STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2307-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL K. DIXON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. MCADAMS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues in this case can be resolved by applying established legal principles to the facts; therefore, oral argument and publication are not warranted.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Dixon with one count of possession of a firearm by a felon. (2; 7.) The criminal complaint alleged that Milwaukee County Police Officer Alvin Hannah saw Dixon and a female standing in front of a "no loitering" sign for approximately five minutes and when Officer Hannah approached, Dixon reached into his pockets and turned around. Officer Hannah saw the handle of a handgun protruding from Dixon's rear right pants pocket. When Dixon admitted he was a felon, Officer Hannah confiscated the 9 mm semi-automatic loaded handgun and arrested Dixon. (2.)

Dixon filed a motion to suppress, seeking to exclude all evidence including the handgun that was recovered from Dixon during the investigatory stop, alleging that the stop was made without reasonable suspicion. (8.) At the hearing on Dixon's suppression motion, the only testimony was from Officer Hannah, who testified that he had been a police officer for nineteen years and that, at the time of Dixon's arrest, he was on a special overtime assignment starting at approximately 3:00 or 4:00 a.m. for two to four hours, related to citizen complaints about prostitution. (25:3, A-Ap. 103.) During this overtime assignment, Officer Hannah did not wear his uniform but was in plain clothes and was in an unmarked squad car. (25:4, A-Ap. 104.)

Officer Hannah testified that the complaints about prostitution from citizens and aldermen, as well as several arrests for loitering and prostitution, had occurred during the last thirty days in the particular area where Dixon was arrested in front of a liquor store. (25:8, A-Ap. 108.) On cross-examination, Officer Hannah further clarified that this overtime assignment was at a time when law enforcement "felt that the prostitutes were out there" in the "specific geographic area . . . where the complaints" about prostitution had come from. (25:16-17, A-Ap. 116-17.)

Officer Hannah further testified that he and his partner in the unmarked squad car saw Dixon and a female at approximately 5:50 a.m. having a conversation and walking "back and forth" in front of Davidson Liquor at least three or four times, not appearing to be going anywhere, for about five minutes. (25:6-8, A-Ap. 106-08.) When he observed Dixon and the female exhibiting this behavior at this hour, Officer Hannah determined that "either one of them was trying to buy drugs or that Mr. Dixon was trying to pick up the black female, or that he was trying to pimp the black female" based on the complaints law enforcement had received that "guys in the area had been trying to pick up young girls and have them prostitute." (25:9, A-Ap. 109.)

At that point, Officer Hannah pulled the squad car up to the corner where Dixon was walking back and forth with the female, in front of the closed liquor store that had a sign posted stating "no loitering or prowling." (25:10, A-Ap. 110.) Officer Hannah then activated the unmarked squad car lights, got out of the squad car, and saw Dixon trying to reach into his back right pants pocket several times. (25:10-11, A-Ap. 110-11.) Officer Hannah testified that he "ordered [Dixon] several times not to reach into his back pocket" and Dixon did not comply. When Dixon tried to reach into his pocket again, Officer Hannah "told him to get his hands up" and "told him to turn around for me, and when he turned around, I observed a handle of what I thought to be a semiautomatic handgun" in Dixon's "right rear pants pocket" where he had been reaching. (25:11-12, A-Ap. 111-12.) Officer Hannah then asked Dixon "was he a felon?" and "Mr. Dixon said yeah, he was a felon. So I drew my gun, and I ordered him to the ground." (25:12, A-Ap. 112.)

On redirect examination, Officer Hannah testified that "[a]s soon as I pulled up and I stopped, I lit the lights and got out of the vehicle" and did not turn on the siren. (25:28, A-Ap. 128.) After he got out of the unmarked squad and identified

himself as a Milwaukee police officer with his badge, he ordered Dixon not to put his hands in his pocket and then, when he ordered Dixon to put his hands up and turn around, "he complied." (25:28-29, A-Ap. 128-29.) After Dixon put his hands up and turned around in compliance with Officer Hannah's order, Officer Hannah saw the gun in Dixon's back right pocket before he had touched Dixon. (25:29, A-Ap. 129.) Officer Hannah testified that he did not draw his gun on Dixon until after he saw the handgun in Dixon's back pocket and "simultaneously asked Mr. Dixon was he a felon. He said yes, and that's when I drew my gun and ordered him to the ground." (25:30-31, A-Ap. 130-31.)

In its oral decision denying the motion to suppress, the circuit court made findings about the events leading up to Dixon's arrest, including that after Officer Hannah saw Dixon and the female on the corner in the area where there had been several complaints about and arrests for prostitution in the last thirty days, Officer Hannah "pulled up to the corner and activated his lights" and "saw Mr. Dixon reach into his back pocket," "do it again," and that "he then ordered Mr. Dixon to put his hands up." (26:5-6, A-Ap. 140-41.) Then, "he told Mr. Dixon to turn around. And at that point, the police officer saw the handle of a gun . . . coming out of Mr. Dixon's right rear pants pocket, the same area he had been reaching for," and after Mr. Dixon told him he was a felon," he ordered Mr. Dixon to the ground." (26:6, A-Ap. 141.)

The circuit court found that this incident involved an investigatory stop that required that the officer have "reasonable . . . articulable suspicion that criminal activity is afoot." (26:8, A-Ap. 143.) In connection with analyzing the reasonableness of the stop, the court determined that the moment of seizure of Dixon was when "Mr. Dixon is directed to raise his arms and turn around" and that the seizure was supported by reasonable suspicion. (26:11-12, A-Ap. 146-47.) In

denying the suppression motion, the circuit court made the following conclusions:

> Number one (1), Officer Hannah was credible that he had recent reports of prostitution activity in the vicinity.
>
> Number two (2), it was reasonable for Fourth Amendment purposes to approach.
>
> When he and his partner saw Mr. Dixon and a woman standing and pacing back and forth outside of a closed liquor store at 5:50 a.m. which had no loitering signs posted on the exterior of the store.
>
> Shining a light on Mr. Dixon did not convert this by itself to a stop.
>
> Conclusion number three (3), however, after seeing the defendant reach into his back pocket twice, it was reasonable to approach Mr. Dixon and request that he raise his hands and turn around.
>
> Once the officer saw the butt of the gun and the defendant said he was felon, there was probable cause for an arrest.

(26:16-17, A-Ap. 151-52.)

Dixon pled guilty to possession of a firearm by a felon, and was sentenced to four years initial confinement and two years of extended supervision. (13; 18; 27.) Dixon appeals from the judgment of conviction. (20.)

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED DIXON'S MOTION TO SUPPRESS.

A. Relevant law and standard of review.

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures, but only apply if a police-citizen contact constitutes a seizure. *See Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Williams*, 2002 WI 94, ¶ 20, 255 Wis. 2d 1, 646 N.W.2d 834. An individual seeking to suppress evidence on the ground that it was obtained in violation of the Fourth Amendment must show (1) that the conduct of law enforcement officers amounted to a seizure of his person and (2) that that seizure was unreasonable. *State v. Young*, 2006 WI 98, ¶¶ 18-21, 294 Wis. 2d 1, 717 N.W.2d 729. A seizure "does not occur simply because a police officer approaches an individual and asks a few questions" but rather, only when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Stated otherwise, a person is seized for Fourth Amendment purposes only if, in view of the totality of the circumstances surrounding the encounter, a reasonable person would have felt that he was not free to terminate the encounter and go about his business. *Id.*; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *Young*, 294 Wis. 2d 1, ¶ 18. The "reasonable person" inquiry presupposes an innocent person. *Bostick*, 501 U.S. at 438.

When examining the totality of the circumstances to determine whether a seizure occurred, some considerations that may be relevant include whether more than one officer was present, whether the officer(s) displayed their weapons, whether an officer made physical contact with the person, and

whether an officer's language or tone suggested that compliance with the officer's request might have been required. *See Mendenhall*, 446 U.S. at 554. The use of spotlights and emergency lights on a squad car have been recognized as potential "indicia of police authority"; however, pulling up behind a parked car and illuminating it with a spotlight does not alone constitute a seizure. *See Young*, 294 Wis. 2d 1, ¶¶ 65, 68-69 (citing *Mendenhall*, 446 U.S. at 554). The test for determining whether a seizure has taken place "is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). The test is an objective one that focuses on whether a reasonable person, under all the circumstances, would have felt free to leave, not whether the defendant himself or herself felt free to go. *Id.* at 573-74.

When the police action involved is a show of authority, rather than use of physical force, the Fourth Amendment is not implicated until police demonstrate a show of authority *and* the individual yields to that show of authority. *See*, *e.g.*, *State v. Kelsey C.R.*, 2001 WI 54, ¶¶ 32-33, 243 Wis. 2d 422, 626 N.W.2d 777 (citing *California v. Hodari D.*, 499 U.S. 621 (1991)). *See also Young*, 294 Wis. 2d 1, ¶ 26. In other words, an *uncomplied-with* show of police authority cannot be a seizure. *Kelsey*, 243 Wis. 2d 422, ¶ 33; *Young*, 294 Wis. 2d 1, ¶ 26.

A seizure may be justified where police officers "approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 U.S. at 22. In such an investigatory or "*Terry*" stop, an officer may "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.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30). The reasonable suspicion test is an objective one: whether the facts available to the officer at the

time of the seizure would "'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *State v. Miller*, 2012 WI 61, ¶ 29, 341 Wis. 2d 307, 815 N.W.2d 349 (quoting *Terry*, 392 U.S. at 21-22). Thus, an investigatory stop will be justified where the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. *See Miller*, 341 Wis. 2d 307, ¶ 29.

Like seizures in general, whether an investigatory stop was supported by reasonable suspicion is determined by examining the totality of the circumstances facing law enforcement leading up to and at the time of the stop. *State v. Williams*, 2001 WI 21, ¶ 23, 241 Wis. 2d 631,623 N.W.2d 106. Moreover, reasonable suspicion does not require that an officer "dispel all innocent inferences before conducting an investigatory stop." *Young*, 294 Wis. 2d 1, ¶ 59.

When this Court reviews a circuit court's denial of a motion to suppress on Fourth Amendment grounds, the standard of review is mixed. The circuit court's findings of fact should be upheld unless those findings demonstrate an erroneous exercise of discretion. *See Williams*, 255 Wis. 2d 1, ¶ 17. Whether the facts found demonstrate that a seizure occurred or that reasonable suspicion existed for such seizure are questions of law, subject to de novo review. *See id.*

B. Under the *Hodari D./Young* submission-to-authority test, Dixon was not seized until he raised his arms and turned around in compliance with Officer Hannah's orders.

Dixon's main argument on appeal is that Officer Hannah seized him as soon as Officer Hannah pulled the squad car up to the liquor store corner and activated the emergency lights. Dixon alleges that at that point, Officer Hannah lacked reasonable suspicion because he had not yet seen Dixon reach

into his back pocket from which the gun was ultimately recovered. (Dixon's br. 10-11.)

However, the circuit court correctly found the seizure of Dixon did not occur until Officer Hannah directed Dixon "to raise his arms and turn around," *after* Officer Hannah saw Dixon reach repeatedly into his pocket and ordered him several times to stop. (26:11, A-Ap. 146.) Specifically, because Dixon at first refused to comply with Officer Hannah's order to stop reaching into his back pocket, Dixon was not seized until Dixon physically complied with Officer Hannah's order to raise his arms and turn around, at which time Officer Hannah saw the gun in his pocket and simultaneously asked Dixon if he was a felon. (25:12, A-Ap. 112.)

As the Wisconsin Supreme Court explained in *Young*, *Mendenhall*'s test of whether a reasonable person would feel free to leave does not address the situation where, as here, a person refuses to yield to a show of authority. *Young*, 294 Wis. 2d 1, ¶ 39 (explaining that the *Hodari D.* court found the *Mendenhall* free-to-leave test insufficient in the context of a fleeing suspect). Accordingly, the *Mendenhall* test only applies when the subject of police attention is either subdued by force, or actually submits to a show of authority. *Id.* Where a person fails to yield to police authority, *Hodari D.* will govern when the seizure occurs. *Young*, 294 Wis. 2d 1, ¶¶ 39-40.

In this case, the *Mendenhall* free-to-leave test is inapplicable because Dixon initially refused to comply with Officer Hannah's order to stop reaching his hand into his back pocket. (25:11-12, A-Ap. 111-12.) *See Young*, 294 Wis. 2d 1, ¶¶ 39-40. As the *Young* court explained, when a suspect does not submit to a show of authority, *Hodari D.* supplies the proper analysis to evaluate whether the suspect was seized. *Id.* ¶ 52.

Accordingly, applying the *Hodari D.* analysis, Dixon was not seized until he complied with Officer Hannah's orders, because Dixon failed to submit to any show of police authority when he refused to comply with Officer Hannah's order several times to not put his hands in his back pocket. *See Hodari D.*, 499 U.S. at 623-24, 629. Finally, Dixon complied with Officer Hannah's order to "get his hands up" and "turn around," at which point Officer Hannah saw the handgun in his rear pants pocket and asked him if he was a felon. (25:11-12, A-Ap. 111-12.) Thus, Dixon was not seized until he complied with Officer's Hannah's order, when he was "directed to raise his arms and turn around," and the seizure was supported by reasonable suspicion. (26:11-12, A-Ap. 146-47.)

The cases are clear that this Court must review the totality of the circumstances in determining whether a Fourth Amendment event occurred. *See, e.g., Young*, 294 Wis. 2d 1, ¶¶ 3, 65 (whether seizure occurs is viewed in light of all of the circumstances surrounding the incident). Here, under the totality of the circumstances, Officer Hannah had reasonable suspicion because Dixon failed to submit to any show of police authority before he turned around in compliance with Officer Hannah's order and Officer Hannah saw the gun in plain view and therefore, the circuit court properly denied the motion to suppress and admitted the gun into evidence.

C. Even if Officer Hannah seized Dixon when Officer Hannah pulled up in the unmarked squad car and activated the lights, Officer Hannah had reasonable, articulable suspicion of criminal activity before the seizure.

The circuit court found that the moment of seizure did not occur until Officer Hannah ordered Dixon to turn around and raise his hands. Before that time, Dixon had not complied with Officer Hannah's orders to stop reaching into his back pockets (see part B, above). Further, given that the squad car

was unmarked and the lights were used to identify it as a police vehicle, Officer Hannah's shining the emergency lights on Dixon and the female was not a seizure (26:17, A-Ap. 152.)

However, even if the seizure of Dixon occurred at the very moment Officer Hannah activated the emergency lights, Officer Hannah had reasonable suspicion of criminal activity before then. Although Dixon argues that neither the multiple complaints and arrests for prostitution during the previous thirty days in the exact area that Dixon was arrested, nor Dixon's behavior of pacing back and forth with a female at 5:50 a.m. in front of a closed liquor store with a posted "no loitering" sign, "amount[ed] to reasonable suspicion that Dixon was engaging in any unlawful activity" (Dixon's br. 11-12), the State submits that Officer Hannah had more than sufficient reasonable suspicion to stop Dixon under the totality of the circumstances.

A police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by specific and articulable facts that criminal activity may be afoot, even if the officer lacks probable cause. *State v. Vorburger*, 2002 WI 105, ¶ 74, 255 Wis. 2d 537, 648 N.W.2d 829. The facts supporting whether an officer has reasonable suspicion are judged *objectively*: would the facts available to the officer warrant a person of reasonable caution in the belief that the action taken was appropriate? *See Terry*, 392 U.S. at 21-22. In other words: "What would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). The circumstances articulated by the investigating officer are not weighed in terms of scholarly analysis, but as understood by those versed in law enforcement. *United States v. Cortez*, 449 U.S. 411, 418 (1981). *See also Young*, 294 Wis. 2d 1, ¶ 53 (to determine whether officer has reasonable suspicion to initiate a *Terry* stop, courts must examine facts leading up to stop to determine whether those historical facts, viewed from

standpoint of objectively reasonable police officer, amount to reasonable suspicion).

Thus, reasonable suspicion only requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. *Young*, 294 Wis. 2d 1, ¶ 21. Moreover, a police officer may initiate an investigatory stop for a *non-criminal* violation, so long as the officer reasonably suspects that the person is violating a non-criminal law. *See State v. Iverson*, 2015 WI 101, ¶ 53, 365 Wis. 2d 302, 871 N.W.2d 661 (reasonable suspicion of violation of non-criminal civil forfeiture offense of littering justified traffic stop). Indeed, the officer's suspicions do not have to relate to particular criminal activity. *State v. Anderson*, 155 Wis. 2d 77, 84-86, 454 N.W.2d 763 (1990) (suspicious conduct by its very nature is ambiguous, and the principle function of an investigative stop is to quickly resolve that ambiguity).

Therefore, if the officers can draw any reasonable inference of wrongful conduct, the officers have the right to temporarily detain the individual for the purpose of inquiry. *Young*, 294 Wis. 2d 1, ¶ 21. *See also State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125 (police need not rule out innocent explanations for behavior when there are reasonable inferences that favor probable cause or reasonable suspicion for the stop); *State v. Blanco*, 2000 WI App 119, ¶ 29, 237 Wis. 2d 395, 614 N.W.2d 512 (same). Nor is the officer constitutionally required to be certain that a crime has occurred when he makes a stop. *See, e.g., State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999) (for probable cause, quantum of evidence need not reach level of proof beyond a reasonable doubt or even that guilt is more likely than not). The law must be sufficiently flexible to allow law enforcement officers, under certain circumstances, the opportunity to temporarily freeze the situation, particularly where failure to act will result in the disappearance of a potential suspect. *State v. Guzy*, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987).

In its decision denying Dixon's motion to suppress, the circuit court recited a number of factual findings that support the conclusion that, at the point that Officer Hannah pulled the unmarked squad car up to the corner and turned on the emergency lights, Officer Hannah effectuated an investigatory stop that was supported by reasonable suspicion.

> First, there[ ] had been reports about prostitution including sexual activity taking place on the street itself.
>
> Second, Mr. Dixon was talking to a woman.
>
> And in different circumstances, I don't think there would be anything suspicious about that.
>
> But Mr. Dixon was outside a liquor store at 5:55 a.m. where there had been recent reports of prostitution.
>
> Third, the store had no loitering signs.
>
> So, I think given that information that a veteran officer had, it was reasonable to approach Mr. Dixon.

(26:11-12, A-Ap. 146-47.)

The court determined that "turning on the car light itself was not a seizure" because it was not until "the point that hands are ordered to be raised, a reasonable person would begin to feel not free to leave." (26:13, A-Ap. 148.) The circuit court further emphasized that "reports about prostitution in the area and the defendant's presence and pacing outside a liquor store at 5:50 a.m." provided reasonable suspicion, and that it was not necessary to determine whether there was a violation of the City of Milwaukee's loitering or prowling ordinance but instead, that the relevant criminal activity that the police were investigating was a violation of anti-prostitution laws. (26:14-15, A-Ap. 149-50.)

The circuit court ultimately determined that Officer Hannah was credible in his testimony about the "recent reports

of prostitution activity in the vicinity" and that it was reasonable for Officer Hannah to approach Dixon when he "saw Mr. Dixon and a woman standing and pacing back and forth outside of a closed liquor store at 5:50 a.m. which had no loitering signs posted on the exterior of the store." (26:16-17, A-Ap. 151-52.) This finding is supported by Officer Hannah's testimony that he and his partner were on a special, overtime assignment as a result of the complaints and arrests in that exact area that had occurred at the exact time – the early morning hours – that they saw Dixon pacing back and forth in front of the closed liquor store with a female. (25:3, A-Ap. 103.)

Based on the circuit court's findings of fact, Officer Hannah had the requisite reasonable suspicion of criminal activity to make an investigative stop of Dixon even prior to activating the unmarked squad car lights because when Officer Hannah observed Dixon and the female and approached them, Officer Hannah was aware that there had been multiple complaints and arrests for prostitution occurring at the same time of day and in the same location. Officer Hannah clearly had reasonable suspicion to approach Dixon and the female in an unmarked squad car in the dark, activate the lights, but not the siren, and identify himself as a Milwaukee police officer. (25:4, A-Ap. 104.) At that same moment, Officer Hannah saw Dixon reach into his back pocket, and when he repeatedly ordered Dixon to stop putting his hands in his back pocket and Dixon failed to comply, Officer Hannah ordered Dixon to turn around and raise his hands. (25:9-11, A-Ap. 109-11.)

Under the totality of the circumstances, the circuit court properly found that Officer Hannah had reasonable suspicion that criminal activity was afoot prior to the seizure of Dixon, whether the seizure occurred at the point Officer Hannah activated the emergency lights or at the point Dixon complied with his order to turn around, and that this reasonable suspicion supported Officer Hannah's investigatory *Terry* stop.

CONCLUSION

For the foregoing reasons, the circuit court properly denied Dixon's motion to suppress and the State respectfully requests that this court affirm the judgment of conviction.

Dated this 14th day of April, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,140 words.

Dated this 14th day of April, 2016.

_____

Anne C. Murphy
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of April, 2016.

_____

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