COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP454-CR **Cir. Ct. No. 2011CF5366**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARTANIAN LEMONT LEWIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 BRENNAN, J. Dartanian Lemont Lewis appeals from a judgment of conviction, entered after he pled guilty to one count of possession with intent to deliver one to five grams of cocaine, and from an order denying his postconviction motion. Lewis argues that the police violated his constitutional rights when they

searched him for weapons during a traffic stop for safety belt violations, allegedly without reasonable suspicion. He further argues that the search violated WIS. STAT. § 347.48(2m)(gm) (2011-12),[1] which prohibits police from taking an individual into "physical custody" solely for failing to wear a safety belt in violation of the law. Because we conclude that Lewis's actions during the traffic stop formed a sufficient basis for police to reasonably believe he may have had a weapon, we affirm.

BACKGROUND

¶2 In November 2011, the State filed a criminal complaint, charging Lewis with one count of possession with intent to deliver one to five grams of cocaine. The complaint was based on a traffic stop for safety belt violations, during which police found cocaine on Lewis's person during a pat down search. Lewis filed a motion to suppress the drugs on the grounds that police lacked reasonable suspicion to search him for weapons and because the stop itself was premised on safety belt violations, punishable only by citation.

¶3 The circuit court held an evidentiary hearing at which Milwaukee Police Officers Daniel Robinson, Andrew Molina, and Scott Kaiser all testified. Lewis does not challenge the accuracy of their testimony on appeal.

¶4 Officer Robinson testified that during the evening hours of October 31, 2011, he was on a special patrol with Officer Kaiser in a high-crime area in the City of Milwaukee. Officer Robinson was a passenger in the squad car

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

when he noticed a Chevy Malibu in which neither the driver nor the passenger was wearing a safety belt. Officer Kaiser and Officer Robinson initiated a stop on the vehicle. Another squad car in the area, containing three more police officers, arrived at the same time to back them up.

¶5 Officer Robinson approached the passenger's window of the Chevy Malibu and tapped on the window. Lewis, who was later identified as the front-seat passenger of the Chevy Malibu, did not roll down his window, but rather, put both of his hands in his pockets. Officer Robinson then opened the passenger's side door and asked Lewis to take his hands out of his pockets; Lewis complied. Officer Robinson testified that he prefers to be able to see a person's hands during a traffic stop because "[i]f I can't see your hands, I don't know what is in your hands. You might be retrieving a weapon or a dangerous device. Could threaten the safety of myself or other individuals around me."

¶6 While Lewis was still seated in the passenger's seat, Officer Robinson identified himself and explained the reason for the stop. During that short exchange, Officer Robinson observed Lewis put his right hand back into his pocket. Concerned that Lewis had a weapon, Officer Robinson again asked Lewis to remove his hand from his pocket and to step out of the vehicle; again, Lewis complied. Once Lewis was out of the vehicle or as he was getting out of the vehicle, Officer Robinson observed Lewis "reach[] for his jacket pocket and -- not grab[] it, but manipulate[] it slightly on his left -- left breast." Lewis's fixation on his pocket and the way he manipulated it reminded Officer Robinson of a "security check that a person that's carrying a firearm, whether it's a police officer or even someone carrying a firearm lawfully, will check to make sure that that firearm is in the place that you put it."

¶7 When asked to describe Lewis's demeanor during the traffic stop, Officer Robinson testified that Lewis "was generally non-responsive verbally. When I asked him, at one point, if he had any guns, drugs, bombs, knives, he didn't answer which generally we will get a laugh, chuckle, smile, something, some sort of a response." Instead, Lewis's "only reaction was to look down to his left, towards the left breast area." Officer Robinson also testified that Lewis was breathing heavily and appeared nervous.

¶8 Given his observations of Lewis's demeanor and fixation on his pockets, Officer Robinson believed Lewis may have a weapon and conducted a pat down search of Lewis's person, beginning at the left breast area where Lewis appeared to be most fixated. Officer Robinson "felt a hard substance that [he] believed was consistent with cocaine, and is about the size of a quarter, a spherical size" in the pocket. Officer Robinson retrieved the baggy of what he thought was cocaine from Lewis's pocket and placed him under arrest.

¶9 Officer Molina testified that he, too, had seen Lewis reach or motion to his chest area a few times while conversing with Officer Robinson. He felt that Lewis was doing "some type of possible security index check" or had a "possible weapon."

¶10 Officer Kaiser testified that during the stop he was interacting with the driver of the vehicle and paid little attention to what was occurring with Lewis.[2]

[2] Neither Lewis nor the other two police officers involved in the traffic stop testified at the evidentiary hearing.

¶11 The circuit court found all three police officers to be credible witnesses. Based on their testimony, the circuit court found that the police had probable cause to believe that both Lewis and the driver of the Chevy Malibu were violating the safety belt statute, and that because the police properly stopped the vehicle they also had the right to ask Lewis to step out of the vehicle. The circuit court went on to find that Officer Robinson's pat down of Lewis was properly based on reasonable suspicion that Lewis may have had a weapon.

¶12 Following the circuit court's decision, Lewis pled guilty to one count of possession with intent to deliver a controlled substance.[3] He was sentenced to three years of initial confinement to be followed by three years of extended supervision.[4] Lewis appeals.

DISCUSSION

¶13 Lewis frames the sole issue on appeal thusly: "Was the search of an automobile passenger and seizure of drugs unconstitutional when the stop was based solely on a seatbelt violation?" Specifically, he argues that the legislature passed WIS. STAT. § 347.48(2m), which requires passengers in a motor vehicle to be properly restrained by a safety belt, to promote safety and not to permit police

[3] In most instances, a defendant who pleads guilty waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). However, WIS. STAT. § 971.31(10) makes an exception to this rule, which allows appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. ***Smith***, 122 Wis. 2d at 434-35.

[4] After sentencing, Lewis filed a postconviction motion challenging the circuit court's conclusion that he was ineligible for the Challenge Incarceration Program. *See* WIS. STAT. § 302.045. The circuit court denied the motion in a written order, but Lewis has abandoned that issue on appeal, and therefore, we do not address it. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned").

to go on fishing expeditions for weapons and drugs. Citing § 347.48(2m)(gm), Lewis contends that the police impermissibly took him into "physical custody" solely for a safety belt violation when they asked him to step out of the car and asked him whether he had any contraband. Lewis believes that under § 347.48(2m)(gm) Officer Robinson could only stop the car, issue the citations, and leave. We disagree and affirm.

¶14 "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. Whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. ***State v. Kieffer***, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). We decide constitutional questions *de novo*, benefiting from the analysis of the circuit court, and will uphold findings of evidentiary or historical fact unless they are clearly erroneous. ***Id.*** Because Lewis does not contend that the circuit court's factual findings were erroneous, our review entails independently applying the facts to the constitutional standard. *See* ***State v. Malone***, 2004 WI 108, ¶14, 274 Wis. 2d 540, 683 N.W.2d 1.

¶15 An officer who has lawfully stopped a car may frisk an occupant if the officer has "a reasonable suspicion that the person is dangerous and may have immediate access to a weapon." ***State v. Johnson***, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182. "'The 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.'" ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted). An officer may not act on a mere hunch.

State v. Alexander, 2008 WI App 9, ¶8, 307 Wis. 2d 323, 744 N.W.2d 909. An officer may, however, "'draw from the facts in light of his experience.' These cases are fact-intensive and must be decided on a 'case-by-case basis, evaluating the totality of the circumstances.'" ***Id.*** (citations, brackets, and one set of quotation marks omitted).

¶16 We conclude that a reasonable police officer in Officer Robinson's position could reasonably have suspected that Lewis had a weapon on his person, justifying the limited frisk of Lewis's person for weapons. Officer Robinson testified that when he approached and tapped on the passenger's side window, rather than roll down the window and acknowledge the presence of a police officer, Lewis immediately placed his hands in his pockets. Lewis then put one of his hands back in his pocket after Officer Robinson asked him to remove it. After Officer Robinson asked Lewis to step out of the car, Lewis again "reached for his jacket pocket" and "manipulated it slightly on his … left breast." Lewis's behavior reminded Officer Robinson, in his experience as a police officer, of a "security check that a person that's carrying a firearm … will check to make sure that that firearm is in the place that you put it." Officer Molina also testified that during the course of the traffic stop he observed Lewis reach or motion for his chest area a few times and that he felt Lewis was doing "some type of possible security index check" or had a "possible weapon." Officer Robinson also described Lewis's behavior during the traffic stop as "generally non-responsive verbally," and noted that Lewis was breathing heavily and appeared nervous.

¶17 The culmination of all of these observations formed a sufficient basis for a reasonable police officer to suspect that Lewis may have had a weapon, thereby justifying Officer Robinson's limited pat down of Lewis's person for weapons. *See* ***Johnson***, 299 Wis. 2d 675, ¶23 (An officer who has lawfully

stopped a car may frisk an occupant if the officer has "a reasonable suspicion that the person is dangerous and may have immediate access to a weapon.").

¶18 In so holding, we reject Lewis's assertion that Officer Robinson impermissibly exceeded the scope of the stop when he asked Lewis if Lewis had any contraband in the vehicle. The Wisconsin Supreme Court has held that:

> The reasonableness of a seizure that is alleged to impermissibly detain an individual for questioning can be measured by examining two variables. First, the nature of an officer's actions may exceed the scope justified by the original stop, raising the question whether "the incremental intrusion" of additional questions is unreasonable when balanced against the public interest. Second, the duration of law enforcement questioning during a valid traffic stop "can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop."

Malone, 274 Wis. 2d 540, ¶26 (citations and emphasis omitted). Applying those variables here, we conclude that Lewis was not impermissibly detained.

¶19 At the time Officer Robinson asked Lewis to step out of the car and whether he had any contraband, Lewis had already exhibited multiple behaviors that suggested to Officer Robinson that Lewis may be armed and dangerous, including: putting his hands in his pockets and failing to acknowledge a police officer knocking on his car window, putting one of his hands back into his pocket after being told not to by a police officer, and fixating and manipulating his jacket pocket as if doing some sort of "security check." Moreover, Lewis's demeanor, as observed by Officer Robinson, was nervous and he was breathing heavily. As such, Officer Robinson's brief question about contraband was supported by reasonable suspicion that Lewis may have a weapon and the question did not add any additional incremental intrusion on Lewis's freedom. As such, it was not impermissible. *See* ***State v. Arias***, 2008 WI 84, ¶¶39-40, 311 Wis. 2d 358,

752 N.W.2d 748 (*de minimus* extension of initial ***Terry***[5] stop does not violate the Fourth Amendment, so long as incremental intrusion upon defendant's liberty is reasonable).

¶20 We also reject Lewis's assertion that the police violated Wisconsin's safety belt laws because they allegedly placed him in "physical custody" solely for the safety belt violation when Officer Robinson asked him to step out of the vehicle, or at the latest, when he was patted down for weapons. *See* WIS. STAT. § 347.48(2m)(gm) (prohibiting police from taking "a person into physical custody solely for a violation of" Wisconsin's safety belt statute). Officer Robinson testified that he asked Lewis to step out of the car and patted him down because he suspected that Lewis may have had access to a weapon, endangering police safety. The circuit court found Officer Robinson credible. As such, even if we were to accept Lewis's argument that he was in "physical custody" when asked to step out of the vehicle, we conclude that the reason for that custody was not "solely" the seatbelt violation, but was instead based on a reasonable suspicion that Lewis had a weapon.[6]

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[5] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

[6] Moreover, the United States Supreme Court has explicitly held that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop" because "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal." *See* ***Maryland v. Wilson***, 519 U.S. 408, 414-15 (1997).

Because we conclude that police had reasonable suspicion to search Lewis for weapons based on his behavior during the traffic stop, we need not address Lewis's argument that the circuit court incorrectly concluded that the stop was also warranted based on the driver's admission to having drugs. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases decided on the narrowest possible grounds).

CONCLUSION

¶21 Lewis is correct that Wisconsin's safety belt laws were not intended to permit police to go on fishing expeditions for weapons and drugs. However, here, where Lewis admits that he violated the safety belt statute, police were not required, upon stopping Lewis's car, to ignore their own safety when Lewis exhibited behaviors that suggested he may be armed and dangerous. "[T]he inordinate risk confronting an officer as he [or she] approaches a person seated in an automobile" is well documented. ***Pennsylvania v. Mimms***, 434 U.S. 106, 110 (1977) (per curiam). Certainly, by enacting Wisconsin's safety belt laws the legislature did not intend for police to ignore specific and articulable facts that suggest to a reasonable police officer that an individual may pose a risk to officer safety. Because Lewis exhibited such specific and articulable facts, Officer Robinson did not violate Lewis's Fourth Amendment rights or Wisconsin's safety belt laws when he patted Lewis down for weapons.

By the Court.—Judgment and order affirmed.

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