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STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I

Appeal Case No. 2020AP000489-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
JAMES E. BROWN,
Defendant-Appellant.

On Appeal from the Circuit Court of Milwaukee County,
Case No. 2018CM003449, the Honorable Daniel J. Gabler,
Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

- I. Whether police had reasonable suspicion to stop James Brown, a black male wearing a dark hooded sweatshirt because a 911 caller reported a black male wearing a black hooded sweatshirt in the area with a gun during a shots-fired incident.

Circuit court's response: Yes.

- II. Whether police impermissibly extended the stop by asking Brown to roll down his window and continuing to communicate with Brown?

This issue was not raised at the trial court. Should this Court addresses this issue, this Court should respond no.

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 October 24, 2018, around 11:18 p.m., City of Milwaukee police officers responded to a shots-fired incident. (R33:7)¹ The officers, who were roughly 15-20 blocks away, heard the gunshots and started to respond. (R33:30) While on their way, 911 dispatch also received a call regarding the shots originating from 8940 West Carmen Avenue. (R33:7-8) The 911 caller reported that the person she had observed with a gun was a black male wearing a “black hoody” and shorts. (R33:8-9)

¹ This brief cites to the record contained in 2020AP000489-CR as “R _:_” The first number indicates the identification of the document in the record and the second number indicates the page of that document.

When officers arrived, they encountered a person who they believed matched that description. (R33:9) Using their spotlight, they observed someone who appeared to be a black male who was wearing a “dark colored hooded sweatshirt” in a gray four-door vehicle. (*Id.*) That vehicle was travelling away from the location where the shots were reported, 8940 West Carmen Avenue. (*Id.*)

When officers first observed the vehicle, it was still around the 8900 block of West Carmen Avenue. (R33:11) It had been approximately three minutes since they were initially dispatched for a shots-fired incident. (*Id.*) There were no other vehicles present. (R33:29) There were no other individuals on the sidewalk. (*Id.*) The officers followed the vehicle for approximately three blocks. (R33:21) Eventually, the officers illuminated their lights in order to stop the vehicle to conduct a field interview. (R33:12)

Officer Schlei made contact by approaching the driver’s side of the vehicle to speak with the driver. (*Id.*) Officer Schlei observed that the driver’s side window was only rolled down about an inch. (R33:14) Officer Schlei asked the driver to roll down his window more so he could communicate and the driver refused. (*Id.*) Officer Schlei identified the driver as James Brown. (R33:13)

Officer Schlei noticed Mr. Brown was wearing a dark colored hoody, but not black. (R33:26) However, in Officer Schlei’s experience, 911 caller descriptions are not always one hundred percent accurate. (*Id.*) Officer Schlei could not make out what sort of pants Mr. Brown was wearing. (R33:30)

While trying to communicate with Mr. Brown, Officer Schlei asked Mr. Brown to exit the vehicle. (R33:14) Mr. Brown refused to exit the vehicle and locked his doors. (*Id.*) While continuing to speak with Mr. Brown, Officer Schlei noticed him glancing toward the center console of the vehicle and reaching toward the center console. (R33:15) After approximately twenty-five minutes, Mr. Brown did exit the vehicle. (*Id.*) Officers located a firearm in Mr. Brown’s pocket. (R1:2)

Mr. Brown was charged with one count of carrying a concealed weapon and one count of resisting an officer. (R1:1) Mr. Brown filed a motion to suppress that asserted he had been illegally stopped. (R5:1-5) Notably, that motion only challenged the initial stop. (*Id.*) An evidentiary hearing was conducted by the trial court and the defense confirmed that the only challenge was to the legality of the “initial stop.” (R33:15-17) When asked if there was a challenge to the extension of the stop or the arrest, defense replied that the challenge was only to the “initial encounter.” (R33:18)

The trial court determined that the stop was based upon articulable specific facts and reasonable inferences. (R33:47) The trial court concluded that the stop was reasonable and denied the motion to suppress. (R33:49)

On July 17, 2019, Mr. Brown pled guilty to carrying a concealed weapon and the charge of resisting an officer was dismissed and read in. (R19:1) Mr. Brown was consequently convicted of carrying a concealed weapon. (*Id.*)

Mr. Brown now asks this court to reverse that conviction and the trial court’s decision to deny the motion to suppress. That is the subject of this brief.

STANDARD OF REVIEW

“A suppression issue presents a question of constitutional fact.” *State v. Smith*, 2018 WI 2, ¶ 9, 379 Wis. 2d 86, 905 N.W.2d 353. This Court reviews “the circuit court’s findings of historical fact under the clearly erroneous standard.” *Id.* (quoting *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560). “But the circuit court’s application of the historical facts to constitutional principles is a question of law [this Court] review[s] independently.” *Id.* (quoting *Floyd*, 2017 WI 78 at ¶ 11).

ARGUMENT

I. Police Officers Reasonably Suspected Mr. Brown Was Involved in Illegal Activity Due to His Proximity to the Location of Gunshots and His

Resemblance to the Description of a Person with a Gun.

- A. An officer may detain a subject if there is suspicion, grounded in specific articulable facts and their reasonable inferences, that the subject has committed a crime.**

“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 (footnotes omitted). A traffic stop is a seizure. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 56.

Even when there is no probable cause to make an arrest, police officers may approach individuals to investigate possible criminal behavior. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). Accordingly, an officer may conduct a traffic stop if he or she reasonably suspects an individual is breaking the law in order to “obtain information confirming or dispelling the officer’s suspicions.” *State v. Houghton*, 2015 WI 79, ¶ 22, 364 Wis. 2d 234, 868 N.W.2d 143 (citation and internal quotations omitted). Reasonable suspicion “is considerably less than proof of wrongdoing by a preponderance of the evidence.” *Alabama v. White*, 496 U.S. 325, 330 (1990). Reasonable suspicion exists if under the totality of the circumstances the facts would warrant a reasonable police officer, in light of his training and experience, to reasonably suspect that a person 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. This standard does not require officers to rule out possible innocent behavior before initiating a brief stop. *Young*, 2006 WI 98, ¶ 21 (citation omitted).

When determining whether police had reasonable suspicion, reviewing courts consider “the facts known to the officer at the time the stop occurred, together with rational inferences and inferences drawn by officers in light of policing experience and training.” *State v. Wortman*, 2017 WI App 61, ¶ 6, 378 Wis. 2d 105, 902 N.W.2d 561. Reviewing courts do not look at any single fact standing alone, but rather at the cumulative effect of all of the facts taken together with their

reasonable inferences. *State v. Waldner*, 2006 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

B. Police reasonably believed that Mr. Brown may have been involved in criminal activity.

The officers' reasonable suspicion was based on their knowledge that shots were fired, the time and location of Mr. Brown's vehicle, Mr. Brown's dark clothing matching a witness's description, combined with the reasonable inferences and the officers' training and experience.

Specifically, officers stopped Mr. Brown's vehicle because he was leaving the area that had reported gunshots a few minutes earlier, which officers had heard as well. The person reporting the gunshots described the suspect as a black male wearing a hooded black sweatshirt and shorts. (R33:8-9) When the officers shone their spotlight at Mr. Brown's vehicle, they could see he was a black male in a dark colored hooded sweatshirt. (R33:9) However, because Mr. Brown was seated in a vehicle, officers had no way of knowing what type of legwear Mr. Brown was wearing.

At some point, the officers recognized that Mr. Brown was wearing a maroon hooded sweatshirt rather than a black hooded sweatshirt, although it is unclear whether that was before or after Mr. Brown's vehicle was stopped. Nevertheless, officer Schlei noted that witness descriptions often vary and they may get an article of clothing incorrect. (R33:26) Consequently, Officer Schlei reasonably relied on his experience and concluded that Mr. Brown broadly matched the description of the person the caller had reported.

Under the totality of the circumstances, stopping Mr. Brown's vehicle was reasonable. Officers heard gunshots, and received a description that matched Mr. Brown. Mr. Brown was close to the gunshot location both in time and physical location. Accordingly, it was reasonable to temporarily stop him to investigate further. Therefore, the Court should affirm the trial court's decision to deny Mr. Brown's motion to suppress and his conviction.

II. Officers Did Not Unreasonably Extend the Duration of the Traffic Stop.

A. The issue was not raised in the trial court so it cannot be raised now.

The Court should not consider Mr. Brown's new argument that police unlawfully extended the traffic stop. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730. The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court. *Young v. Young*, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985).

However, here the record clearly establishes that the extension of the stop was not raised before the court. (R5:1-5) In fact, when the prosecutor asked for clarification as to whether she should explore that topic, defense counsel reiterated that their motion only challenged the initial stop. (R33:15-17) Accordingly, Mr. Brown cannot establish that the issue was raised in the circuit court and, consequently, cannot now argue that the stop was illegally extended.

Furthermore, if the issue had been raised at the circuit court, the State would have adduced additional testimony to justify the extension. Thus, allowing Mr. Brown to now argue that the stop was illegally extended would be unfair to the State. Therefore, the Court should disregard the argument that the stop was illegally extended.

However, even if this Court chooses to consider Mr. Brown's new argument that the stop was illegally extended, the Court should deny it.

B. The officers did not unlawfully extend the stop.

The Supreme Court of Wisconsin has held that "when an officer conducts a valid traffic stop, part of that stop includes checking identification, even if the reasonable suspicion that

formed the basis for the stop in the first place has dissipated.” *State v. Smith*, 2018 WI 2, ¶ 2, 379 Wis. 2d 86, 91, 905 N.W.2d 353, 355 (citing *Rodriguez v. United States*, 575 U.S. 348, 354 (2015)). Thus, an officer’s “ordinary inquiries” associated with a traffic stop do not extend the stop or violate the Fourth Amendment. *State v. Wright*, 2019 WI 45, ¶¶ 23-24, 386 Wis. 2d 495, 506, 926 N.W.2d 157, 162. These ordinary inquiries include checking the driver’s license, registration, and proof of insurance, as well as determining whether the driver has outstanding warrants. *Id.* at ¶ 24 n. 20. The Wisconsin Supreme Court has also recognized that officers may take “negligibly burdensome precaution[s]” during a traffic stop which do not impermissibly extend the stop, including asking a driver and all passengers to exit the vehicle. *Id.* at ¶¶ 24-25. See also *State v. Floyd*, 2017 WI 78, at ¶ 27, 377 Wis. 2d 394, 413, 898 N.W.2d 560, 569 (holding an officer may ask about the presence of weapons and for permission to frisk without violating the Fourth Amendment).

Here, there was no extension of the stop because the interaction was part of the officer’s ordinary inquiries associated with the initial stop. However, Mr. Brown’s suspicious actions during these ordinary inquiries furthered the officer’s reasonable suspicion and ultimately lead to probable cause to arrest. As officer Schlei approached the vehicle, he could see the window was only rolled down an inch. (R33:14) Officer Schlei attempted to get Mr. Brown to roll down the window so they could communicate more clearly but Mr. Brown refused. (*Id.*) Furthermore, when Mr. Brown locked his doors and refused to exit his vehicle, he disobeyed a lawful order. At that point, officers had probable cause to arrest for resisting an officer.

Officers did not unlawfully extend the seizure of Mr. Brown or his vehicle. Moreover, that argument was not put before the trial court. Therefore, the Court should affirm the trial court’s decision to deny Mr. Brown’s Motion to suppress and Mr. Brown’s conviction.

CONCLUSION

For the reasons discussed, this Court should affirm the circuit court's denial of Mr. Brown's motion to suppress and his judgment of conviction.

Dated this 24th day of July, 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 word count of this brief is 2216.

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 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.

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