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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2020AP286-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHONDRELL R. EVANS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A SUPPRESSION MOTION, ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE SUSAN M. CRAWFORD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Evans left his hotel room in a high crime area with no luggage at 2:30 a.m., briefly parked at a nearby apartment building, then returned to the hotel and sat in his running car for several minutes. He had been convicted of felony theft just two weeks earlier. Police, knowing that the area was a high crime area and that no businesses were open at that time, walked toward Evans's car and immediately smelled marijuana and saw smoke. A gun and hollow-point bullets were found in the car, and Evans pleaded guilty to felon in possession of a firearm. He now claims that prior to the search, the police unlawfully seized him without a reasonable suspicion that he had committed a crime.

1. Prior to arriving in the parking lot, did police have a reasonable suspicion that Evans had committed, was committing, or was going to commit a crime?

The circuit court answered: "Yes."

This Court should answer: "Yes."

2. Was Evans seized when the two officers pulled into the parking lot and began walking toward his vehicle to speak with him?

The circuit court answered: "No."

This Court should answer: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

Evans left a hotel room in a high crime area at 2:30 a.m. with no luggage. He parked at a nearby apartment building for about one minute before returning to the hotel parking lot, where he sat in his running car for several minutes. A police officer who observed this behavior knew the area was a high-crime area and decided to go and speak with Evans. He called a second officer for support. The two officers pulled into the parking lot without blocking Evans's exit or turning on their emergency lights. They smelled the odor of marijuana and saw smoke as they approached the car. They then searched the car and found a handgun and hollow-point bullets. Evans, who was convicted of a felony theft just two weeks before this incident, was charged with possession of a firearm by a felon and carrying a concealed weapon.

Evans moved to suppress the results of the search. He asserted that the officers violated his Fourth Amendment rights by seizing him without a reasonable suspicion that he had committed, was committing, or was going to commit a crime. After a suppression hearing, the circuit court concluded that Evans was not seized prior to the officers smelling marijuana, and that even if he had been seized, the seizure would have been supported by reasonable suspicion based on the suspicious behavior the officers observed. Evans pleaded guilty to possession of a firearm by a felon and was placed on probation. He now appeals the circuit court's denial of his suppression motion.

For two independent reasons, Evans is not entitled to any relief. First, the officers had reasonable suspicion to seize Evans before entering the parking lot based on his suspicious behavior. Law enforcement pointed to specific and articulable facts that warranted a reasonable belief Evans was involved in criminal activity. Second, even if this Court disagrees that the officers' suspicion was reasonable, Evans was not seized

prior to the officers smelling the odor of marijuana. A reasonable innocent person in Evans's position would have believed that he was free to leave.

STATEMENT OF THE CASE

On March 8, 2018, at approximately 2:30 a.m., Evans and a female left the Clarion Suites Hotel in Madison, Wisconsin with no luggage or bags. (R. 2:1; 39:6.) They drove to a nearby residential parking lot, parked there for approximately one minute, and then returned to the Clarion Suites parking lot. (R. 2:1–2.) They then sat in the car, which remained running, for several more minutes. (R. 2:2.) Police officers found this behavior to be suspicious and approached the vehicle. (R. 2:2.) They immediately smelled the odor of marijuana and noticed that the vehicle was filled with smoke. (R. 2:2.)

The officers searched the vehicle and found marijuana and a digital scale. (R. 2:2.) They also found a hollow-point bullet on the passenger seat, as well as a handgun inside the glove compartment. (R. 2:2.) The handgun's magazine contained nine additional hollow-point bullets. (R. 2:2.) Evans was on supervision at the time, having recently been convicted of theft of movable property from a person / corpse, a class G felony, on February 23, 2018. (R. 2:3; 41:6.) Evans was charged with possession of a firearm by a felon and carrying a concealed weapon. (R. 2:1.)

Evans filed a suppression motion on August 14, 2018. (R. 18.) He asserted that the evidence obtained during the March 8 search of his vehicle resulted from an unlawful stop of his vehicle. (R. 18:1.) He alleged that the police stopped his vehicle without reasonable suspicion that a crime had been or was being committed. (R. 18:2.) The circuit court held a hearing on Evans's motion on October 16, 2018. (R. 39:1.)

At the suppression hearing, Town of Madison police officer Logan Brown testified that he observed Evans and a female leaving the Clarion Suites at 2:30 a.m. with no luggage, drive to a nearby apartment complex parking lot, park there for one minute, then return to the hotel parking lot. (R. 39:4, 6–8.) They continued to sit in the running car for several more minutes without exiting. (R. 39:8.) Officer Brown testified that he knew the area to be "a high-crime area, known for shots fired incidents, homicides and narcotic trafficking." (R. 39:18.) He further testified that the conduct he observed Evans engage in was consistent with his drug cases, and that the time of night was consistent with the time he made many of his previous drug arrests. (R. 39:18.)

Officer Brown told his partner, officer Andrew Hoffman, what he observed, and the two of them pulled into the parking lot to make contact with Evans's vehicle. (R. 39:12.) He testified that they parked their marked squad cars on either side of Evans's vehicle, ensuring that they left Evans a path to exit the parking lot if he wished. (R. 39:12–13.) Neither squad car had its red and blue emergency lights turned on. (R. 39:13.) However, they did have their overhead spotlights turned on and pointed toward the area of Evans's vehicle. (R. 39:27, 46.) When Officer Brown stepped out of his vehicle and walked toward the driver's side door of Evans's vehicle, he smelled the odor of marijuana. (R. 39:14.) Officer Brown then approached the vehicle and asked Evans and the female he was with to step outside so they could search the vehicle. (R. 39:23.)

Town of Madison police officer Andrew Hoffman testified that when he arrived to assist Officer Brown, he parked his squad car "at approximately a 45-degree angle off the rear bumper" of Evans's vehicle. (R. 39:39.) He acknowledged that Evans's vehicle was parked in front of a concrete median in such a way that Evans could not have exited the parking lot by pulling forward. (R. 39:51.)

Officer Hoffman testified that when he exited his car, he "immediately" smelled the odor of marijuana in the air. (R. 39:39.) He approached the vehicle holding a flashlight and noticed that the inside of the vehicle was filled with smoke. (R. 39:40.) He also testified that the area was a high-crime area in which he "very frequently" makes arrests related to narcotics. (R. 39:44.) He explained that there are no bars or businesses open at 2:30 a.m. in the area. (R. 39:44–45.) He further explained that aside from drug-related or violence-related activity, "[t]here's not really anything else that goes on in that area at that time of day." (R. 39:45.)

Officer Hoffman testified that after smelling marijuana, he walked over to the passenger's side of the vehicle while Officer Brown walked over to the driver's side. (R. 39:39–40, 46.) Officer Hoffman had a flashlight in his hand, and he testified that Officer Brown was likely holding a flashlight as well. (R. 39:47–48.) Portions of the officers' body camera videos from the incident were played in court. (R. 23; 39:20.)

The circuit court first noted that no one argued it was improper for Officer Brown to follow Evans's vehicle out of the Clarion Suites parking lot. (R. 39:67.) The circuit court found that Evans drove off and returned in the manner Officer Brown described. (R. 39:67.) The circuit court also made a factual finding that the officers parked in such a way that Evans could have left the parking lot the same way he came in. (R. 39:67.) It also found that the officers could smell marijuana when they stepped out of their squad cars, before they made contact with Evans. (R. 39:67–68.) Based on these findings, the circuit court concluded that Evans was not seized until after the officers detected the odor of marijuana, at which point they had probable cause to seize him. (R. 39:68.) The circuit court also concluded that even before the officers pulled into the parking lot, they had reasonable suspicion to stop Evans's vehicle based on the behaviors

observed by Officer Brown. (R. 39:68.) For these reasons, the circuit court denied the suppression motion. (R. 39:69.)

Evans pleaded guilty to possession of a firearm by a felon on January 9, 2019. (R. 40:1, 7.) In exchange for his guilty plea, the State agreed to dismiss and read in the carrying a concealed weapon count, and to dismiss and read in the files from two other pending cases against Evans. (R. 40:2–3.) The case proceeded to sentencing on January 16, 2019, where the parties jointly recommended three years of probation with 60 days of conditional jail time. (R. 41:1–2.) The circuit court accepted the joint recommendation, withheld sentencing, and placed Evans on probation. (R. 41:11–12.) Evans now appeals the circuit court's denial of his suppression motion.

STANDARD OF REVIEW

Reasonable suspicion:

Whether a reasonable suspicion to support an investigative stop exists is a question of constitutional fact. *State v. Walli*, 2011 WI App 86, ¶ 10, 334 Wis. 2d 402, 799 N.W.2d 898. This Court must uphold the trial court's findings of fact unless they are clearly erroneous, but determines do novo whether a stop is justified by reasonable suspicion. *Id.*

Seizure:

"Whether someone has been seized presents a two-part standard of review." *County of Grant v. Vogt*, 2014 WI 76, ¶ 17, 356 Wis. 2d 343, 850 N.W.2d 253. "This court will uphold the circuit court's findings of fact unless they are clearly erroneous, but the application of constitutional principles to those facts presents a question of law subject to de novo review." *Id.*

ARGUMENT

I. The officers had reasonable suspicion to stop Evans based on the behaviors they observed.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729 (footnote omitted). Consistent with these protections, law enforcement may conduct an investigatory stop if they have a "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *Id.* ¶ 20.

"Reasonable suspicion" means the officer can point to "specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young*, 294 Wis. 2d 1, ¶ 21. The reasonable suspicion standard is a lower standard than probable cause. *See State v. Felton*, 2012 WI App 114, ¶ 10, 344 Wis. 2d 483, 824 N.W.2d 871. A police officer may conduct an investigatory stop so long as "any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn." *Young*, 294 Wis. 2d 1, ¶ 21 (quoting *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)).

Importantly, "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Id.* (quoting *Anderson*, 155 Wis. 2d at 84. Reasonable suspicion may be based solely on lawful acts. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

Terry v. Ohio, 392 U.S.1 (1968), the preeminent United States Supreme Court case on investigatory stops, is an example of lawful acts giving rise to a reasonable suspicion of criminal activity. In *Terry*, a police officer observed two men walk repeatedly past a store window while periodically conferring with one another and with a third man. *Id.* at 6.

Even though there is nothing unlawful about walking past a storefront or conferring with others, the officer suspected they were "casing" the store. *Id.* The Supreme Court held that the officer was justified in stopping the individuals to investigate this suspicion even though he had not observed any illegal conduct. *Id.* at 22–23.

As the Wisconsin Supreme Court has acknowledged, "the suspects in *Terry* 'might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store.'" *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989) (citation omitted). However, the existence of plausible innocent explanations for the suspects' conduct did not render the police stop unconstitutional. This is because "suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal." *Id.*

In this case, police had a reasonable suspicion supported by specific and articulable facts that a crime had been, was being, or was going to be committed. Officer Brown explained that he saw Evans and a female leave their hotel at 2:30 a.m. with no luggage, which he considered suspicious due to the fact that no businesses in the area are open at that time. (R. 39:17.) His suspicion was amplified by the fact that he knew the area to be a high-crime area where he had made several drug arrests, largely at the same time of night. (R. 39:17–18.) As Officer Hoffman explained, "[t]here's not really anything else that goes on in that area at that time of day" other than criminal activity. (R. 39:45.)

After Evans left the hotel, Officer Brown watched him drive to the parking lot of a nearby apartment complex, park there for approximately one minute, then return to the Clarion parking lot. (R. 39:7–8.) The car then idled for several minutes with no one getting in or out. (R. 39:8.) He testified

that Evans's conduct was "consistent with" his drug cases. (R. 39:18.) For these reasons, police had a reasonable suspicion to believe that a crime had been, was being, or was going to be committed, and were therefore entitled to briefly seize Evans and investigate this suspicion. *See, e.g., Terry*, 392 U.S. at 22–23.

Evans points out that there are "numerous innocent explanations for why a couple would leave a hotel at 2:30 in the morning without luggage and return a short while later." (Evans's Br. 13.) This is true. Evans could have simply gone to retrieve a wallet or clothing from a friend's apartment, just as the defendants in *Terry* could have been impatiently waiting for a friend to leave the store. *See Jackson*, 147 Wis. 2d at 835. As explained earlier, however, the existence of plausible innocent explanations for a defendant's conduct cannot defeat reasonable suspicion. *Id.* ("[S]uspicious activity by its very nature is ambiguous."). The police reasonably suspected, but were not certain, that Evans may have been engaged in criminal activity. In accordance with *Terry*, they were entitled to briefly detain him to investigate their suspicion.

Evans also argues that the officers did not sufficiently specify which crime they suspected and why Evans's conduct created this suspicion. (Evans's Br. 12–13.) As discussed above, however, Officer Brown described the specific conduct that they considered suspicious—leaving a hotel at 2:30 a.m. with no luggage, driving briefly to a nearby parking lot, then returning and sitting in a running car for several minutes, all in a high-crime area where he had made several previous drug arrests. (R. 39:7–8, 17–18.) He also explained why he considered Evans's behavior suspicious—he observed conduct consistent with drug cases he has handled in the past. (R. 39:18.) Officer Hoffman further explained that aside from drug and violence-related activity, "[t]here's not really anything else that goes on in that area at that time of day."

(R. 39:45.) While Evans argues that the officers did not specify "what crime they suspected," he cites no case suggesting that police need to articulate which specific crime they suspect, and such a requirement is not apparent from the case law. The officers in this case were not required to specify, for example, whether they suspected Evans was buying or selling drugs, or which specific drug he was buying or selling. The officers pointed to specific and articulable facts that warranted a reasonable belief Evans was engaged in drug-related criminal activity, so they were entitled to briefly seize him without violating the Fourth Amendment. *See Young*, 294 Wis. 2d 1, ¶ 21.

II. Evans was not seized prior to the officers smelling marijuana because a reasonable person in Evans's position would have felt free to leave.

As explained above, the officers had reasonable suspicion to believe that Evans had committed, was committing, or was going to commit a crime, so they were permitted to seize him under the Fourth Amendment. Even if this Court disagrees, however, Evans was not actually seized before the police smelled the odor of marijuana and therefore had probable cause to arrest him.

The Fourth Amendment "protect[s] people from unreasonable searches and seizures." *Young*, 294 Wis. 2d 1, ¶ 18. A person is "seized" under the Fourth Amendment "only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (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.

The reasonable person test is an objective test, "focusing not on whether the defendant himself felt free to

leave but whether a reasonable person, under all the circumstances, would have felt free to leave." *State v. Williams*, 2002 WI 94, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834. This objective standard "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). If the test were not objective, "officers would be hesitant to approach anyone for fear that the individual would feel 'seized.'" *Vogt*, 356 Wis. 2d 343, ¶ 31. Additionally, the test "presupposes an *innocent* person," *Florida v. Bostick*, 501 U.S. 429, 438 (1991), so the question to ask is whether a reasonable *innocent* person in the defendant's position would have felt free to leave.

"Questioning by law enforcement officers does not alone effectuate a seizure." *Williams*, 255 Wis. 2d 1, ¶ 22. "While it is true that '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.* ¶ 23 (citation omitted). Instead, police questioning does not result in a seizure unless the surrounding circumstances are "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded." *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). Examples of circumstances that may potentially lead a reasonable person to conclude that he is not free to leave include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554.

This Court recently applied the "reasonable person" test in *Vogt*, 356 Wis. 2d 343. In that case, the defendant was parked next to a closed park and boat landing at 1:00 a.m. during the winter. *Id.* ¶¶ 4–5. The officer parked behind the

defendant and tapped on his window, and motioned for Vogt to roll the window down. *Id.* ¶ 17. Vogt did so, the officer then smelled intoxicants when Vogt spoke, and Vogt was arrested for operating under the influence. *Id.* ¶¶ 8–9. Vogt argued that the officer seized him in violation of the Fourth Amendment, but the Wisconsin Supreme Court held that a reasonable person in Vogt's position would have felt free to leave. *Id.* ¶ 3.

In *Vogt*, the Wisconsin Supreme Court also cited with approval the Supreme Court of North Dakota's decision in *State v. Steffes*, 791 N.W.2d 633 (2010). In that case, a police officer watched a man get into his car in a bar parking lot and suspected he may have been intoxicated. *Id.* at 634. Like in this case, the officer parked near him but left him enough space to exit the parking lot. *Id.* at 634. The officer tapped on the window and the man looked at the officer and turned away. The officer then tapped on the window a second time. *Id.* at 635. A second officer also arrived while they were talking. *Id.* The defendant eventually gave a fake name and was charged with providing false information to a police officer. *Id.* The defendant argued that he was unlawfully seized, but the Court held that a reasonable person in the defendant's position would have felt free to leave, emphasizing that the officer did not park so as to block the defendant's exit and did not activate his emergency lights. *Id.* at 637.

In this case, Evans was not seized prior to the officers smelling marijuana. As a preliminary matter, the circuit court found as fact that the officers smelled the odor of marijuana as they approached on foot prior to making contact with Evans's vehicle. (R. 39:68.) The officers had probable cause to search the car as soon as they smelled marijuana. *See State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999). (R. 39:68.)

For this reason, the question in this case is whether Evans was already seized *before* the officers arrived at his vehicle. Because the officers' knock on Evans's window and their conversation with Evans are not a part of the analysis in this case, the facts of this case are even less suggestive of a seizure than are the facts in *Vogt* or *Steffes*.

A reasonable innocent person in Evans's position would have felt free to leave prior to the officers arriving at the vehicle. When the two officers arrived at the Clarion Suites parking lot, they did not activate their sirens or their red and blue emergency lights. (R. 39:13.) Instead, they simply turned on their overhead spotlights for visibility. (R. 39:27–28.) Additionally, the officers took care to park on either side of Evans's vehicle rather than behind him, leaving him ample space to exit the parking lot if he wished. (R. 39:12–13.) If the officers had wished to demonstrate that Evans was not free to leave, they could have easily parked behind him or turned their flashing lights on, but they did not do so.

Further, this case did not involve any of the indicia described in *Mendenhall* that could have indicated to a reasonable innocent person that he was not free to leave. The case did not involve "the threatening presence of several officers," *Mendenhall,* 446 U.S. at 554, but instead involved only two officers. Neither officer had a weapon drawn. *Id.*; (R. 39:15, 40–41.) Neither officer physically touched Evans or used any language indicating he was seized. *Id.* And unlike in *Vogt* and *Steffes*, the officers had probable cause to search Evans's car before they even arrived at his vehicle, so the window knock and ensuing conversation are not a part of the seizure analysis.

In short, the circumstances of this police encounter were not "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded." *Delgado*, 466 U.S. at 216. The officers parked in such a way that Evans could have quickly and easily left

the parking lot if he wished. (R. 23; Evans's Br. 4.) They then walked toward Evans without activating their sirens or emergency lights, using only their overhead spotlights for visibility. These facts alone, prior to the officers even arriving at Evans's vehicle, would not cause a reasonable person to believe he was not free to leave. *See, e.g., Vogt*, 356 Wis. 2d 343. Therefore, Evans was not seized when the officers pulled into the parking lot and began walking toward his vehicle.

CONCLUSION

This Court should affirm the judgment of conviction and order denying Evans's postconviction motion.

Dated this 20th day of August 2020.

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 3,978 words.

Dated this 20th day of August 2020.

NICHOLAS S. DESANTIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 20th day of August 2020.

NICHOLAS S. DESANTIS
Assistant Attorney General