COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2729-CR **Cir. Ct. No. 2011CF2603**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEJA DOMINIQUE THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Deja Dominique Thomas appeals a judgment of conviction entered upon his guilty plea to possessing a firearm as a felon. The only issue is whether the circuit court properly denied his motion to suppress the

evidence found during an investigative stop and subsequent search of his person. We affirm.

BACKGROUND

¶2 We briefly review the relevant facts developed at the suppression hearing. On January 6, 2011, at 9:50 p.m., Milwaukee police officer Sean Mahnke and his partner were patrolling in a police car in the 3400 block of North Palmer Street. According to Mahnke, the officers saw a man, subsequently identified as Thomas, walking in the street just to the right of the center of the road. Mahnke stopped Thomas, believing that Thomas was violating a Wisconsin statute that prohibits standing on a roadway. Mahnke asked Thomas why he was walking in the street. Thomas replied, "it's cold outside."

¶3 Mahnke testified that the 3400 block of North Palmer Street is in "a high crime area plagued with gun violence and street crimes such as robberies, homicides, shootings and numerous armed individuals." Mahnke asked Thomas if he had any weapons. Thomas did not respond. Mahnke directed Thomas to show his hands, which were in his pockets. Although Thomas complied, he twice reached towards his waistband despite police directives to keep his hands up. As Thomas reached towards his waistband for the second time, Mahnke began to pat the outside of Thomas's jacket and immediately felt an object that he suspected was a firearm. After a brief struggle, Mahnke seized a gun that had been tucked into Thomas's waistband, and Thomas fled on foot. Mahnke's partner followed Thomas and arrested him a few minutes later. Mahnke issued Thomas a citation for standing on a roadway. The State subsequently charged him with possessing a firearm as a felon.

¶4 The circuit court denied Thomas's motion to suppress the evidence found during the investigative search. Thomas then pled guilty to possessing a firearm as a felon, and this appeal followed.[1]

DISCUSSION

¶5 Thomas alleges that the circuit court erred by denying his motion to suppress evidence. "We review suppression motions using a two-step process. First, we uphold the circuit court's findings of historical fact unless clearly erroneous. Whether those facts require suppression is a question of law reviewed without deference to the circuit court." ***State v. Pender***, 2008 WI App 47, ¶8, 308 Wis. 2d 428, 433, 748 N.W.2d 471 (citations omitted).

¶6 "The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." ***State v. Artic***, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. Wisconsin courts typically interpret "Article I, Section 11 of the Wisconsin Constitution in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court." ***State v. Young***, 2006 WI 98, ¶30, 294 Wis. 2d 1, 717 N.W.2d 729. The Fourth Amendment is not offended when the police conduct an investigatory stop and briefly detain a person based on '"reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.'" *See* ***State v. Colstad***, 2003 WI App 25, ¶¶7-8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted, brackets in

[1] A circuit court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Colstad). The standard is the same under the Wisconsin constitution. *See* ***State v. Young***, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997).

¶7 Reasonable suspicion is based on the totality of the circumstances. *See* ***Colstad***, 260 Wis. 2d 406, ¶8. Moreover, '"[t]he question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.'" ***Id.*** (citation omitted).

¶8 Thomas first contends that the police stopped him unlawfully. We disagree. The police stopped Thomas as he walked on a highway to the right of the center of the road.[2] Thomas acknowledges that his activity "could be view[ed] to have been in violation of WIS[]. STAT[]. § 346.28(1)." That statute provides: "[a]ny pedestrian traveling along and upon a highway other than upon a sidewalk shall travel on and along the left side of the highway and upon meeting a vehicle shall, if practicable, move to the extreme outer limit of the traveled portion of the highway." A pedestrian who violates § 346.28(1) is subject to a civil forfeiture pursuant to WIS. STAT. § 346.30(1)(a).

¶9 Thomas asserts that, because he did not commit a crime by violating WIS. STAT. § 346.28(1), the police could not lawfully stop him. Thomas is not correct. The police may conduct a valid investigatory stop "when a person's activity can constitute either a civil forfeiture or a crime." ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991).

[2] Thomas does not dispute that North Palmer Street is a highway. *See* WIS. STAT. § 340.01(22) (defining "highway").

¶10 Thomas accurately points out that, according to Mahnke's testimony, the police stopped him believing that he was violating WIS. STAT. § 346.29(2), which prohibits standing or loitering on a roadway if the activity interferes with traffic. In fact, Thomas was not violating § 346.29(2) when the police approached him. The officers' subjective error, however, is irrelevant to the lawfulness of the stop. *See* ***State v. Repenshek***, 2004 WI App 229, ¶10, 277 Wis. 2d 780, 691 N.W.2d 369. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." ***Whren v. United States***, 517 U.S. 806, 813 (1996). Rather, the relevant inquiry is whether the objective facts support a reasonable suspicion that a suspect is committing any offense. *See* ***Repenshek***, 277 Wis. 2d 780, ¶11. If such objective facts exist, the seizure is lawful. *See* ***id.*** '"[A]n arrest is not rendered unlawful by the fact that an officer who has authority to make an arrest for a particular offense erroneously states he is making an arrest for some other offense.'" ***Id.*** (citation omitted, brackets in ***Repenshek***). Because Thomas was in fact violating WIS. STAT. § 346.28(1) when police stopped him, the seizure was a lawful one.

¶11 Thomas next complains that the police lacked justification for conducting the pat-down search that uncovered his concealed weapon.

> "During an investigative stop, an officer is authorized to conduct a [protective] search of the outer clothing of a person to determine whether the person is armed if the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" The purpose of a protective search is "to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." In evaluating a search, "due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."

State v. Sumner, 2008 WI 94, ¶21, 312 Wis. 2d 292, 752 N.W.2d 783 (citations and footnote omitted, brackets in ***Sumner***).

¶12 Here, Mahnke testified about his observations of Thomas's behavior during the stop. The circuit court credited that testimony, finding that it "justified the frisk."[3] Credibility determinations rest with the circuit court. ***State v. Berggren***, 2009 WI App 82, ¶18, 320 Wis. 2d 209, 769 N.W.2d 110. We therefore accept the circuit court's credibility assessment. Accordingly, we review Mahnke's testimony to determine *de novo* whether the totality of the circumstances that he described establishes reasonable suspicion for the protective search. *See* ***State v. Williams***, 2001 WI 21, ¶48, 241 Wis. 2d 631, 623 N.W.2d 106.

¶13 First, Mahnke testified that he stopped Thomas in a high-crime area. A suspect's presence in a high-crime area is a permissible factor for consideration when determining the lawfulness of a protective search. *See* ***State v. Kyles***, 2004 WI 15, ¶62, 269 Wis. 2d 1, 675 N.W.2d 449.

¶14 Second, the police stopped Thomas just before 10:00 p.m. on a January night. The lateness of the hour is a relevant consideration in determining the reasonableness of a protective frisk. ***State v. Morgan***, 197 Wis. 2d 200, 213-14, 539 N.W.2d 887 (1995).

[3] Thomas suggests that Mahnke's testimony conflicts with information in police reports that Thomas includes in the appendix of his appellate brief. The police reports, however, are not in the appellate record, so we have not considered them. '"[W]e are bound by the record as it comes to us."' ***State v. Linton***, 2010 WI App 129, ¶11 n.3, 329 Wis. 2d 687, 791 N.W.2d 222 (citation omitted, brackets in ***Linton***).

¶15 Third, when Mahnke asked Thomas why he was walking in the middle of the road, Thomas offered an evasive answer about the weather. Although refusal to cooperate does not alone create reasonable suspicion, a subject's evasiveness is a relevant consideration in assessing whether suspicion is reasonable. *See* ***State v. Olson***, 2001 WI App 284, ¶8, 249 Wis. 2d 391, 639 N.W.2d 207.

¶16 Fourth, when Mahnke asked Thomas if he had any weapons, Thomas did not answer at all. This concerned Mahnke, who believed that an unarmed person would have answered the question. *See* ***State v. Bridges***, 2009 WI App 66, ¶¶19-20, 319 Wis. 2d 217, 767 N.W.2d 593 (explaining that an officer may ask questions "to obtain information confirming or dispelling the officer's suspicions concerning weapons," and the individual's answers, "including the absence of or refusal to provide a response, may provide information that is relevant to whether a protective search is reasonable").

¶17 Fifth, Thomas twice lowered his hand towards the waistband of his pants after the police directed him to keep his hands up. Mahnke testified that these actions concerned him because he knew from experience that armed suspects normally carry firearms in their waistbands. Mahnke further testified that his specialized training has taught him that an armed suspect may touch a weapon as part of an inadvertent "security check." "[T]raining and experience enable[] law enforcement officers to perceive and articulate meaning that would not arouse suspicion to an untrained observer." ***Young***, 212 Wis. 2d at 429.

¶18 Sixth, and finally, Mahnke testified that he had nearly five years of experience and training and that his observations led him to suspect that Thomas

was armed. Courts may consider an officer's training and experience when deciding whether reasonable suspicion exists. *See* ***Young***, 212 Wis. 2d at 429.

¶19 Although each of the facts, standing alone, might have been insufficient to justify a protective search in this case, '"that is not the test we apply. We look to the totality of the facts taken together.'" *See* ***State v. Allen***, 226 Wis. 2d 66, 75, 593 N.W.2d 504 (Ct. App. 1999) (citation omitted). A common sense assessment of the facts and circumstances here supports the conclusion that police reasonably suspected Thomas was armed. *See* ***Colstad***, 260 Wis. 2d 406, ¶8. Accordingly, Mahnke lawfully conducted a protective search for the safety of the officers. We affirm.

By the Court.—Judgment affirmed.

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