COURT OF APPEALS
DECISION
DATED AND RELEASED

January 14, 1997

No. 96-1580-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELTON L. EATON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Judgment affirmed; order reversed and cause remanded with directions*.

CURLEY, J. Elton L. Eaton appeals from a judgment after a guilty plea convicting him of carrying a concealed weapon. He also appeals from an order denying his motion for postconviction relief. He raises two issues for review: (1) whether the trial court erred when it concluded he lacked standing to challenge the search incident to his arrest and seizure of a loaded handgun located in a car, which he had allegedly been driving and which was owned by his girlfriend; and (2) whether the trial court erred when it concluded that the police had probable cause to arrest him for violating a City of Milwaukee

ordinance against prowling. Because the appellate record currently contains insufficient evidence on whether Eaton had standing to contest the search, and further because Eaton was preempted by the trial court's ruling from presenting evidence to establish his standing to contest the search, this court must reverse the order denying Eaton's motion for postconviction relief and remand the matter for further evidentiary hearings on this issue.[1]

I. BACKGROUND

The following facts were presented at the hearing on Eaton's suppression motion. City of Milwaukee Police Officers Wilson and Hess were driving in their patrol car in the early morning hours of February 5, 1995. They observed another car traveling at "a high rate of speed," which Officer Wilson estimated was twenty miles per hour over the posted speed limit. The officers followed the car, but never initiated the squad car's siren or flashing lights. The car increased its speed and made several turns, eventually pulling to the side of the street and parking. The officers could not identify the car's occupants.

Officer Wilson testified that three black males exited the car, all wearing dark clothing. The officers parked the squad car "less than a half a block" away from the other car. The three males fled, the officers chased them on foot. Then, while Officer Hess continued to chase them, Officer Wilson "circled around" to "make sure" that no one came back to the parked and locked vehicle.

One to two minutes later, Officer Wilson spotted a black male, later identified as Eaton, walking in a yard between two houses and toward the parked car. Officer Wilson testified that he did not recognize Eaton, but asked him, "What are you guys doing in the yards?" Eaton said that he had been visiting a friend named Carol. The officers then walked him over to the squad car, conducted a protective patdown, and handcuffed Eaton. Officer Hess remained with Eaton while Officer Wilson went to verify Eaton's story. Officer Wilson testified that while Eaton was handcuffed, he was being detained and was not free to leave.

[1] This appeal is decided by one judge, pursuant to § 752.31(2), STATS.

Officer Wilson went to the closest house and rang the doorbell. A woman, identified as Carol, talked to him through the upper floor window. She said that Eaton had not been at her house that day. Officer Wilson then returned to the squad and questioned Eaton about the seemingly conflicting stories. Eaton asked to be allowed to go to the door where Carol lived, but the officers refused. Officer Wilson then asked him whether the parked car was his vehicle, and Eaton said it was his girlfriend's car. Officer Wilson then asked him if he had the car's keys. Eaton said, "You'll see." The officers then arrested him for violating the City of Milwaukee's ordinance against prowling. *See* MILWAUKEE CODE OF ORDINANCES 106-31.[2] They searched him, and found car keys in his pocket. They ran a record search on the car and Eaton; the car was not stolen, but Eaton's automobile operator's permit was suspended. The officers then used the keys to open the parked car and search the inside of the vehicle. They recovered a loaded handgun underneath the driver's seat of the car. At that point, the officers took Eaton's statement. He admitted that it was his gun, and that it was the reason the occupants ran from the vehicle. Eaton

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[2] MILWAUKEE CODE OF ORDINANCES 106-31 provides in relevant part:

> **Loitering or Prowling**. Whoever does any of the following within the limits of the city may be fined not more than $500 or, upon default of payment thereof, shall be imprisoned in the house of correction of Milwaukee county for not more than 90 days.
>
> **1. LOITERING**. Loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the officer at the time, would have dispelled the alarm.

was taken into custody and the State charged him with carrying a concealed weapon contrary to § 941.23, STATS.

In a pretrial motion, Eaton moved to suppress both the handgun and his statements to police, arguing that they were fruits of an illegal search and seizure. He argued that the police lacked probable cause to arrest him for violating the prowling ordinance and that the search of the car was an illegal search incident to an arrest. After the hearing, the trial court ruled that the officers did not have probable cause to arrest Eaton for prowling, but the evidence and statements need not be suppressed because Eaton did not have the standing to challenge the search of the automobile. After his suppression motion was denied, Eaton pleaded guilty to the carrying a concealed weapon charge. The trial court sentenced him and the judgment of conviction was entered.

In a postconviction motion, Eaton moved the trial court to reconsider its earlier ruling on his suppression motion and offered to present evidence establishing his standing to challenge the search. The trial court declined, ruling that even assuming that Eaton had standing, the trial court had subsequently reviewed the prowling ordinance and now concluded that the officers did have probable cause to arrest him for prowling. This appeal follows.

II. ANALYSIS

Eaton challenges both the probable cause determination and the trial court's conclusion that he lacked standing to challenge the search. We address each issue separately.

While this court reviews a trial court's findings of historical fact under the "clearly erroneous" standard, whether police had probable cause is a question that this court reviews *de novo*. *See* ***Ornelas v. U.S.,*** 116 S. Ct. 1657, 1651 (1996).

> The probable cause standard is defined in terms of facts and circumstances sufficient to warrant a reasonable police officer in believing that the defendant committed or was committing a crime….
>
> Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.
>
> Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.

State v. Koch, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161, *cert. denied*, 510 U.S. 880 (1993). Here, Eaton was not originally arrested for committing a crime, but for violating a city ordinance. Thus, the probable cause standard is slightly different; that is, an officer "may make a warrantless arrest of a person if the officer has 'probable cause to believe the person was committing … an ordinance violation.'" ***City of Milwaukee v. Nelson,*** 149 Wis.2d 434, 458, 439 N.W.2d 562, 571, *cert. denied*, 493 U.S. 858 (1989) (citation omitted).

Police arrested Eaton without a warrant for violating the City of Milwaukee's ordinance against prowling. In order to violate the ordinance, a suspect must loiter or prowl "in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." *See* MILWAUKEE CODE OF ORDINANCES 106-31. Further, the police must give a suspect the chance to "dispel any alarm which would otherwise be warranted" prior to any warrantless arrest. ***Id.***

At the suppression hearing, the trial court originally concluded that the police did not have probable cause to arrest Eaton for prowling. The court's reasoning was primarily premised on the fact the State had not provided the court with a copy of the municipal ordinance. Thus, the court ruled that although Eaton's actions were suspicious enough for an investigatory stop, they did not rise to the level of probable cause necessary for arrest.

At the postconviction motion hearing, the trial court reversed this earlier ruling on probable cause and, after reviewing the ordinance, concluded that the evidence presented at the suppression hearing supported probable cause to arrest Eaton for prowling. In reaching this conclusion the trial court made several findings of fact that this court concludes are "clearly erroneous."

First, the court found that Officer Wilson identified Eaton as the driver of the car when the car's occupants fled. The record does not support such a finding. Officer Wilson specifically testified that neither of the officers could identify any of the car's occupants while they were driving, or when they fled after parking the car. At most, the record shows Officer Wilson's in-court, *post hoc* identification of Eaton as the car's driver based on information he had obtained after Eaton's arrest. Once more, the record also shows that, prior to the arrest, the officers only knew that three black males wearing dark clothing exited the parked car.

Next, the trial court found that Eaton had fled from the officers. Again, the record does not support such a finding. Officer Wilson testified that three unidentified black males fled the car. There is no evidence in the record that Eaton matched the description of any of these unidentified males.

Nonetheless, based on the undisputed evidentiary record and the trial court's remaining findings of fact, this court concludes there was sufficient evidence to support probable cause to arrest Eaton for violating the prowling ordinance. The police saw Eaton walking between houses in the early morning hours. They stopped him and asked him what he was doing. On hearing his response, the officers checked on his explanation with the woman he stated he was visiting. She told the police that he had not been at her house. At that point, the officers again asked Eaton to explain his activities and he had no response other than to say that he had been at the woman's residence. It was at this point that the police arrested Eaton for prowling. Under the totality of the circumstances known to the officers at the time of Eaton's arrest, this court concludes that the above evidence was sufficient for probable cause to arrest Eaton.

Next, we address the search of the parked car and the seizure of the loaded handgun. The trial court originally ruled that Eaton did not have standing to challenge the search of the car. Then at the postconviction hearing, the trial court ruled that even assuming that Eaton had standing, the police had probable cause to arrest him and thus, the search and seizure was proper. This court is unable to review this issue based on the present evidentiary record.

Standing to challenge a search and seizure is "a matter of substantive Fourth Amendment law, framed in terms of reasonable or legitimate expectation of privacy." ***State v. Dixon,*** 177 Wis.2d 461, 467, 501 N.W.2d 442, 445 (1993).

> The determination of whether an accused has a reasonable or legitimate expectation of privacy in the place invaded depends on (1) whether the individual has by his or her conduct exhibited an actual (subjective) expectation of privacy in the area searched and in the seized item, and (2) whether such an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable.

Id. at 468, 501 N.W.2d at 445.

The trial court originally ruled that the only evidence in the record at the suppression hearing was that Eaton stated the car was owned by his girlfriend and that this minimal evidence did not support of finding of a legitimate or justifiable expectation of privacy. At the postconviction motion hearing, however, the trial court preempted Eaton from presenting evidence to establish standing, by ruling essentially that it was irrelevant because the search and seizure was proper.

Because this court concludes that there are real issues of whether the search of the locked, parked car, seemingly unconnected to Eaton's arrest for prowling was proper, *see* ***Thompson v. State,*** 83 Wis.2d 134, 139, 265 N.W.2d 467, 470-472 (1978) (discussing search of automobiles), the order denying Eaton's postconviction motion must be reversed and remanded for further evidentiary hearings on this issue. Accordingly, on remand the trial court is directed to conduct further evidentiary hearings on whether Eaton had an actual expectation of privacy in the parked car and whether any expectation was reasonable. *See* ***Dixon,*** 177 Wis.2d at 468, 501 N.W.2d at 445; *see also* ***State v. Harris***, Nos. 95-1595-CR and 95-1596-CR, slip op. at 14 (Wis. S. Ct., Dec. 27, 1996) (adopting bright line rule for standing to challenge lawfulness of seizure of occupants of automobile). The trial court shall make specific factual findings on this issue and then determine whether Eaton had standing to contest the search. If the trial court concludes that Eaton had standing, the trial court shall then make specific findings with respect to the search of the parked car and seizure of the handgun, and whether the search was under any of the exceptions to the warrant requirement. *See* ***Thompson***, 83 Wis.2d at 139, 265 N.W.2d at 469. If the trial court determines that the search and seizure was not proper, it shall suppress the evidence and allow Eaton to withdraw his plea.

By the Court. – Judgment affirmed; order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.