COURT OF APPEALS DECISION DATED AND FILED

June 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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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. 2017AP2081-CR

Cir. Ct. No. 2016CM000972

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARQUIS LAKEITH PENDELTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL J. HANRAHAN, Judge. *Judgment reversed and cause remanded.*

¶1 DUGAN, J.[1] Marquis Lakeith Pendelton appeals from the judgment convicting him of one count of carrying a concealed weapon, following his guilty plea. He also appeals the order denying his postconviction motion.[2] However, Pendelton challenges only the trial court's prior ruling denying his motion to suppress evidence.[3]

¶2 Pendelton maintains that the trial court erred when it denied his suppression motion. He contends that when officers stopped him, they did not have an objectively reasonable suspicion to believe that he may have been engaged in criminal activity. We agree and, therefore, reverse the trial court's order denying Pendelton's motion to suppress, reverse the judgment, and remand the cause for further proceedings.

¶3 The following background facts provide context for the issues raised on appeal.

BACKGROUND

¶4 Officer Ross Mueller, one of the arresting officers, was the sole witness at the suppression hearing. The trial court found that Mueller was a credible witness and that his testimony was credible and detailed.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Although Pendelton's notice of appeal states that he appeals the denial of his postconviction motion, his initial appeal brief states that on appeal he is not "re-litigating" the issues raised in that motion. Thus, we do not address any of those issues.

[3] A defendant may appeal an order denying a motion to suppress even though the judgment of conviction is based on a guilty plea. *See* WIS. STAT. § 971.31(10).

¶5 We begin by summarizing Mueller's testimony. He and his partner, Officer Josh Heritz, were on duty on March 26, 2016, working from 7:00 p.m. to 3:00 a.m. They were both in uniform and in a marked squad car. At approximately 1:46 a.m., they responded to a dispatch involving a call regarding suspicious persons. The call came into the police department at 1:34 a.m. The person who called the police lived near a church with a parking lot where numerous cars parked overnight. The church was closed at the time.

¶6 Mueller stated that the caller reported seeing a suspicious person who appeared to be looking in the vehicles or loitering in the area. Mueller also initially stated that he believed that the caller reported that the person was a black male wearing dark clothing with a possible dark hooded sweatshirt. However, on cross-examination, he testified that the computer-aided dispatch reflected that the caller reported there were two suspicious males, there was no description of race, and the only description of the males was—"wearing a black hoodie." It also reflected that the caller reported that the two men just ran off. On cross-examination, Mueller acknowledged that he did not have a racial description and did not have a description of the males.

¶7 The church is located on North 68th Street between West Thurston Avenue and West Silver Spring Drive in the City of Milwaukee. There is a T-shaped alley (T-alley) that runs north and south behind the church and then runs east and west between North 68th Street and North 69th Street. Mueller parked the squad in a position to watch the parking lot and the alley behind the church. He saw a black male in dark clothing, who

appeared to be exiting the parking lot and moving from the north through the alley, and then turning westbound through the T-alley.

¶8 Mueller stated that he just observed a black male in dark clothing. He could not make out much more due to the poor lighting in the alley. He then drove through the alley, following the same path as the male. He turned westbound in the T-alley and was slightly behind the male. As he followed the male for a short distance, he could see that the male was not wearing a hoodie—he was wearing a "nice" jacket.

¶9 At the end of the alley, the male stepped into the street. Mueller testified that initially, he was only going to speak to the male and ask if he had observed anyone. Mueller asked the male to stop, but the male "continued to slowly kind of meander in a southeast direction on the sidewalk" towards a metal fence surrounding a residence, and walked south along the fence. Mueller then got out of the squad car and instructed the male to stop and come to him. The male complied with the instruction.

¶10 In response to trial counsel's question, what it was about the male's appearance or conduct that made him suspicious that the male was the person in the dispatch, Mueller stated, "the area he was walking from, the area he was walking in, and being the only person out in that whole—the whole area."

¶11 Mueller also testified that after the male stopped and began to come to him in response to his instruction, the male turned his left side away from him and had his left arm across his body like a seatbelt formation, and he concealed his left hand in his left jacket pocket. Mueller described the movement as "blading," stating that it is used to conceal a

portion of the body from law enforcement to conceal some type of contraband or weapon. He said that he decided to pat the male down because he believed the male was armed with a weapon.

¶12 In denying the motion to suppress, the trial court found that under the totality of the circumstances, after the person bladed, the officer had reasonable suspicion to make an investigatory stop and question the individual, and to perform a safety frisk to make sure that the person did not possess any weapons. The trial court relied on the officers' observation of Pendelton coming from the area of the church parking lot where suspicious activity had been reported, Mueller's testimony that when a suspect is attempting to leave a crime scene, the suspect will walk through alleys as opposed to city streets because there a fewer streetlights in alleys and it is easier to conceal one's movements in an alley. It also cited Pendelton's failure to respond to the officers' initial request to come over and talk to them, his presence in the alley at night alone, the "blading his body," his dark clothing, and the fact that the area was considered a "hot spot" area. Most significantly, the trial court stated that,

> If the person did not blade their body, did not have their left arm across their body like a seatbelt, or appear to be holding something against their body, the officer may have decided that this person was not someone that was involved in the call, or is not someone that might be involved in a crime and could have moved away.

¶13 Subsequently, Pendelton pled guilty to carrying a concealed weapon. The trial court sentenced Pendelton to three months in the Milwaukee County House of Correction imposed and stayed, and placed

him on probation for nine months. Subsequently, Pendelton filed a postconviction motion asserting a claim of ineffective assistance of counsel.

¶14 The trial court denied the postconviction motion. In denying the postconviction motion, the trial court stated that:

> The defendant presumes that he was seized when Officer Mueller exited his vehicle and instructed him to stop the second time. The court did not make a finding that the officer seized the defendant when he said, "stop and come here" the second time and does not believe that this was a seizure.

However, the trial court also stated that assuming that the defendant was seized at that point and it was improper to consider his body movements (the "blading"), it would not have affected the court's decision that the officer had reasonable suspicion to stop the defendant, based on the other circumstances that it considered to support its ruling. It did not explain why it changed the conclusion it made during the hearing on the motion to suppress that if the person did not blade his body, there would not have been reasonable suspicion to stop him. This appeal followed.

DISCUSSION

¶15 Pendelton maintains that he was seized when the police commanded that he "stop and come here," and that the police did not have reasonable suspicion to seize him. Thus, the questions before this court are when was Pendelton seized and did the officers have reasonable suspicion for his seizure at the time he was seized.

I. Standard of Review and Applicable Law

¶16 "This case presents a question of constitutional fact subject to a two-part standard of review." *See* ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. The trial court's findings of evidentiary or historical fact are upheld unless they are clearly erroneous. ***Id.*** The determination of whether Pendelton was "seized" for Fourth Amendment purposes is reviewed *de novo*.[4] *See* ***id.***

¶17 The Wisconsin Supreme Court has stated, "[w]e acknowledge that people may have the right to disregard the police and walk away without giving rise to reasonable suspicion." ***State v. Young***, 2006 WI 98, ¶73, 294 Wis. 2d. 1, 717 N.W.2d 729. "Where a police officer, 'without reasonable suspicion or probable cause, approaches an individual, the individual has a right *to ignore* the police and *go about his business*.'" ***Id.*** (citing ***Illinois v. Wardlow***, 528 U.S. 119, 125 (2000)). Under these circumstances, "any 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a [stop] or [arrest].'" ***Id.*** (citation and one set of quotation marks omitted).

¶18 A constitutionally cognizable seizure occurs "when an officer 'by means of physical force or show of authority, has in some way

[4] Pendelton also relies upon the article I, section II of the Wisconsin Constitution, which guarantees citizens the right to be free from "unreasonable searches and seizures", and WIS. STAT. § 968.24, which codifies these constitutional requirements. Our Supreme Court consistently follows the United States Supreme Court's interpretation of the Fourth Amendment search and seizure provision in interpreting the same provision under the state constitution. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990).

restrained the liberty of a citizen[.]'" ***Id.***, ¶18 (citing ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980)). The test focuses on whether, under the totality of the circumstances, the actions of the police "would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" ***Kaupp v. Texas***, 538 U.S. 626, 629 (2003) (citations and one set of quotation marks omitted). "Included in this test for a seizure is the requirement that when a police officer makes a show of authority to a citizen, the citizen yields to that show of authority." ***State v. Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777. An example of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980).

¶19 ***Terry v. Ohio*** recognizes that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." ***Id.***, 392 U.S. 1, 22 (1968). Thus, "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." ***United States v. Sokolow***, 490 U.S. 1, 7 (1989) (citation omitted). However, reasonable suspicion cannot be based merely on an "inchoate and unparticularized suspicion or 'hunch[.]'" ***Terry***, 392 U.S. at 27 (citation omitted).

¶20 The reasonableness of an investigative stop is determined, based on the totality of the facts and circumstances. ***State v. Post***, 2007 WI 60, ¶26, 301 Wis. 2d 1, 733 N.W.2d 634. The State bears the burden of proving a stop was reasonable. ***State v. Pickens***, 2010 WI App 5, ¶14, 323 Wis. 2d 226, 779 N.W.2d 1.

II. Pendelton was Seized when He Complied with the Officers' Directive to "Stop and Come Here"

¶21 Pendelton contends that he was seized when the officers told him to "stop and come here." We agree. Indeed, as Pendelton points out, the State indicates that "[n]either was Pendelton seized nor the officers' conduct subject to Fourth Amendment scrutiny until the moment Pendelton actually yielded to Officer Mueller's instruction that he stop."

¶22 Here, the record establishes that when the officers initially made contact with Pendelton, Mueller asked Pendelton to stop. Pendelton did not respond at all and continued to walk, without deviating from his route. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *See* ***Mendenhall***, 446 U.S. at 554. It is clear that the police do not make unreasonable seizures "merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." ***United States v. Drayton***, 536 U.S. 194, 200 (2002).

¶23 However, although Pendelton had rightfully ignored the officers' earlier request and continued on his way, the officers escalated the

situation and created an authoritative presence as they continued to follow Pendelton in the squad car through the alley. Then Mueller, in uniform, exited the squad car and instructed Pendelton to "stop and come here." Based on the officers' conduct, a reasonable person would no longer believe that he was free to disregard the officer's instruction and walk away. *See* ***Mendenhall***, 446 U.S. at 554. Moreover, consistent with Mueller's directive, Pendelton complied. *See* ***Kelsey C.R.***, 243 Wis. 2d 422, ¶30 (stating that "[i]ncluded in this test for a seizure is the requirement that when a police officer makes a show of authority to a citizen, the citizen yields to that show of authority.")

¶24 Having considered the officers' actions *de novo*, we conclude that Pendelton was seized when he stopped in compliance with Mueller's directive.[5]

III. The Officers Did Not Have Articulable Facts to Establish Reasonable Suspicion for the Stop

¶25 Next, Pendelton contends that at the time of the stop, the officers did not have a reasonable suspicion justifying his seizure. We agree.

¶26 When the police told Pendelton to stop, they lacked articulable facts to support a reasonable suspicion for the seizure. Mueller observed one male wearing dark clothing in the area of the church parking lot and saw him slowly walk through the T-alley, onto the street, and

[5] Because we conclude that Pendelton was seized when he submitted to Mueller's show of authority, we need not address Pendelton's subsequent conduct—the blading movement.

continue to slowly meander on the sidewalk. Any connection between the male's presence in the area and the caller's report that two men were looking into vehicles parked in the church parking lot or loitering was attenuated because (1) the caller also reported the males had just run away, and (2) the officers arrived at the location ten minutes after the call. The officers did not have any information about the race, ethnicity, build, or hair type of the males.[6] There was no description other than two males wearing dark clothing and that one male was wearing a black hoodie. Pendelton was wearing a "nice" jacket, not a black hoodie. Under the State's analysis of the facts stated above, any male in dark clothing walking through the alley into the street could have been seized. However, we conclude that the facts objectively known to Mueller at the time of the stop and the reasonable inferences from those facts are insufficient to connect Pendelton to the suspected criminal activity.

¶27 The officers then followed Pendelton through the T-alley. He stepped into the street and Mueller initially asked him to stop. Pendelton continued to "slowly kind of meander in a southeast direction on the sidewalk", which he had every right to do. As noted earlier, "people may have the right to disregard the police and walk away without giving rise to

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[6] The trial court said that it could only consider what Mueller said he knew, not what the computer-aided dispatch said. However, the State has the burden of proof. *See* ***State v. Pickens***, 2010 WI App 5, ¶14, 323 Wis. 2d 226, 779 N.W.2d 1. On cross-examination, Mueller reviewed the computer-aided dispatch and then stated that although he testified that the dispatch described the male as black, in fact the dispatch only described the person as male. Moreover, when asked about the information contained in computer-aided dispatch, he did not dispute that information or say that he did not have that information at the time of the incident. Because the State had the burden of proof on the motion and it did not show that Mueller did not have the information, it is appropriate to consider that he was aware of the information in the computer-aided dispatch.

reasonable suspicion." ***Young***, 294 Wis. 2d. 1, ¶73. Pendelton had the right not to respond and to continue walking. *See* ***State v. Pugh***, 2013 WI App 12, ¶12, 345 Wis. 2d 832, 826 N.W.2d 418 (stating "[o]f course … Pugh had the right to walk away"). That is exactly what he did.

¶28 After Mueller asked Pendelton to stop, Pendelton did nothing to indicate that he was attempting to evade Mueller. He did not alter his pace or route, take flight, attempt to hide, or engage in any other evasive conduct. *See* ***State v. Washington***, 2005 WI App 123, ¶18, 284 Wis. 2d 456, 700 N.W.2d 305. The only facts connecting Pendelton to the caller's report were his presence in the area, his dark clothing, and his gender, nothing more. Also, there were no facts presented that established that it was unusual for a person to be in that alley on a Saturday night. *See* ***Brown v. Texas***, 443 U.S. 47, 52 (1979) (stating that reliance on the defendant's presence in the alley in a reasonable suspicion calculus was not supported by facts of record, which would indicate that it was unusual for people to be in the alley). Furthermore, although Pendelton could have continued walking westerly through the alley, he did not remain in the alley. He walked from the alley onto the street and continued to slowly meander in a southeast direction along the sidewalk towards a fence surrounding a residence and walked along the fence. It was then that Mueller got out of his marked squad car and in full uniform "instructed" Pendelton to "stop and come here." Pendelton complied, and as we have concluded, was seized. However, the State has not established that between the time of the initial request that Pendelton stop and the time he was seized, Mueller obtained any additional facts that would have supported a reasonable suspicion for the stop.

¶29 Further, while Mueller testified that his police district considers the location "a hot spot through data-driven policing," the State has not explained how that changes the calculus in terms of contributing towards a reasonable, particularized determination that a person is committing a crime. "'[A]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.'" *See* ***Pugh***, 345 Wis. 2d 832, ¶12 (citing ***Wardlow***, 528 U.S. at 124). *See also* ***Washington***, 284 Wis. 2d 456, ¶¶3, 17 (stating that seeing a suspect in front of vacant house was insufficient reason to stop him even though: (1) the officer knew that the suspect did not live in the area, (2) the suspect had been previously arrested for selling narcotics, and (3) the police had received a complaint that someone was loitering in the area).

¶30 Pendelton's conduct did not give rise to a reasonable suspicion supported by articulable facts that criminal activity "may be afoot." Even Mueller testified that initially he was only going to speak to Pendelton and ask if he had observed anyone. It was only after Pendelton complied with Mueller's command to stop and come to him, that he engaged in movements that Mueller described as "blading." Mueller stated that when he saw Pendelton blading, he decided to conduct a frisk of his person because he believed he was armed with a weapon. Until Pendelton engaged in that blading movement, Mueller was merely going to speak with him and ask him if he saw anyone in the area. These facts, without more, are not sufficient to constitute articulable facts of suspected criminal activity. *See* ***Washington***, 284 Wis. 2d 456, ¶17.

¶31 Moreover, in its oral decision on the motion to suppress, the trial court stated that without the blading, there would not be reasonable suspicion to stop the person:

> If the person did not blade their body, did not have their left arm across their body like a seatbelt, or appear to be holding something against their body, the officer may have decided that this person was not someone that was involved in the call, or is not someone that might be involved in a crime and could have moved away.

Further, in its decision denying the postconviction motion, the trial court stated that it did not make a finding that Mueller seized Pendelton when he told Pendelton to "stop and come here" and that it did not believe that Mueller's instruction constituted a seizure. It then stated that even without the blading, the facts supported a reasonable suspicion to stop the person.[7]

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[7] As a basis for that conclusion, the trial court's postconviction motion decision cites the following factors:

> (1) the defendant was observed coming from the area of the church parking lot w[h]ere suspicious activity (a possible attempted car theft) was reported to have just occurred, (2) the defendant was walking alone through the alleys late in the evening, (3) the area was known to the officer as a "hotspot" of criminal activity, (4) the defendant did not respond to the officer's initial call to stop and kept walking, (5) the defendant matched the description of the subject as he knew it to be at the time (black male/dark clothing).

(Emphasis omitted.) As explained in this portion of our decision, these factors are insufficient to establish a reasonable suspicion that criminal activity could be afoot. Further, as previously noted, based on Mueller's cross-examination concession that he had no racial description for the males, the male's race did not contribute to reasonable suspicion.

However, the trial court did not explain what made it change its original conclusion. We believe its original conclusion was correct.

¶32 In sum, based on our *de novo* review, we conclude that under the totality of the circumstances at the time of the seizure, the facts known to the officers and the reasonable inferences from those facts were insufficient to establish reasonable suspicion that criminal activity "may be afoot." Therefore, the seizure of Pendelton was unlawful.

CONCLUSION

¶33 Based on our *de novo* consideration of the suppression issues, we conclude that Pendelton was seized when he complied with the police command that he "stop and come here." We further conclude that at the time Pendelton was seized, the police did not have reasonable suspicion to stop him. Because the seizure of Pendelton was illegal, the evidence of the gun taken from his person was the fruit of an illegal seizure and should have been suppressed. *See* ***Pugh***, 345 Wis. 2d 832, ¶13. Therefore, we reverse the trial court's order denying Pendelton's suppression motion, reverse the judgment, and remand this cause to the trial court.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.