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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP001796-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY ALEXANDER NORTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered
in Milwaukee County Circuit Court,
the Honorable Kristy Yang Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

1. Did the circuit court err when it denied Mr. Norton's motion to suppress evidence?

The circuit court denied the motion to suppress because it believed the actions of police were supported by constitutionally requisite reasonable suspicion. (35:59-60); (App. 105-106).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is statutorily ineligible for publication. Oral argument is not warranted given the straightforward nature of the facts.

STATEMENT OF THE CASE

A criminal complaint filed on February 5, 2018 charged Mr. Norton with:

- Resisting an officer contrary to Wis. Stat. § 946.41(1);
- Possession of THC contrary to Wis. Stat. § 961.41(3g)(e).

(1:1).

Mr. Norton filed a motion to suppress, alleging that police lacked reasonable suspicion when they conducted an underlying seizure. (5:2). Following an evidentiary hearing, the circuit court denied the motion. (35:60); (App. 106).

After the denial of his motion to suppress, Mr. Norton pleaded guilty to resisting an officer. (40:2). Following his plea, the Honorable Kristy Yang withheld sentence and placed Mr. Norton on probation for one year. (17:1); (App. 101).

This appeal follows.[1] (29).

STATEMENT OF FACTS

Police Contact

According to the testimony at the suppression hearing, Milwaukee Police Department Officer Justin Schwarzheber responded to a shots fired call on the evening of October 7, 2017. (35:5). He testified that the call originated from the "area of East Locust and North Booth Street." (35:6). According to Officer Schwarzheber, this is an area "that is becoming troublesome."(35:41).

Officer Schwarzheber could not recall when he responded to the call, although he did recall that it was "later at night." (35:6). On cross-examination, Officer Schwarzheber testified that he was dispatched "around 11:00" at night. (35:20). A squad car video, related to this incident, was introduced which showed Officer Schwarzheber traveling to the

[1] Wis. Stat. § 971.31(10).

scene of the shots fired complaint at 11:28 P.M. (35:8).[2]

Officer Schwarzheber, along with his partner, Officer Robert Gregory, began driving toward the area of the suspected shots fired incident. (35:6). They were not given a specific location, only "like a vicinity." (35:20). The officers also did not know which side of the street the shots fired complaint originated from. (35:21). In addition, while Officer Schwarzheber was aware that the complaint originated with a citizen witness, he did not have an opportunity to actually talk to that person before arriving on the scene. (35:21). He specifically testified that he did not "know what he saw or heard." (35:22). The officers also lacked a suspect description, a car description, or any information about which house, if any, the gunshots came from. (35:22).

While arriving on the scene, they passed "a vehicle parked on the west side of the street, just north of East Locust Street." (35:10). This was one of "many other" cars parked on the street at that time of night. (35:24). There were no pedestrians on the street. (35:10).

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[2] The State utilized the squad car video throughout the motion hearing. However, it never moved the video into evidence, meaning that it could not contribute any weight to the reasonable suspicion calculus. As the State was the one with the burden of proof, it bears the responsibility for this defect in the record. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

Because it was dark out, the officers utilized their car-mounted spotlight to look inside the cars parked on the street, in order to "see if anyone had been shot inside of a car, anybody in the car that could be armed." (35:12). As they shined their light into one of the parked cars, Officer Schwarzheber observed two men sitting inside. (35:12). The car was parked and not running. (35:24). He testified that the driver "became startled and began moving as if he was, like, placing something, or trying to place something behind his back." (35:12). Officer Schwarzheber testified that in his experience it was not unusual for a driver to be startled by the spotlight, although he claimed that the driver's specific movements were somewhat unusual to him. (35:27). He agreed, however, that there could have been an innocent explanation for that movement. (35:31). He identified Mr. Norton as the driver. (35:13).

According to Officer Schwarzheber, his observations of the parked car occurred "seconds" after they arrived on the scene to investigate the shots fired complaint. (35:24). The vehicle was legally parked and Officer Schwarzheber testified that he did not observe any traffic violations. (35:25). However, because of Mr. Norton's allegedly furtive movements, the officers made the decision to stop their car and question Mr. Norton. (35:14). To that end, they turned on their flashing lights in order to effectuate a traffic stop. (35:18). After parking the squad car close by, Officer Schwarzheber approached on foot. (35:15). His partner approached the car from

the other side and began yelling at the occupants to put their hands up. (35:35).

Meanwhile, Officer Schwarzheber pointed his flashlight into the car, with his other hand on his gun. (35:15). As he shined the light into the car, he testified that he was able to observe a baggie of suspected marijuana. (35:15). Officer Schwarzheber therefore opened the car door, disclosing an odor of marijuana. (35:15). Officer Schwarzheber then ordered Mr. Norton out of the car and patted him down for weapons, finding none. (35:16-17).

As officers attempted to take Mr. Norton to their car, he pushed Officer Schwarzheber and tried to run away. (1:2). The officers were ultimately able to recapture him, however. (1:2). In so doing, they discovered additional drugs on his person and on the ground near Mr. Norton. (1:2).

Motion to Suppress

Based on the nature of the police contact, Mr. Norton filed a suppression motion challenging the stop. (5). The court held a hearing, from which the bulk of the above facts are derived. (35).

At the conclusion of the suppression hearing, the court found Officer Schwarzheber credible. (35:59); (App. 105). Based on the officer's observations, the shots fired complaint, and the character of the neighborhood, the court found reasonable suspicion to support the stop. (35:59);

(App. 105). The court denied the defense motion. (35:59); (App. 105).

Plea and Sentence

Following the adverse ruling, Mr. Norton ultimately agreed to resolve his case with a plea to Count One, resisting an officer. (40:2). Count Two, possession of THC, as well as an uncharged allegation that Mr. Norton possessed a stimulant (a "designer drug" similar to MDMA) during the stop, were read-in for sentencing purposes. (40:2-3). The court withheld sentence and placed Mr. Norton on probation for 12 months. (40:22).

ARGUMENT

I. The police detention was unsupported by reasonable suspicion. Accordingly, the circuit court erred in denying Mr. Norton's suppression motion.

A. Legal principles and standard of review.

This case involves a preserved challenge to law enforcement's decision to detain Mr. Norton. That temporary detention is governed by the "reasonableness" requirement of both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.[3]

[3] It is also governed by Wis. Stat. § 968.24 which codifies these constitutional requirements.

A police officer may "in appropriate circumstances and in an appropriate manner" stop and briefly detain an individual "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); *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

To effectuate a seizure, an officer must have "a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." *State v. Gammons*, 2001 WI App 36, ¶ 6, 241 Wis. 2d 296, 625 N.W.2d 623; *see also Florida v. Royer*, 460 U.S. 491, 498 (1983). In other words, suspicion of criminal wrongdoing only becomes "reasonable suspicion" when it is based on "specific and articulable facts" and not a mere "hunch." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729; *Terry*, 392 U.S. at 27.

Whether constitutionally sufficient reasonable suspicion exists in a given case is determined by examining the "totality of the circumstances." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Where an unlawful seizure occurs, the remedy is to suppress the evidence produced. *State v. Carroll*, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

This Court applies a two-part test when reviewing the denial of a motion to suppress. *State v. Popp*, 2014 WI App 100, ¶ 13, 357 Wis. 2d 696, 855

N.W.2d 471. A circuit court's findings of fact are upheld unless clearly erroneous, but the application of constitutional principles to the facts are reviewed de novo. *Id*.

B. Police lacked any reasonable basis to subject Mr. Norton to this intrusive law enforcement contact.

In this case, it is undisputed that officers seized Mr. Norton when they pulled up behind his parked car with their lights flashing, exited the car, and began yelling commands at him. The only question for this Court is whether constitutionally sufficient reasonable suspicion existed.

Here, the circuit court based its reasonable suspicion finding on three primary factors: (1) the shots fired complaint; (2) the fact that this was a high crime area; and (3) Mr. Norton's furtive movements. (35:58-60); (App. 104-106). However, these factors, even in the aggregate, are incapable of supporting the constitutionally requisite level of justification.

First, reliance on the shots fired complaint is superficially problematic. While the existence of a shots fired complaint may be a factor in the reasonable suspicion calculus, *see State v. Alexander*, 2008 WI App 9, ¶ 13, 307 Wis. 2d 323, 744 N.W.2d 909, the persuasive force of that factor is considerably reduced in this case. Here, the State never presented any proof as to when the alleged shots fired complaint occurred. While Officer Schwarzheber was dispatched "around 11:00," the State never

satisfactorily established the temporal relationship between the caller's complaint and the actual dispatch. Moreover, to the extent that the dispatch was received "around 11:00" and the State also presented testimony that the officers were not actually on the scene until roughly half an hour later (35:8), there is still a sizeable gap between the dispatch and the officers' actual arrival. In other words, there is absolutely no way to evaluate whether it was reasonable to continue to believe that the shooter would be on site without more definite temporal detail.

The testimony also reveals that Officer Schwarzheber did not have a specific location in mind, only a broad geographic "vicinity." (35:20). Moreover, while Officer Schwarzheber was aware that the call was made by a citizen witness, he was almost totally unaware of what the witness had actually observed. Officer Schwarzheber had no description of a suspect, a suspect vehicle, or a home from which the shots could have originated. (35:21).

In addition to their total lack of information about the shots fired complaint, police also lacked any information which would enable them to link Mr. Norton's car to that complaint. His mere presence in the vicinity of an area where a hypothetical crime *may* have occurred, without more, does not constitute reasonable suspicion. *See State v. Gordon,* 2014 WI App 44, ¶ 14, 353 Wis.2d 468, 846 N.W.2d 483, *State v. Pugh*, 2013 WI App 12, ¶ 12, 345 Wis. 2d 832, 826 N.W.2d 418.

Second, the character of the neighborhood is a very weak basis for reasonable suspicion. Mere presence in a high crime area does not transform the innocuous citizen into a possible criminal. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("An 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."); *State v. Morgan*, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995) (quoting treatise for proposition that "simply being about in a high-crime area should not of itself ever be viewed as a sufficient basis to make an investigative stop. "); *United States v. Mallides*, 473 F.2d 859, 861 n.3 (9th Cir. 1973) ("That innocent activity occurs in a high crime area provides no basis for converting innocuous conduct into suspicious conduct. ").

At the same time, there was not any specific explanation offered, beyond the officer's conclusory testimony, as to why this was a "high crime area." More problematically, the officer's testimony actually stopped short of using that phrase, instead only stating that the area was getting "troublesome." (35:41).

Third, the allegedly furtive movements of Mr. Norton fail to contribute much to the reasonable suspicion calculus. In the vehicular search context, the Wisconsin Supreme Court has been critical of over strong reliance on otherwise innocuous behaviors with potentially innocent explanations. *See*

State v. Johnson, 2007 WI 32, ¶ 43, 299 Wis. 2d 675, 729 N.W.2d 182:

> Were we to conclude that the behavior observed by the officers here [leaning forward and reaching under the seat] was sufficient to justify a protective search of Johnson's person and his car, law enforcement would be authorized to frisk any driver and search his or her car upon a valid traffic stop whenever the driver reaches to get his or her registration out of the glove compartment; leans over to get his wallet out of his back pocket to retrieve his driver's license; reaches for her purse to find her driver's license; picks up a fast food wrapper from the floor; puts down a soda; turns off the radio; or makes any of a number of other innocuous movements persons make in their vehicles every day. In each of these examples, the officer positioned behind the vehicle might see the driver's head and shoulders move, or even momentarily disappear from view. Without more to demonstrate that, under the totality of circumstances, an officer possesses specific, articulable facts supporting a reasonable suspicion that a person is dangerous and may have immediate access to a weapon, such an observation does not justify a significant intrusion upon a person's liberty.

Id., ¶ 43.

Here, Mr. Norton's reaction to having the light shined into his car was not inexplicable or irrational and, as counsel pointed out, may well have been consistent with reaching for a wallet, a necessary part of almost any traffic stop. (35:28).

Putting these factors together, the evidence is clear that police lacked any real basis for seizing Mr. Norton beyond a "hunch." They did not observe anything generating concrete suspicion, like a hand-to-hand drug transaction or actual drug use. They had no basis to infer that Mr. Norton was connected to the shots fired complaint, beyond his mere presence in the area. Instead, police appear to have randomly shined their light on his person and, when he was startled and made ambiguous movements, used that justification for the seizure at issue. The Fourth Amendment requires more.

Accordingly, law enforcement acted unreasonably when they subjected him to this unlawful detention. This Court should therefore reverse the circuit court and remand with an order that the evidence be suppressed.

CONCLUSION

Mr. Norton therefore respectfully requests that this Court reverse the circuit court and remand for further proceedings.

Dated this 14th day of November, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,449 words.

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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 November, 2019.

Signed:

Christopher P. August
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 14th day of November, 2019.

Signed:

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APPENDIX

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