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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN**

DISTRICT I

Appeal Case No. 2019AP001796-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LARRY ALEXANDER NORTON,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Victoria S. Crosby
Assistant District Attorney
State Bar No. 1104704
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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ISSUES PRESENTED

Did officers have the requisite reasonable suspicion to detain and perform an investigatory stop of Mr. Norton when they were responding to reports of eight rapid shots fired in the area where Mr. Norton was parked?

The circuit court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On February 5, 2018, Mr. Norton was charged with resisting an officer, contrary to Wis. Stat §946.41(1) and possession of THC, contrary to Wis. Stat §946.41(3g)(e). Mr. Norton filed a motion to suppress, alleging that police lacked reasonable suspicion when they conducted an underlying seizure. (R5:2).

At the evidentiary hearing, Milwaukee Police Officer Justin Schwarzhuber testified he responded to a shots fired call “around 11:00” in the evening of October 7, 2017 from the “area of East Locust and North Booth Street.”(R35:5-6).

Officer Schwarzhuber and his partner Officer Robert Gregory began driving toward the area of the suspected shots fired incident (R35:6). Though the officers did not have a specific address, the were provided with a “vicinity” of the shots fired report (R35:20). While arriving on the scene, the officers passed “a vehicle parked on the west side of the street, just north of East Locust Street.” (R35:10).

Due to the time of night, the officers utilized their car-mounted spotlight to look inside the cars parked on the street to “see if anyone had been shot inside of a car, anybody in the car that could be armed.” (R35:12). Officer Schwarzhuber testified that he observed two men sitting inside one of the parked cars. (R35:12). 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.” (R35:12). Officer Schwarzhuber testified in his experience when people see a bright light they, “might put their hands up to block the light, but they’re not usually moving around.” (R35:14). He stated Mr. Norton’s movements were “not a normal reaction”. (R35:14). Based on Mr. Norton’s furtive movements, the officers made the decision to stop their car and question Mr. Norton (R35:13). Officer Schwarzhuber testified he was concerned that the driver of the vehicle had a firearm at this point “because we were called to the area for a shots fired in that exact location or the vicinity of the location there. (R35:14). As the officers got closer to speak with the driver Officer Schwarzhuber testified he “observe[ed] a clear, plastic baggie obtaining a green, leafy plant-like substance which [he] believe[d] was marijuana.” (R35:15).

Following the evidentiary motion hearing, in which the above facts were derived (R:35), the Honorable Kristy Yang found Officer Schwarzhuber credible (R35:59). Based on Officer Schwarzhuber’s observations, the shots fired complaint, and the character of the neighborhood, the court found reasonable suspicion to support the stop, and denied Mr. Norton’s motion. (R35:59).

After the denial of his motion, Mr. Norton pled guilty to resisting an officer (R40:2). Judge Yang withheld sentence and placed Mr. Norton on probation for 1 year (R17:1).

This appeal follows.

STANDARD OF REVIEW

Mr. Norton disputes whether the circuit court properly found the temporary detention to be supported by reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot’” *United States v. Sokolow*, 490 U.S. 1,7, 109

S.Ct. 1581 (1989). Mr. Norton preserved a challenge to law enforcement's decision to detain him. The temporary detention is governed by the "reasonableness" requirement of both the Fourth Amendment of the United States Constitution, Article I, Section 11 of the Wisconsin Constitution, and further governed by Wis. Stat. § 968.24, which codifies these constitutional requirements.

A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. *State v. Casarez*, 2008 WI App 166, ¶ 9, 314 Wis. 2d 661, 762 N.W.2d 385. The reviewing court will uphold the trial court's findings of fact unless they are clearly erroneous. *Id.*; Wis. Stat. § 805.17(2) (made applicable to criminal proceedings by Wis. Stat. § 972.11(1)). The trial court's application of constitutional principles to those facts is reviewed *de novo*. *Casarez*, 314 Wis. 2d 661, ¶ 9, 762 N.W.2d 385.

ARGUMENT

1. Officers had reasonable suspicion to approach and question the Mr. Norton.

The State asserts that the trial court's application of constitutional principles to the facts was proper, given the totality of the circumstances. The trial court determined that Officer Schwarzhuber's credible testimony established facts to support a finding that officers had a reasonable suspicion that Mr. Norton had committed, was committing, or was about to commit a crime, under the totality of the circumstances. (R35:60).

The circuit court based its reasonable suspicion finding on three primary factors: (a) the shots fired complaint; (b) the location is a high crime area; and (c) Mr. Norton's furtive movements (R35:58-60). These facts, put together through the evidence presented, are "specific and articulable facts," not a mere "hunch"; and would warrant a reasonable officer in the belief that Mr. Norton probably had committed, was committing, or was about to commit a crime, *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729; *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In *Terry v. Ohio*, the United States Supreme Court ruled, “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.” *Terry v. Ohio*, 392 U.S.1 at 22. Reasonable suspicion exists if, under the totality of the circumstances, “the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonable suspicion must be based on more than an officer's “inchoate and unparticularized suspicion or ‘hunch.’” *Terry v. Ohio*, 392 U.S. at 27. An officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” See *Id.*

Here, the credible testimony established that the officers had the requisite reasonable suspicion to detain Mr. Norton.

a. Shots Fired Complaint

The credible testimony established that officers responded to a call of eight rapid shots fired on October 7, 2017, around 11:28 p.m. at E. Locust and N. Booth St. (R35:7) Mr. Norton was sitting in his parked car at 2911 N. Booth St., very close in proximity to where the gunshots were heard (R35:11). Because it was approximately 11:30 p.m., it was very dark and the officers had to use their flashlights to investigate (R35:12).

Officer Schwarzhuber observed that when he and Officer Gregory approached the vehicle, within the vicinity of the of the shots fired complaint, Mr. Norton “became startled and began moving as if he was, like, placing something, or trying to place something behind his back.” (R35:12).

Mr. Norton relies on *State v. Johnson*, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182, in which the Wisconsin Supreme Court held that police were not justified in conducting a “Terry” stop of a person who was in a car stopped for a minor traffic violation just because they saw a movement of the head

and shoulders. *Johnson* is distinguishable. Here, Mr. Norton was not merely being stopped for a minor traffic violation, but was being approached about eight rapid shots fired and Mr. Norton had made sudden and sharp movements as if he was concealing something on his person (R35:14).

b. Location is a High Crime Area

Mr. Norton's reliance on *State v. Gordon*, is not applicable in this case because the officers did not approach Mr. Norton solely because he was in a high crime area. Mr. Norton was stopped because he was in the "vicinity" in which eight rapid shots were reported, not because he was in a "high crime area." *State v. Gordon*, 2014 WI App. 44, 353 Wis. 2d 468, 846 N.W.2d 483.

Officer Schwarzhuber testified that the area in which this incident occurred "is becoming troublesome. There are a lot of drug activities. There have been shots fired over there recently." (R35:41). The description of the location was taken into account when considering the totality of the circumstances.

c. Mr. Norton's Furtive Movements

Reasonable suspicion, as stated above, exists if, under the totality of the circumstances, "the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonable suspicion must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Terry v. Ohio*, 392 U.S. at 27.

In the present case at hand, Officer Schwarzhuber testified that Mr. Norton's movements were "not a normal reaction," and that, in his experience, when people see a bright light they "might put their hand up to block the light, but they're not usually moving around." (R35:14).

The credible testimony established officers did have reasonable suspicion that Mr. Norton was armed and dangerous

and a temporary search for weapons was necessary to ensure Mr. Norton did not pose a danger to the officers or the public.

In *United States v. Fisher*, 579 F.3d 1156 (10th Cir. 2010), the 10th Circuit Court of Appeals, held that officers had reasonable suspicion to stop individuals in a parked car at an address, in the immediate vicinity of an emergency report of shots fired, even before officers learned of the description of the shooter.

Similar to the *Fisher* case, this was not a case where officers were “driving around a bad neighborhood stopping random vehicles.” *Id.* at 1159. Officers conducted a stop of Mr. Norton because they responded to a shots fired call late at night, in a high crime area, suspecting gun play, and see two individuals sitting in a parked car in the vicinity of the shots fired complaint. These were specific facts which would warrant a reasonably prudent officer to believe he was involved in criminal activity.

CONCLUSION

Accordingly, based on the totality of the circumstances of this case, Officers Schwarzhuber and Gregory had reasonable suspicion to approach Mr. Norton and ask him questions because the officers were responding to a call of eight rapid shots fired in the same area where Mr. Norton was parked. Additionally, the location of the shots fired complaint, and Mr. Norton’s furtive movements, as if he was concealing something, contributed to the officer’s reasonable suspicion to approach Mr. Norton. He was stopped and questioned based on these “specific and articulable facts.”

For these reasons, the State respectfully requests that the decision denying Mr. Norton’s motion be affirmed.

Dated this 21 day of January, 2020.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

Victoria S. Crosby
Assistant District Attorney
State Bar No. 1104704
Attorneys for Plaintiff-Respondent

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 1876.

Date

Victoria S. Crosby
Assistant District Attorney
State Bar No. 1104704

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

Victoria S. Crosby
Assistant District Attorney
State Bar No. 1104704

P.O. Address:

Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.