

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP98-CR

Cir. Ct. No. 2013CF822

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL LAMAR ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. A jury found Michael Lamar Robinson guilty of possession of between five and fifteen grams of cocaine, with intent to deliver,

contrary to WIS. STAT. § 961.41(1m)(cm)2. (2013-14).¹ The circuit court sentenced Robinson to four years of initial confinement followed by two years of extended supervision, to run consecutively to any other sentence. The sole issue on appeal is the circuit court's denial of Robinson's suppression motion challenging an investigatory stop. We conclude that the stop was constitutional, and therefore we affirm the judgment of conviction and postconviction order.

FACTS

¶2 We set out the facts as testified to by two Milwaukee police officers at the suppression hearing. The circuit court found both officers credible, and the court's factual findings are consistent with the officers' testimony.

¶3 At approximately 12:50 a.m. on June 30, 2012, Officer Jeffrey Krueger, in full uniform, was patrolling in an unmarked squad car with his partner, Officer Brendan Dolan. As the squad car was travelling eastbound on Chambers Street, Krueger looked down an alleyway located between 25th and 26th Streets and saw a vehicle parked at the north end of the alley, in the middle, with its lights off. Krueger testified that he "tr[ies] to watch the alleys" while on patrol because, in his experience, drug dealing often takes place in alleys because they are not the "main streets." Krueger testified that he considered that residential neighborhood to be "violent" and known for shootings, robberies, and dealing of crack cocaine and marijuana.

¹ All references to the Wisconsin Statutes are to the 2013-14 version, because, for purposes of the dispute here, there are no differences that matter between the current version and the version that was in effect when Robinson committed the crime on appeal.

¶4 Krueger testified that he “wanted to see what was going on” because the vehicle “was stopped in the middle of the alley with its lights off.” The officers drove around the block and approached the parked vehicle, a Jeep, from the north. As they approached the vehicle, Krueger saw a woman standing in front of the Jeep and a man standing off to the side, near a second car, a Crown Victoria, that was parked to the left of the Jeep, out of the alleyway. Krueger believed the people to be “loitering” and his suspicions were raised because of the early morning hour.

¶5 Krueger testified that as he and his partner approached, he observed the man standing to the side of the Crown Victoria “make what [he] believed to be ... a discarding motion,” moving his left arm backwards. Krueger told that man to walk over to the Jeep where Officer Dolan was, and the man complied. Krueger also saw another man, sitting behind the driver’s seat of the Crown Victoria, with the door open and his feet out of the car. Krueger recognized that man from prior contacts in the neighborhood. Krueger asked that man to go towards Dolan, and he did so.

¶6 Krueger then approached the man sitting in the driver’s seat of the Crown Victoria, later identified as Robinson. Through the window, Krueger asked Robinson if he lived there. Robinson first replied “yes,” then immediately changed his answer to “no,” but said “[his] people” lived there. Krueger considered Robinson’s changing answers to be “suspicious.”

¶7 Krueger testified that he shined his flashlight into the Crown Victoria because he was concerned that Robinson might be armed. From his vantage point outside the driver’s door, Krueger saw a closed but partially empty liquor bottle next to Robinson’s right leg. Krueger also saw a softball-sized

bundle of empty “baggies” wedged between Robinson’s left thigh and the car door. Krueger testified that in his experience there is a “strong correlation” between plastic bags and illegal drugs, with the bags “used to package drugs for street sales.”

¶8 Krueger then opened the car door and asked Robinson to get out of the car. Robinson “made a quick motion and put his hand in his right pocket.” Concerned that Robinson may be reaching for a firearm, Krueger stepped back, unlatched the “hood” of his gun (apparently a covering or latch on the holster) and yelled at Robinson to put his hands up. Robinson did so, claiming he was just trying to get his cell phone. Robinson refused to exit the car, however, and denied it was his car. After a one-to-two minute struggle between Robinson and the officers, Robinson was removed from the car. After Robinson was out of the car, Krueger walked to the passenger side, used his flashlight to look into the car, and saw a stash of drugs between the two front seats, near the driver’s seat. Police recovered 13.47 grams of crack cocaine, twenty-two Ecstasy pills, and 2.03 grams of marijuana from the car.

¶9 Officer Dolan also testified at the suppression hearing. Dolan stated that when the squad’s spot lamp lit up the scene, the woman standing near the Jeep “began to look around ... wildly ... as if she was looking for somewhere to flee.” When Dolan got out of the squad car, he saw a roll of money in the woman’s right hand. Because they were in an alley in a high-crime and high-drug area, Dolan believed the woman to be “purchasing street-level narcotics.” The woman told Dolan she was “paying her car note” to a local used-car dealership.

¶10 The circuit court concluded that the officers acted reasonably throughout the incident. The court ruled that the officers “clearly had a basis to

approach the vehicle in ... an alleyway in a residential area, 12:50 at night. The car's not running. They don't know what's going on [and] [t]hey see some individuals in the alleyway." The court acknowledged that the behavior "could have been ... totally legal ... but the officers didn't know" and it was "very reasonable for the officers to drive around, pull behind the vehicle, [and] find out what's going on." The court noted that the money in the woman's hand and her "look[ing] like she wanted to take off" reasonably added to the officers' suspicions.

¶11 The circuit court further ruled that Krueger acted reasonably when he used a flashlight to look inside the car, to "make sure there are no firearms," in light of the time of day and being in a high-crime area. From that point, the baggies were in plain view of Krueger. The court concluded that Krueger acted reasonably when he opened the car door and asked Robinson to get out, in light of the "large amount of baggies ... along with the money in the woman's hand, along with the actions of the person throwing something in the alley."

STANDARD OF REVIEW

¶12 When reviewing a circuit court's denial of a motion to suppress evidence, this court will uphold the circuit court's findings of fact unless they are clearly erroneous. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. Applying the constitutional standards to the facts is a question of law, which is subject to de novo review. *See State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

DISCUSSION

¶13 Robinson did not testify and he offered no witnesses to contradict the officers' testimony. As stated above, the circuit court expressly found the officers to be credible. The circuit court's factual findings, which recounted the officers' testimony, are supported by the record and must be upheld. See *State v. Bailey*, 2009 WI App 140, ¶33, 321 Wis. 2d 350, 773 N.W.2d 488. We next consider whether those facts meet constitutional standards.

¶14 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution both require that all searches and seizures be reasonable. *State v. Ziedonis*, 2005 WI App 249, ¶13, 287 Wis. 2d 831, 707 N.W.2d 565. "The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present." *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990) (quoted source omitted).

¶15 In *Terry v. Ohio*, 392 U.S. 1, 22 (1968), the Supreme Court held that "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." The police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. The Court provided an objective standard which the facts must be measured against: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22 (quoted source omitted).

¶16 An investigatory stop is constitutional if a law enforcement officer, in light of his or her training and experience, has a reasonable suspicion that an unlawful activity has been committed, is being committed, or is about to be committed. *See State v. Young*, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. The officer must have more than an “inchoate and unparticularized suspicion or ‘hunch.’” *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoted source omitted). The standard of reasonable suspicion is met when “those facts known to the officer at the time of the stop [are] taken together with any rational inferences, and considered under the totality of the circumstances.” *State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305. An inquiry into whether an investigatory stop is supported by reasonable suspicion is “fact intensive.” *State v. Miller*, 2012 WI 61, ¶36, 341 Wis. 2d 307, 815 N.W.2d 349.

¶17 The test is objective and is rooted in common sense. *See State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). We must strike a balance between individual privacy and the societal interest in effective crime prevention and detection. *Id.* “The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot.” *Id.* at 57. We look at the totality of the facts and the reasonable inferences that can be drawn about the cumulative effect of the accumulated “building blocks of fact.” *Id.* at 58. “[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.” *Id.* at 60.

¶18 With those standards in mind, we turn to the investigatory stop in this case. Officers Krueger and Dolan were patrolling an area where, in their experience, drug dealing was common. Time of day and the officers' perception, rooted in their experience and training, that an area is "high-crime" are relevant considerations. See *State v. Morgan*, 197 Wis. 2d 200, 211-14, 539 N.W.2d 887 (1995). The officers' decision to stop and investigate the vehicle, parked in the middle of an alley, a common place for drug sales, in the early morning hours, in order to dispel or confirm their suspicions was reasonable. See *State v. Amos*, 220 Wis. 2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998) (police entitled to investigate a reasonable suspicion of criminal activity even if criminal activity was not the only explanation for a defendant's actions).

¶19 When the officers got closer to the parked Jeep, they observed a second parked car, together with persons standing outside. They saw one of those persons make a motion as if he were throwing something away, and another person holding a roll of money. Both observations raised the officers' suspicions that criminal activity was afoot.

¶20 These additional facts distinguish this case from *State v. Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App 1997), on which Robinson relies. In *Young*, this court held that an investigatory stop was unconstitutional when police observed a brief meeting between two persons on a sidewalk in the early afternoon in an area known for drug sales and an officer testified that, in his experience, drug sales in that neighborhood took place on the street and involved brief meetings. *Id.* at 433. This court noted that the conduct in question "describe[d] large numbers of innocent persons in the neighborhood" and, thus, the investigatory stop was unreasonable. *Id.* Here, Officers Krueger and Dolan observed additional

conduct consistent with the sale of drugs.² Further investigation, in the form of questioning Robinson, was reasonable.

¶21 That brings Officer Krueger to his interaction with Robinson and his looking into the car, where the plastic baggies and drugs were visible. Courts have recognized that “drug dealers and weapons go hand in hand.” *Richardson*, 156 Wis. 2d at 144. During an investigative stop, an officer may conduct a pat-down search of an individual when the officer has a reasonable suspicion that the individual may be armed. *Morgan*, 197 Wis. 2d at 209-10. In this case, the level of intrusion is much less than a pat-down of a person. Here, we are concerned with an officer’s looking into a vehicle when the building blocks of suspicion have accumulated throughout the incident. We conclude that Krueger had reasonable suspicion to look into the vehicle.³

¶22 When Krueger looked into the car, he saw a bundle of plastic baggies between Robinson and the car door. The plain-view doctrine applies to Krueger’s observations.

[F]or the plain-view doctrine to apply, the evidence must be in plain view, the officer must have a lawful right of access to the object itself, and the object’s incriminating character must be immediately apparent. To show that the incriminating character of an item was immediately apparent, police must show they had probable cause to believe the item in plain view was evidence or contraband.

² When considering whether a stop is reasonable, the inquiry looks to the collective knowledge of the officers. *Johnson v. State*, 75 Wis. 2d 344, 350, 249 N.W.2d 593 (1977).

³ Krueger was entitled to use a flashlight to look into the interior of the car. *Warrix v. State*, 50 Wis. 2d 368, 374, 184 N.W.2d 189 (1971).

State v. Guy, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992) (citations omitted). The plastic baggies were in plain view and Krueger had a right to look into the car. Krueger testified, from his training and experience, that plastic baggies are often used for packaging in street-level drug sales. The three-element plain-view test was met and Krueger had probable cause to seize the evidence. The circuit court properly denied Robinson's suppression motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

