, or if he told him to take off his shoes, or whether he or any other officer told all of the five gentlemen to take off their shoes.
>
> In any event, the defendant didn't hear what the officer said. Instead, he saw that the others were taking off their shoes, so he took his off as well.

[3] Schmidt also sought to suppress his statement; however, because he does not pursue this issue on appeal, we do not discuss it.

The circuit court concluded that the search of Schmidt's shoes was constitutionally permissible, finding that Schmidt took his shoes off because others were doing it. The circuit court stated: "If you remove your shoes, they're open for search."

¶7 Schmidt subsequently pled no contest to the cocaine charge and now appeals the circuit court's denial of his suppression motion.

DISCUSSION

¶8 Schmidt concedes the legality of the stop and pat-down search. At issue is whether he consented to the subsequent search of his shoes. We conclude that he did.

¶9 In reviewing a circuit court's order refusing to suppress evidence, we uphold its findings of historical fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995); *see also* WIS. STAT. § 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Whether a search or seizure violates the Fourth Amendment, however, is a question of law that we review *de novo*. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶10 "A consent search is constitutionally reasonable to the extent that the search remains within the bounds of the actual consent." ***State v. Douglas***, 123 Wis. 2d 13, 22, 365 N.W.2d 580 (1985). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991).

¶11 Here, five individuals who appeared to be violating the city ordinance against public drinking were approached by numerous officers. Schmidt consented to a pat-down search and afterward, was seated with the rest of the individuals on a curb. After seeing the others do so, Schmidt removed his shoes. By this conduct, a reasonable officer would have concluded that Schmidt consented to a search of his shoes.[4]

¶12 Schmidt argues that this conclusion is contradicted by the circuit court's findings. We disagree. After concluding that the stop and pat-down search were permissible the circuit court found:

> The taking off of the shoes was not—the defendant didn't do that at the behest of the police. He did that because he saw the others doing it, and the contraband was then found.
>
> I find nothing [c]onstitutionally offensive about the stop or the search, including the removal of the defendant's shoes, which were then searched. If you remove your shoes, they're open for search.

By these findings, the circuit court essentially determined that Schmidt consented to the search. *See* ***State v. Goyette***, 2006 WI App 178, ¶22 n.11, 296 Wis. 2d 359, 722 N.W.2d 731 (We may "assume facts, reasonably inferable from the record, in a manner that supports the circuit court's decision."); *see also* ***State v. Phillips***, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998) ("Consent to search need not be given verbally; it may be in the form of words, gesture, or conduct.").

[4] Citing ***State v. Johnson***, 177 Wis. 2d 224, 234, 501 N.W.2d 876 (Ct. App. 1993), Schmidt argues that mere acquiescence is not sufficient to imply consent. This court is not convinced that Schmidt's conduct constitutes "mere acquiescence." In contrast to ***Johnson***, where "[n]othing in the record provide[d] any basis upon which consent reasonably could have been inferred," *see* ***id.*** at 233-34, here, Schmidt provided such a basis when he removed his shoes.

¶13 The circuit court did not err in denying the motion to suppress. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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