COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1120-CR **Cir. Ct. No. 2013CF1675**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH D. INGRAM,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Joseph Ingram appeals from a judgment of conviction, entered on his guilty plea, for one count of possession of narcotic

drugs, contrary to WIS. STAT. § 961.41(3g)(am) (2011-12).[1] Ingram argues that the trial court erroneously denied his motion to suppress evidence. We affirm.

BACKGROUND

¶2 After his arrest, Ingram moved to suppress evidence of drugs seized from his pocket. He argued that he had been illegally stopped and searched as he was walking down the street. The trial court held a motion hearing at which the arresting officer, Eric French, and Ingram testified.[2]

¶3 French said that he was driving in his squad car on routine patrol at about 5:00 p.m. on April 4, 2013, when he saw Ingram and another man exiting the rear yard of a duplex from which drugs were reportedly being sold. French testified that he had seen the same two men earlier in the day outside another building where police suspected drugs were being sold. French said that one reason he decided to make contact with the two men was that he knew they did not live in the duplex they were exiting.[3]

¶4 French said that he drove behind the men without activating his lights or siren and then parked his squad car. French continued:[4]

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

[2] The Honorable Timothy G. Dugan denied the suppression motion and later accepted Ingram's guilty plea. The Honorable Daniel L. Konkol sentenced Ingram.

[3] French explained that he knew who lived in the duplex because he had "responded to numerous calls to that residence almost every day."

[4] Transcript references to "Q" and "A" have been removed for easier reading.

> I exited the vehicle, closed the … door, took a couple steps in the same direction that they were walking and said, "Hey, can I talk to you guys?"
>
> ….
>
> One of them stated, "We're just walking to the liquor store."
>
> ….
>
> [I said,] "Okay. Can I talk to you?"
>
> ….
>
> … At that point they just stopped walking and turned around and faced me.

¶5 French characterized the way he spoke to the men as the "way I would talk to friends." French said after the men stopped and faced him, he had a conversation with both of them, although he spoke primarily with Ingram. French asked them what they were doing earlier in the day and about the duplex they had just left. French testified that Ingram was "[a]gitated" but the other man "was much more calm." French said he asked Ingram if he could search him and Ingram replied, "Search me, man." According to the criminal complaint, when French searched Ingram, he found oxycodone pills and crack cocaine.

¶6 Ingram testified that he was not walking with the other man and that instead, that man was following Ingram and "tryin' to get [Ingram] to get him some beer." Ingram said that he had already crossed the street when he heard French call out to him: "Hey, come here." Ingram said he crossed back across the street to see what French wanted. Ingram testified that he spoke with French about where he had been that day and that French later asked him for identification. Ingram said that he told French he did not have any identification with him and that French "told me ['']throw my hands on the car['']" and "started searching me." Ingram denied giving French permission to search him.

¶7 The trial court found that French's testimony was credible and made factual findings consistent with that testimony.[5] For instance, the trial court found that French said, "Hey, can I talk to you guys?" and walked up to the two men. The trial court said that even though the officer repeated his request to talk with the men, "that doesn't mean there's a command that you have to come back over." Finally, the trial court found that Ingram consented to the search when he said, "Search me."

¶8 Based on those facts, the trial court concluded that although there was no "reasonable, articulable suspicion to stop the individuals in this case," there was no constitutional violation because French had a "consensual encounter" with the men. The trial court explained:

> The applicable law is that law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place by asking him if he's willing to answer some questions…. The person approached … need not answer any questions put to him. Indeed, he may decline to listen to the questions at all and may go on his way.
>
> ….
>
> … Here the Court is going to find that this is merely an officer approaching an individual on the street in a public place asking him if he's willing to talk…. [T]he officer wasn't commanding him to stop in any manner and was merely asking him general questions.

[5] The trial court implied that Ingram was not credible, explaining: "I got the impression that Mr. Ingram was working very hard at describing details throughout his statement to try and portray the situation completely differently."

The trial court also concluded that the search was permissible because Ingram had consented. Based on those conclusions, the trial court denied the motion to suppress. This appeal follows.

STANDARD OF REVIEW

¶9 On appeal of an order denying a motion to suppress evidence, we uphold the trial court's findings of fact unless they are clearly erroneous, but we apply *de novo* review to the application of constitutional principles to those facts. ***County of Grant v. Vogt***, 2014 WI 76, ¶17, 356 Wis. 2d 343, 850 N.W.2d 253.

DISCUSSION

¶10 Ingram argues that the trial court should have granted his suppression motion because: (1) he was unlawfully seized; and (2) he was unlawfully searched. We consider each issue in turn.

¶11 At the outset, we note that with respect to both issues, Ingram emphasizes his own testimony, as opposed to the testimony accepted by the trial court. For instance, he asserts that French said, "Hey, come here," and that he "did not consent to the search of his person." However, it is up to the trial court to determine credibility and make factual findings. *See* ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582 (We will uphold the trial court's findings of fact "unless they are against the great weight and clear preponderance of the evidence."); ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989) (We defer to the trial court's credibility determinations.). Ingram does not explicitly allege that the trial court's findings are clearly erroneous, and we conclude that there is no basis to overturn those findings. *See* ***id.*** Thus, for

purposes of analyzing the issues on appeal, we rely on the facts found by the trial court, as opposed to the facts presented by Ingram's testimony.

¶12 Ingram's first argument is that he was unlawfully seized. "[N]ot all personal interactions between law enforcement officers and people constitute a seizure." ***Vogt***, 356 Wis. 2d 343, ¶19. "A seizure occurs '[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" ***Id.***, ¶20 (quoting ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980); brackets in ***Vogt***). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Id.*** (quoting ***Mendenhall***, 446 U.S. at 554) (one set of quotation marks omitted). "If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure." ***State v. Young***, 2006 WI 98, ¶37, 294 Wis. 2d 1, 717 N.W.2d 729.

¶13 Ingram argues that he was not free to disregard French when French said, "Hey, can I talk to you?" and then repeated his request. Ingram explains:

> In response to Officer French's initial inquiry, Mr. Ingram stopped walking, responded, and then tried to walk away and terminate the encounter. When he did so, Officer French stopped him by continuing to question him. The repeated questioning "indicat[es] that compliance with the officer's request might be compelled," ***Mendenhall***, 446 U.S. at 554, and converted the consensual encounter into a seizure. Additionally, a reasonable person would not believe that he is free to ignore the questions and walk away when an attempt to do so only results in further questioning.

(Bolding added.)

¶14 In response, the State notes that French did not activate his squad's emergency lights, did not draw his weapon, "did not approach the men in a threatening or authoritative manner," and used "a tone of voice that he would use if talking to a friend." The State continues:

> These facts show a consensual encounter and not a seizure. Officer French made no overt show of authority and did nothing in his manner that would suggest to a reasonable person that he/she was restrained and not free to go on his/her way or otherwise terminate the contact. His questions were also not threatening or coercive. While it is true that French's presence seemed to agitate Ingram, the test is not a subjective one but an objective one. Based on the totality of circumstance[s], Ingram's unease can be best explained by his own knowledge of his ongoing criminal activity, and not a response to any forceful action taken by Officer French. Under all the circumstances present in this case, the trial court correctly held that Officer French and Ingram were engaged in a consensual encounter, and consequently there was no Fourth Amendment seizure.

¶15 We agree with the State. As noted, not all encounters between an officer and a citizen constitute a seizure. *See* ***Vogt***, 356 Wis. 2d 343, ¶19. The facts as found by the trial court do not demonstrate a show of physical force or authority, and we are not convinced that a reasonable person would have concluded that he was not free to leave. *See* ***id.***, ¶20. We reject Ingram's argument that he was illegally seized.

¶16 Ingram's second argument relates to the search of his person. He states that he "continues to assert that he did not consent to the search of his person." This assertion is contrary to the trial court's credibility and factual findings, which are not clearly erroneous. Ingram's argument fails.

¶17 In the alternative, Ingram argues in a single paragraph that even if he did consent, his consent was "involuntary" because he "was seized unlawfully."

We have already concluded that Ingram was not seized, and Ingram has not pointed to any other basis upon which this court might conclude that his consent was involuntary. Therefore, we reject his argument and affirm the judgment.

By the Court.—Judgment affirmed.

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