

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal Case No. 2017AP000234-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TRAVAIL L. LEWIS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION,
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE MICHAEL J. HANRAHAN,
PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX
OF PLAINTIFF-RESPONDENT
ADMITTING ERROR

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ISSUE PRESENTED

Whether Milwaukee Police Officers had reasonable suspicion to stop Travail Lewis at the time they seized him.

Trial Court's Answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § 809.22, The State does not believe oral argument is necessary because the briefs fully address the legal issue and authority such that oral arguments would only be of marginal value to the court.

Pursuant to Wis. Stat. § 809.23, the State does not believe publication is needed as the issue presented can be decided on well-settled legal precedent.

STATEMENT OF THE CASE

On July 24, 2014, City of Milwaukee Police Officer Robert Crawley and his partner, Officer Randy Wesley, were sent to the area of 3800 North 50th Street for a shots fired complaint at 1:37 p.m. (R33:3, 9, 16). While responding to that call, Officer Crawley was given information from dispatch that several subjects were possibly involved in the shots fired event and they fled southbound from the original scene. (R33:3). Dispatch was able to provide a description of one of the suspects as wearing red shorts and a white t-shirt. (R33:8). When Officer Crawley and Officer Wesley drove through an alleyway near 4877 West Fond Du Lac Avenue to look for possible suspects, they observed Travail Lewis walking by himself in the alleyway at 1:47 p.m. (R33:4, 17). Lewis was wearing blue jeans (R33:10). Lewis was walking southbound in the alleyway away from Officer Crawley so that his back was visible to the officers as they approached him. (R33:4, 9).

As Officer Crawley approached Lewis he could see that Lewis had his hands near the waistband of his pants like he might be holding up his pants or holding something up. (R33:4-5). Officer Crawley believed based on Lewis' behavior that he may be trying to hide something from the officers' view. (R33:5). Officer Crawley and Officer Wesley then exited their squad car, drew their weapons, and asked Lewis to hold his hands up and asked if he was armed. (R33:5, 12). Lewis complied with the order to put his hands up and he told the officers that he had a gun. (R33:5). Officers recovered a

handgun from Lewis and learned that he was not a permit holder under Wisconsin Statutes Section 175.60. (R33:5).

On cross examination, Officer Crawley testified that 4877 West Fond Du Lac Avenue, where he encountered Lewis, was southeast from 3800 North 50th Street. (R33:7). However, Lewis, through his attorney, was able to show that, in fact, 4877 West Fond Du Lac Avenue is in a northeastern direction from 3800 North 50th Street. (Def.'s Br. 3). However, Officer Crawley also testified that he received information from dispatch that the subjects involved in the shots fired were running on Fond Du Lac Avenue, passing West Melvina Street. (R33:9). The intersection of Fond Du Lac and Melvina can be seen very close to the address of 4877 West Fond Du Lac Avenue on the same map provided by Lewis. (Def.'s Br. 3). What is clear is that Officer Crawley observed Lewis a few blocks away from the original shots fired scene within ten minutes of being sent to that area. (R33:17). Lewis was wearing blue jeans, he was not running and did not appear to be out of breath or sweating as if he had just been running. (R33:15). Officer Crawley did not see a firearm in Lewis' possession, but believed Lewis may have had a firearm in his waistband because his hands were near his waistband as evidenced by Lewis' elbows flaring out to the side, in a chicken-wing fashion, as he walked away from the approaching officers. (R33:15, 18).

Based on these events, Lewis was charged with a single count of Carrying a Concealed Weapon in violation of Wisconsin Statutes Section 943.20 on July 26, 2014. (R1:1). On August 26, 2014, Lewis filed a motion to suppress the physical evidence based on an illegal stop. (R3:2). That motion was heard in the Circuit Court on March 16, 2016. (R33:1). At the conclusion of that hearing, the court found that the officers did have reasonable suspicion to stop Lewis based on his presence in an area very close to a shots fired complaint and the fact that Lewis was holding his hands in a way that reasonably caused the officers to believe he may have been holding something in his waistband. (R33:29-30). The court further found that it was reasonable for officers to believe that one potential object Lewis may have been holding in his waistband was a gun. (R33:30). Lewis now brings this appeal of that decision.

STANDARD OF REVIEW

In reviewing a motion to suppress, a court must apply a two-step standard of review. *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625. As to the factual findings, a reviewing court should uphold the trial court's findings unless they are clearly erroneous. *Id.* However, a reviewing court should review the constitutional applications to those facts *de novo*. *Id.*

ARGUMENT

An investigatory or *Terry* stop is a seizure that constitutes only a minor infringement on personal liberty and requires only that police have reasonable suspicion at the time of the seizure. *State v. Young*, 2006 WI 98, ¶ 20, 294 Wis. 2d 1, 717 N.W.2d 729. This type of seizure differs from an arrest, which requires police to have probable cause. *Id.*, ¶ 22. Reasonable suspicion requires that an officer be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the seizure. *Terry v. Ohio*, 392 U.S. 1 (1968). It is imperative that the specific and articulable facts be judged against the standard of whether at the time of the seizure, those facts would cause a man of ordinary caution to believe that the officer's actions were appropriate. *Id.*

Generally, police contact with a citizen becomes a seizure under the Fourth Amendment when an officer uses physical force or a show of authority to restrain the liberty of a citizen. *United States v. Mendenhall*, 446 U.S. 544, 552 (1980). 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.* at 554.

In this case, Lewis was seized at the moment officers drew their guns, pointed them at Lewis, and ordered him to put his hands in the air. Certainly no reasonable person in Lewis' position would have felt free to disregard the officers' commands with two guns pointed at him.

Though Wisconsin courts have noted the compelling safety interest of officers being aware who has a concealed weapon when responding to a shots fired call, those cases predated 2011 Wisconsin Act 35¹ and still required officers to have reasonable suspicion to believe criminal activity was afoot prior to stopping an individual. *See State v. Brown*, No. 2011AP2049-CR, unpublished (WI App. April 17, 2012) (App. 101-119);² *State v. Hamdan*, 2003 WI 113, ¶ 55, 264 Wis. 2d 433, 665 N.W.2d 785.

In a somewhat similar case, and one Lewis heavily relies on in his brief, the *Gordon* court held that officers lacked reasonable suspicion to conduct an investigatory stop when police officers observed a man look at their marked squad car and perform a “security check”³ while in a high crime, high gun violence area. *State v. Gordon*, 2014 WI App 44, ¶ 9, 353 Wis. 2d 468, 846 N.W.2d 483. Arguably, the officers in *Gordon* had more reason to suspect criminal activity than the officers in this case after Gordon first looked at them and then performed a security check. In reaching its decision, the *Gordon* court noted that to conclude officers had reasonable suspicion because an individual in a high crime area saw police and patted his pocket would condemn a whole population of people simply due to their status of living in a high crime area. *Gordon*, 2014 WI App. 44, ¶ 15. The court further noted that many people in high crime areas are forced to live there. *Id.*

Like *Gordon*, Lewis was walking in a high crime area, though here, police were responding to a shots fired report from moments earlier. Lewis was also walking and did not run from

¹ 2011 Wisconsin Act 35, section 38 legalized the carrying of concealed weapons by citizens subject to certain exceptions, none of which are relevant to this appeal.

² Pursuant to Wisconsin Statute section 809.23(3)(b) & (c), this case is cited only as persuasive authority and a copy of the case has been attached as an appendix.

³ “Security check” was defined as “a conscious or unconscious movement that an individual does when they’re [sic] confronted by law enforcement when they’re [sic] typically carrying, you know, a weapon, and it’s done either by the individual placing a hand over the pocket or a waistband where the gun might be, just to make sure that the weapon is still there and that it’s secure.” *Gordon*, 244 WI App 44, ¶ 9. It was also later conceded to be an act which could be explained by someone making sure he had keys or a wallet still in a pocket. *Id.*, ¶ 4.

police, in fact, it is unknown whether Lewis ever observed police as Gordon did. Both Lewis and Gordon positioned their hands in a way that caused officers to believe they may be armed – Gordon by patting his pocket and Lewis by walking with his hands near his waistband.

Though the cases have several similarities, the key differences between *Gordon* and this case are the fact that police were responding to a call for shots fired and Lewis may not have been aware of the police presence. These differences, however, cannot be enough to distinguish this case from *Gordon*. To do so would bring the same danger of which the *Gordon* court warned. If the totality of these circumstances equated to reasonable suspicion then police would be permitted to stop any persons walking in an area where gunshots were fired if they had their hands near their waistband or in their pockets without any other facts. Certainly this would affect a whole population of people, based on residency in high crime areas, as the court in *Gordon* feared.

Perhaps even more notable in *Gordon* is the fact that the State argued that the court should follow the ruling in a federal case finding reasonable suspicion whose facts are more similar to the facts in Lewis' case than they are in *Gordon*. *Gordon*, 2014 WI App 44, ¶ 18, n.5. In that federal case, Milwaukee police officers were patrolling an area of Milwaukee with a high crime rate that had recent complaints of shots fired. *United States v. Moore*, 2013WL273864, unpublished, (E.D. Wis. Jan. 24, 2013) (App. 120-122). While patrolling, the police observed three men walking in front of their squad car at 9:45 p.m. *Id.* One of the men positioned his arm on the front center of his waistband causing officers to believe he may have a weapon in his waistband. *Id.* The *Gordon* court declined to follow the holding in *Moore*. *Gordon*, 2014 WI App 44, ¶ 18, n.5.

By declining to follow the decision in *Moore*, the *Gordon* court asserted that the Wisconsin state courts were not willing to find reasonable suspicion where police saw a man with his arm on his waistband in a high crime area with recent reports of shots fired. Lewis' case presents exactly those facts. Lewis was walking a few blocks away from where shots had been fired very recently, and officers saw him with his hands

near his waistband. The State concedes that based on the *Gordon* court's decision to decline to follow the decision in *Moore*, this Court should find that officers in this case did not have reasonable suspicion to stop Lewis.

CONCLUSION

Because Lewis' case has striking similarities to *Moore*, which the *Gordon* court declined to follow, and material similarities to the facts in *Gordon*, the State must concede that officers in the present case did not have reasonable suspicion to stop Lewis at the time they ordered him to put his hands up at gunpoint. Therefore, the State joins Lewis in asking this court to reverse the decision of the Circuit Court and to remand the case back to the Circuit Court for further proceedings.

Dated this _____ day of June, 2017.

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 word count of this brief is 2,069.

Date

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

Date

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