STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP320-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. SMITH,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID C. SWANSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED[1]

Whether the circuit court properly denied William J. Smith's suppression motion because Smith was not seized.

The circuit court said yes.

This Court should say yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

In the course of pursuing a fugitive, Milwaukee Sheriff's detectives followed Smith and another man into a store with the hope that the men could give them a lead on the fugitive. One of the detectives asked Smith to talk to him in the store's vestibule and Smith agreed. While the two were talking in the vestibule, the other detective joined them and immediately smelled marijuana. After Smith admitted that he had smoked marijuana earlier that day, the detectives patted Smith down and discovered drugs and a gun.

The State charged Smith with being a felon in possession of a firearm and possession of marijuana. Smith moved to suppress the evidence, arguing that he was seized when the police asked him to talk in the vestibule. The court

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[1] Because there was no seizure when Smith went into the vestibule, the State does not address Smith's alternative argument that police lacked reasonable suspicion to seize him.

denied Smith's motion, concluding that a reasonable person would have felt free to ignore the detective's questions.

Smith renews his argument on appeal. This Court should affirm Smith's judgment of conviction because he was not seized when the detective asked him to talk in the vestibule. Because he was not seized, the circuit court correctly denied his motion to suppress.

STATEMENT OF THE CASE

On the morning of April 5, 2017, Milwaukee County Sheriff's Department Detective Alex Martinez and his partner, Detective Steven Wall, were following a car associated with a man who had a felony warrant from Florida. (R. 25:5–9.) When the car pulled into a gas station, two men at the station appeared to engage with the car's driver. (R. 25:9–11.) After the car pulled away, the detectives chose to follow the men from the gas station, hoping to get information from them about the connection between the car and the man with the warrant. (R. 25:11–13.)

The detectives found the men inside a nearby glass store and went inside to talk to them. (R. 25:12–15.) Once inside, Martinez identified himself to one of the men, whom he soon learned was Smith. (R. 25:39–41.) Wall spoke to the other man, whom he learned was Derek Johnson. (R. 25:16.)

Martinez, wearing his standard police gear, asked Smith if he could talk to him. (R. 25:31, 41, 46–47.) When Smith asked Martinez what he wanted to talk about, Martinez said that he just had a couple of questions. (R. 25:42.) Smith followed Martinez into the store's entrance vestibule after Martinez asked to speak with him there. (R. 25:43–44.)

While Martinez and Smith were talking in the vestibule, Wall joined them and immediately smelled

marijuana. (R. 25:17–18.) Smith denied that he possessed marijuana, but admitted that he had smoked earlier in the day. (R. 25:19.) While Smith began to look for his identification in his pockets, he bladed his body away from the detectives, which raised their suspicions. (R. 25:19–20, 45.) Both detectives performed a pat down search on Smith and uncovered marijuana and a gun. (R. 25:20–21, 45–46.)

The State charged Smith with being a felon in possession of a firearm, contrary to Wis. Stat. § 941.29(1m)(a), and possession of marijuana as a second and subsequent offense, contrary to Wis. Stat. § 961.41(3g)(e). (R. 1.)

Smith moved to suppress the evidence against him, arguing that Martinez had illegally seized him when he asked him to follow him into the vestibule.[2] (R. 25:82–85.) The court held a hearing on the motion at which Wall, Martinez, and Smith testified. (R. 25.) At the end of the hearing, the court concluded that a reasonable person would have felt free to decline Martinez's request to talk in the vestibule. (R. 25:86–87.) And because a reasonable person would have felt free to decline the request and walk away, Smith was not illegally seized when he went into the vestibule. (R. 25:87.) Therefore, the court denied Smith's motion to suppress. (R. 25:88.)

Smith pleaded guilty to both charges. (R. 16.) The court sentenced him to a total term of three years' initial confinement, followed by two years' extended supervision. (R. 16.)

Smith appeals.

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[2] Smith's motion is not in the appellate record.

STANDARD OF REVIEW

This Court employs a two-prong test in reviewing a suppression motion. *See State v. Felix*, 2012 WI 36, ¶ 22, 339 Wis. 2d 670, 811 N.W.2d 775. First, the Court upholds the circuit court's findings of fact unless they are clearly erroneous. *Id.* Second, the Court applies constitutional law to those facts independently. *Id.*

ARGUMENT

Martinez did not seize Smith when he asked Smith to step into the store's vestibule. Because there was no seizure, the court properly denied Smith's motion to suppress the evidence.

A. Relevant law.

Although the Fourth Amendment protects people from unreasonable searches and seizures by the police, "not all police-citizen contacts constitute a seizure." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729. Generally, police contact is a seizure when through physical force or a show of authority, police restrain a person's liberty. *Id.*

"As long as a reasonable person would have believed he was free to disregard the police presence and go about his business, there is no seizure and the Fourth Amendment does not apply." *Id.* The reasonable person test imagines a reasonable innocent person. *See State v. Williams*, 2002 WI 94, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834.

B. A reasonable person would have felt free to decline Martinez's request to speak in the vestibule.

Martinez and Wall walked into the glass store to ask Smith and Johnson about their encounter with the person or

people in the red car that the detectives were surveilling. (R. 25:11–12.) Once inside the store, Martinez approached Smith and Wall approached Johnson. (R. 25:16, 41.) Martinez told Smith that he was a detective and asked whether he could ask Smith some questions. (R. 25:40–42.) Martinez asked Smith to follow him into the vestibule to talk, which Smith did. (R. 25:43–44.) Once the two were in the vestibule, Wall entered and smelled marijuana. (R. 25:44.) Because Wall smelled marijuana—and Smith then admitted that he had smoked marijuana—the detectives had reasonable suspicion that Smith had committed a crime and were justified in patting Smith down.[3]

Here, Smith was not seized when Martinez asked to talk to him in the vestibule and Smith agreed to do so because Martinez did not use physical force or a show of authority to restrain Smith's liberty. *See In re Kelsey C.R.*, 2001 WI 54, ¶ 30, 243 Wis. 2d 422, 626 N.W.2d 777. Martinez did not have his gun or handcuffs out, he did not touch Smith, and he did not yell or even raise his voice. (R. 25:42.) Martinez did not threaten to arrest Smith or tell him that he had to talk to him before he could leave the store; Martinez merely asked Smith to come into the vestibule to talk. (R. 25:42–43.) Martinez—dressed in his usual police gear—did nothing more than ask Smith twice if he would talk to him. (R. 25:42, 46, 69.) Police "do not violate the Fourth Amendment's prohibition of 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, 201 (2002). Under these circumstances, a reasonable

[3] Smith does not challenge the search.

innocent person would have felt free to ignore Martinez's request to talk in the vestibule. *See Williams*, 255 Wis. 2d 1, ¶ 21.

Smith counters that he was seized in the glass store.[4] He says that several circumstances weigh in favor of finding a seizure. He argues that the detectives "made a dramatic entrance" into the small store, "announcing their presence as police officers to those in earshot."[5] He points out that the detectives were armed "and appeared to be on a 'mission.'"[6] He says that when Martinez entered the store, he told him to "stop" and approached him in a threatening manner.[7] Smith complains that although he told Martinez multiple times that he did not want to talk to him, Martinez "refused to take 'no' for an answer" and altered his tone, frowned, and narrowed his eyes when Smith declined to talk.[8] He complains that Martinez asked him to remove his hands from his pocket.[9] Smith also argues that Wall's presence supports a finding that he was seized, and that both detectives blocked the only exit to the store.[10]

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[4] Smith does not point to the moment of the seizure, but because a seizure does not occur until a citizen yields to an officer's show of authority, the State assumes that Smith means to argue that he was seized when he followed Martinez into the vestibule. *See In re Kelsey C.R.*, 2001 WI 54, ¶ 33, 243 Wis. 2d 422, 626 N.W.2d 777.

[5] Smith's Br. 13.

[6] Smith's Br. 13–14.

[7] Smith's Br. 13.

[8] Smith's Br. 13.

[9] Smith's Br. 15.

[10] Smith's Br. 13–14.

Smith's arguments are without merit. First, there is no evidence that Martinez and Wall entered the store in a "dramatic" way, nor is a "dramatic" entry a factor in Fourth Amendment jurisprudence. Second, Smith testified that when the detectives came into the store, they "asked [him] to stop," not that they entered and "immediately told" him to do so.[11] (R. 25:76.) Third, Smith testified that to exit the store, he would have had to walk "past one of the two officers"—not that both detectives were blocking the exit, as he argues. (R. 25:74.) Fourth, that the detectives were armed is a non-starter. *Drayton*, 536 U.S. at 205 ("The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."). Fifth, Martinez's request that Smith remove his hands from his pockets was just that: a request. (R. 25:52.) It was not, as Smith says, "signaling a degree of control over Mr. Smith's bodily autonomy that is not consistent with a purely voluntary encounter."[12]

But more importantly, Smith's testimony that Martinez's tone, affect, and approach led him to feel seized is not supported by the evidence. At the suppression hearing, Smith's responses were tepid. For example, when asked if Martinez had to tell him to get into the vestibule for him to comply, Smith said, "It felt more of a demand than [a] statement." (R. 25:75.) When asked to describe Martinez's tone of voice, Smith responded that it was "clear." (R. 25:63.) And Smith explained that he felt like he could not walk away because when he told Martinez that he did not want to talk, Martinez told him "again that he wanted to talk to

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[11] Smith's Br. 14.

[12] Smith's Br. 15.

[him] in the vestibule, like it was more of a demand." (R. 25:66.)

On the other hand, Martinez said that he went into the store, identified himself, and asked Smith if he could talk to him. (R. 25:40–41.) When Smith asked Martinez what he wanted to talk about, Martinez told him that he just had a couple of questions. (R. 25:42.) Martinez did not raise his voice, threaten Smith, brandish his weapon, or engage in any intimidating or coercive behavior. (R. 25:42–43.) Instead, Martinez conducted a textbook example of a consensual police-citizen encounter.

Smith's arguments ignore that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation." *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). And although "most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Id.* "Unless the circumstances of the encounter are *so intimidating* as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded," there has not been a seizure. *Id.* (emphasis added).

In this case, there was nothing coercive about the detectives' conduct. That Smith may have felt nervous or uncomfortable declining Martinez's request is not under review. The question is only whether a reasonable innocent person would have felt free to disregard Martinez's request to talk in the vestibule. *See Williams*, 255 Wis. 2d 1, ¶ 23. And under the circumstances here, the answer must be that a reasonable innocent person would have felt that he or she could leave because the detectives' conduct, on the whole, lacked any troubling coercive effect. *Id.*

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated this 19th day of July, 2018.

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 2,092 words.

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KATHERINE D. LLOYD
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Dated this 19th day of July, 2018.

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