COURT OF APPEALS DECISION DATED AND FILED

July 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2004AP1299-CR

Cir. Ct. No. 2003CF471

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM R. JUNNOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 WEDEMEYER, P.J. William R. Junnor appeals from a judgment entered after he pled guilty to one count of possession of a controlled substance (heroin), contrary to WIS. STAT. § 961.41(3g)(a)2. (2003-04). He claims the trial court erred in denying his motion seeking to suppress evidence, which he alleged

was discovered during an unlawful investigatory stop. Because the trial court did not err in denying the suppression motion, we affirm.

BACKGROUND

¶2 On January 22, 2003, two City of Milwaukee police officers knocked at the front door of 503 West Chambers Street, while investigating a complaint of drug activity. Officer Michael Washington remained on the other side of the house and observed Junnor walking away from the house. Washington approached Junnor and asked him if he lived in the residence. Junnor answered "no." Washington then asked Junnor whether he had anything in his possession that he should not have. Junnor answered "no." Washington then asked Junnor if he could check (by conducting a pat-down search). Junnor responded "go ahead." During the pat-down, Washington discovered a metal pipe in Junnor's pocket. Washington recovered the crack pipe and arrested Junnor for possession of drug paraphernalia.

¶3 Later, at the police station during a custodial search, the officers discovered a package of heroin on Junnor's person. Junnor was subsequently charged with one count of possession of a controlled substance—heroin. He filed a motion seeking to suppress the evidence based on his claim that the stop and search violated his Fourth Amendment rights. The trial court conducted a hearing, during which testimony was taken from Junnor and Officer Washington. The two offered very different accounts of the factual circumstances surrounding the interaction between the two on January 22, 2003. The trial court found that Junnor's version was not credible, but that Washington's account was credible. Based on these findings, the trial court ruled that Junnor voluntarily consented to the pat-down search, which led to the discovery of the crack pipe and his arrest for

possession. The trial court ruled that the heroin was discovered pursuant to a lawful arrest and therefore there was no violation of the Fourth Amendment and no reason to suppress the evidence discovered. Junnor then pled guilty. He now appeals.

DISCUSSION

¶4 In reviewing a trial court's decision on a suppression motion, we apply a mixed standard of review. We will uphold the trial court's factual findings unless they are clearly erroneous, but will independently evaluate those facts under the constitutional standard to determine whether the search violated the Fourth Amendment. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891.

¶5 Junnor first claims that there was no reasonable suspicion to justify the investigatory stop conducted by Officer Washington. He argues that he was seized without any basis. We reject Junnor's claims.

¶6 In making this argument, Junnor ignores the credibility findings made by the trial court. The trial court found that Junnor's version of the facts did not make sense and therefore was not credible. The trial court found that Washington's accounting of the interaction was what actually took place. In Washington's version, the police-citizen contact was a consensual encounter and not a Fourth Amendment seizure. In ***United States v. Mendenhall***, 446 U.S. 544 (1980), the Supreme Court set forth guidelines for distinguishing between a consensual encounter and a seizure:

> We conclude that 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. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be

> 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.

Id. at 554-55 (footnote omitted). Relying on ***Mendenhall***, Junnor contends three of the four criteria indicating that a seizure occurred were present in his case. He argues that he was threatened by the presence of officers, there was physical touching of his person, and that Washington's language and tone of voice indicated compliance was compelled. Junnor's argument, however, is based on his version of the encounter, which the trial court rejected. He offers this court no persuasive reason to set aside the credibility determinations made by the trial court. *See* ***Posnanski v. City of West Allis***, 61 Wis. 2d 461, 465-66, 213 N.W.2d 51 (1973) (trial court is "ultimate arbiter of the credibility of witnesses" and its findings will not be disturbed on appeal unless they are against the great weight and clear preponderance of the evidence).

¶7 Applying Washington's version of the encounter, under the ***Mendenhall*** test, we must conclude that the trial court's decision was correct. Officer Washington testified that he did not stop Junnor. He simply asked him a question and Junnor stopped on his own. Washington indicated he never touched Junnor prior to the time Junnor consented to the pat-down search. Washington stated that Junnor did not attempt to walk away and that Washington's tone and language was conversational. In addition, Washington indicated that only one other officer was present, located behind Washington, during the encounter with Junnor. Based on this accounting, there is but one logical conclusion and that is, the interaction did not constitute a seizure. There was no visible display of weapons, no threats, no touching and no show of force. Accordingly, Officer

Washington's initial contact with Junnor was a consensual encounter and not a seizure under the Fourth Amendment.

¶8 Junnor's second contention is that the officers coerced him into consenting to Washington's request to conduct a pat-down search. We are not persuaded. The record reflects that Washington asked Junnor whether he could check Junnor to see if he was carrying anything he should not be carrying. Junnor responded "go ahead." The court found Washington's testimony on this point to be a credible accounting:

> Here the Court accepts the testimony of Officer Washington as more credible, that he began a pat-down in response to the consent to search, felt the pipe, asked the defendant what it was, and the defendant responded that it was a pipe. It felt like a metal pipe to the officer, and was a metal crack pipe. And in response that it was a pipe, the officer reasonably believed that it was a crack pipe, which then justified probable cause to arrest for possession of drug paraphernalia and the drugs were found incident to that.
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> ….
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> So I find the officer's testimony credible under the totality of the circumstances that the defendant did consent to the search, that there was a pat-down, the pipe was found, following after that the statement that it was a crack pipe by the defendant, and there was reasonable, probable cause to arrest for possession of drug paraphernalia warranting the arrest and subsequent search.

¶9 Thus, the trial court found that Junnor consented to the pat-down search. Consent is an exception to the warrant requirement of the Fourth Amendment. When a defendant voluntarily consents to a search, there is no violation of the Fourth Amendment. ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). Whether a consent was voluntary involves a question of historical fact. A trial court's findings of historical fact will be upheld on appeal

unless they are clearly erroneous. ***State v. Vorburger***, 2002 WI 105, ¶88, 255 Wis. 2d 537, 648 N.W.2d 829. Whether constitutional standards have been satisfied based on those facts, however, will be independently determined. ***Id.***

¶10 The test for whether a defendant voluntarily consented to the search is whether, based on the totality of the circumstances, the consent was given free of duress or coercion. ***Phillips***, 218 Wis. 2d at 197-98. In applying the test here, we conclude that Junnor voluntarily consented to the pat-down search. The trial court's findings as to historical fact are not against the great weight of the evidence and, therefore, must be accepted. The trial court found Washington's version of events more credible. In applying those facts to the applicable law, we must uphold the trial court's ruling that consent was voluntarily given. Washington did not coerce, deceive, or trick Junnor into allowing the pat-down search. There was no credible evidence demonstrating that the police threatened, physically intimidated, or punished Junnor. Accordingly, there is no basis to reverse the trial court's determination that Junnor voluntarily consented to the pat-down search.

¶11 Based on the foregoing, we conclude that the trial court did not err in denying Junnor's motion to suppress.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶12 KESSLER, J. (*dissenting*). The State argues that Officer Washington's initial contact with Junnor was a consensual encounter and not a seizure that would trigger Fourth Amendment protections. Further, the State asserts that the pat down was legal because Junnor gave his consent; the State offers no other legal basis to justify the warrantless search. Because I conclude that Junnor's consent was not freely and voluntarily given, I would reverse.

¶13 In ***State v. Vorburger***, 2002 WI 105, 255 Wis. 2d 537, 648 N.W.2d 829, our supreme court summarized the standard of review applicable in suppression cases:

> The constitutional validity of a search and seizure raises a question of constitutional fact. When a defendant moves to suppress evidence, the circuit court considers the evidence, makes findings of evidentiary or historical fact, and then resolves the issue by applying constitutional principles to those historical facts. We review a circuit court's denial of a motion to suppress in two steps. We examine the circuit court's findings of historical fact under the clearly erroneous standard, and then review de novo the application of constitutional principles to those facts.

Id., ¶32 (internal quotation marks and citations omitted).

¶14 I agree with the Majority that the trial court's findings of historical facts are not clearly erroneous and, therefore, must be accepted. *See* ***id.*** However, I disagree with the Majority's conclusion that, under the applicable constitutional principles, Junnor voluntarily consented to the pat down of his person.

¶15 The test for voluntariness turns on whether, considering the totality of the circumstances, the defendant's consent was given free of duress or coercion,

either express or implied. ***State v. Phillips***, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). Where consent is relied upon prior to a warrantless search, the State must prove "'by clear and positive evidence that the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied.'" ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993) (citation omitted). I conclude that, under the established facts of this case, the State has not met this burden.

¶16 According to Washington's testimony, he and three other officers were dispatched to a certain house to conduct a "knock and talk" investigation concerning a complaint of drug activity. Two of the officers went to the door and knocked, while Washington remained on the other side of the house. Washington saw Junnor, ten feet away, walking away from the house toward the sidewalk. However, Washington did not see Junnor exit the house and did not know if Junnor had been in the house. As Washington started walking toward Junnor, a detective followed behind and eventually reached Junnor as well.

¶17 Washington testified that less than one minute passed from the time he saw Junnor and he pulled the pipe from Junnor's pocket. In less than one minute, Washington did all of the following:

- Noticed Junnor walking away from the house
- Moved to the public sidewalk
- Called to Junnor, asking if he lived in the house
- Was told "no" by Junnor
- Moved quickly enough to catch up with Junnor, who by then had stopped walking and turned to face the officer
- Asked Junnor if "he had anything on him he shouldn't"

- Was again told “no” by Junnor
- Asked Junnor “Do you mind if I check you?”
- Was told “go ahead”
- Did a pat down of Junnor
- Detected a metal object in Junnor’s pants pocket
- Asked Junnor what the object was
- Was told it was a pipe
- Removed the pipe from Junnor’s pants pocket

¶18 At the time of this encounter, Washington was in uniform and wore a gun, a baton, handcuffs, and chemical spray. The uniform and the professional equipment are not for the purpose of engaging in friendly banter with citizens; these professional items are for the purpose of controlling conduct and compelling compliance with lawful orders. Like military uniforms, they have an intimidating effect.

¶19 In the context here, where an armed police officer and a detective pursue, then stand in close proximity to the defendant, they give the defendant much less than sixty seconds in which to consider a request of enormous constitutional significance, I conclude, as a matter of law, that the facts do not establish by clear and convincing evidence that the defendant voluntarily consented to the pat down of his person. Prior to and during the encounter, Junnor did nothing but walk on a public sidewalk. Everything was moving quickly. A citizen, as to whom the officer has no reasonable articulable suspicion of misconduct or personal danger, should be given reasonable time to consider his choices before a consent can be voluntary in the constitutional sense. Because so little time passed between the officer noticing Junnor walking and the time the officer asked to conduct the search, there was no meaningful opportunity for

Junnor to consider his choices. I believe the Constitution requires at least that opportunity. I would suppress the evidence obtained in the pat down.