COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP568-CR **Cir. Ct. No. 2013CF3398**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TARREL T. ROBERTSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA and DANIEL L. KONKOL, Judges. *Judgment affirmed in part, reversed in part; order reversed and cause remanded for further proceedings*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Tarrel T. Robertson appeals the judgment entered on his guilty plea to possession of a firearm by a felon as a repeater. *See* WIS. STAT. §§ 941.29(2)(a), 939.62(1)(b) (2013-14).[1] He argues that the circuit court erred in denying his motion to suppress. Robertson also appeals the order denying his postconviction motion to vacate the DNA surcharge on grounds that it constituted an *ex post facto* punishment.[2] We uphold the circuit court's order denying his motion to suppress and, therefore, affirm the judgment of conviction in part. However, we reverse the portion of the judgment and postconviction order relating to the DNA surcharge and remand with directions that the circuit court apply the surcharge statute that was in effect when Robertson committed the crime in this case.

I. BACKGROUND

¶2 Before pleading guilty, Robertson and his co-defendant, Anthony Moore, moved to suppress evidence obtained following a search of a vehicle they were sitting in. Robertson argued that evidence was obtained as the result of an illegal seizure.

¶3 Testimony from the suppression hearing revealed that Robertson initially was seated in the third row of a van parked on a residential Milwaukee street at approximately 9:30 p.m. on a summer evening. Officer Scott Freiburger

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. This appeal was previously held in abeyance pending a decision in ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786. The hold is now lifted.

[2] The Honorable Clare L. Fiorenza presided at the suppression hearing and entered the judgment of conviction. The Honorable Daniel L. Konkol denied Robertson's motion for postconviction relief.

testified that when he and his partner drove past the van, he saw a man in the front passenger seat of the van look "startled" and make an unknown movement to his left. Moore was the front-seat passenger. Officer Freiburger also testified that he noticed that the van's engine was running and that Moore was not wearing a seatbelt. He and his partner then parked their squad car and approached the van. As they walked up to the vehicle, the van's passenger window was open and Officer Freiburger started talking to Moore. While the two were talking, Moore repeatedly put his hand in his left-front pocket. Meanwhile, Moore moved his right hand toward the door handle several times, which led Officer Freiburger to believe he might attempt to flee. Once Officer Freiburger and his partner realized there were five people in the van, they called for back-up.

¶4 When another squad car arrived at the scene, Moore began rolling up the window, despite being told to stop. Officer Freiburger said that he then placed his hand in the window, at which point Moore turned his body to the left and starting moving from the seat. As Officer Freiburger grabbed Moore's sweatshirt, his partner, Officer Joel Susler, saw a gun on the seat where Moore had been sitting. Officer Susler testified that when he yelled out "banger," Moore grabbed the gun and pointed it at Officer Freiburger.[3] According to Officer Susler, as this was happening, Robertson reached forward, grabbing Moore and pulling him backward. Moore fell back onto the seat and dropped the gun.

[3] "Banger" is street slang for a firearm.

¶5 The officers then removed all of the people from inside the van and searched it. They found three guns.[4]

¶6 The circuit court denied the suppression motion and Robertson pled guilty to being a felon in possession of a firearm as a repeater. The circuit court sentenced him to three years in prison followed by five years of extended supervision, consecutive to any other sentence.

¶7 Robertson subsequently filed a postconviction motion arguing that the imposition of the mandatory $250 DNA surcharge constituted an *ex post facto* violation. The circuit court denied the motion.

II. DISCUSSION

A. *Motion to Suppress*

¶8 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. Our supreme court has recognized two types of seizures—investigatory stops and arrests. ***State v. Young***, 2006 WI 98, ¶¶20, 22, 294 Wis. 2d 1, 717 N.W.2d 729. An investigatory stop, which Robertson argues is at issue here, must be supported by reasonable suspicion. *See* ***id.***, ¶20.

¶9 "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. An appellate court "will uphold the circuit court's findings of fact

[4] Two other witnesses testified during the suppression hearing; however, the circuit court found that portions of their testimony did not make sense, were not credible, or were inconsistent in relating the specifics of some details but not others.

unless they are clearly erroneous[.]" ***Id.*** "[T]he application of constitutional principles to those facts presents a question of law subject to *de novo* review." ***Id.*** "The same standard of review applies to a motion to suppress." ***Id.***

¶10 We first consider when Robertson was "seized" in a constitutional sense. *See* ***Young***, 294 Wis. 2d 1, ¶23 ("The moment of 'seizure' is critical for two reasons: (1) it determines when Fourth Amendment and [a]rticle I, [s]ection 11 protections become applicable; and (2) it limits the facts we may consider in evaluating whether [the officer] had reasonable suspicion to stop [the defendant.]"). The United States Supreme Court has set forth the following test for determining whether a particular police-citizen encounter constitutes a seizure for purposes of the Fourth Amendment:

> [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 [or she] 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. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

United States v. Mendenhall, 446 U.S. 544, 554-55 (1980) (citations and footnote omitted). Additionally, questioning by law enforcement officers alone is unlikely to effectuate a seizure. ***Immigration and Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984).

¶11 Robertson submits that the men in the van were stopped and seized for purposes of the Fourth Amendment when the officers parked their squad car in

the middle of the street, blocking traffic, and the officers approached both the driver and passenger side of the van. He argues that the circuit court's factual finding that the squad car "did not block the vehicle" was clearly erroneous.

¶12 Here, the circuit court held that Robertson was not seized when the officers walked up to the van and questioned the occupants. The circuit court found the testimony of both officers credible. Additionally, the circuit court found: "Officer Freiburger stopped and—the squad in the street, did not put on his lights, did not put on his siren. He did not block the vehicle, and both officers got out." The circuit court went on to find that the officers walked up to the van, asked some questions, and asked for identification. The circuit court held that the seizure occurred two or three minutes after that, when the officers, in response to Moore's actions, drew their weapons.

¶13 The circuit court's finding that the squad car did not block the van is supported by Officer Freiburger's testimony that the squad car did not "cut off" the van and by the diagram he drew that showed the squad car in the center of the road and the van parked on the left side of the road. Against this backdrop, we cannot conclude that the circuit court's finding was clearly erroneous. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶¶11-12, 290 Wis. 2d 264, 714 N.W.2d 530 (Findings of fact are clearly erroneous when they are not supported by the record or when "the finding is against the great weight and clear preponderance of the evidence.").

¶14 Alternatively, Robertson argues the men were seized when police parked their squad car in front of the van and surrounded it. As the State concedes, if this characterization of the facts was accurate, it would agree that a

stop had occurred. The problem for Robertson is that this is not an accurate characterization.

¶15 When asked where he stopped the squad car in relation to the van, Officer Freiburger testified: "It was in the middle of the street to the right of the van and it was ahead of the van by the time I stopped it." The diagram drawn by Officer Freiburger shows the squad car somewhat ahead of the van but in a different lane. Officer Freiburger acknowledged that the squad car would have been "blocking the road." Officer Susler, the passenger in the squad car, said he was "not sure if [they] were blocking traffic." When shown the diagram drawn by Officer Freiburger, Officer Susler testified: "I guess, maybe a vehicle that [sic] could have went around us to the right, according to the diagram."

¶16 In his reply brief, Robertson "acknowledges that the record does not reflect that police angled their squad car such that it was partially or fully in the left parking area in front of the van."[5] Additionally, the testimony presented does not show that the police "surrounded" the van. As described by Robertson, the two officers approached the driver and passenger sides of the van. Neither officer stood in front of the car.

¶17 Robertson contrasts the facts in his case with our supreme court's decision in ***Vogt*** where the court concluded that an officer's knock on a car window and the attendant circumstances did not result in a seizure. *See* ***id.***, 356

[5] However, Robertson goes on to suggest that that there may have been something in front of the van in the left parking lane, which would have prevented the van from leaving. We agree with the State that if something prevented the van from driving straight ahead, it was Robertson's burden to produce that evidence. *See* ***State v. Noble***, 2002 WI 64, ¶19, 253 Wis. 2d 206, 646 N.W.2d 38 ("On a motion to suppress, the defendant generally bears the burden of producing evidence to support a constitutional violation.").

Wis. 2d 343, ¶53. In doing so, Robertson makes too much of the fact that in ***Vogt***, the officer's car was *behind* the defendant's in such a way that the defendant still could have driven away. According to Robertson, his case is different because "the police parked their squad car in the middle of the street in *front* of the van." As the State points out, it was not precise placement of the squad car that was critical; rather, what was important in ***Vogt*** was that "there was an avenue by which Vogt could have actually left." *See* ***id.***, ¶42. Just as Vogt could have driven away, here, the circuit found that the squad car was not blocking the van.

¶18 Robertson was not seized when the officers initially approached the van and questioned its occupants. We therefore uphold the circuit court's denial of Robertson's motion to suppress and affirm the judgment of conviction in part.

B. *DNA Surcharge*

¶19 The underlying crime occurred in 2013 and Robertson was sentenced in 2014. When Robertson committed the offense, the DNA surcharge was discretionary with the court. *See* WIS. STAT. § 973.046(1g) (2011-12). In June 2013, the legislature made the DNA surcharge mandatory at sentencing following conviction for all felonies. *See* 2013 Wis. Act 20, §§ 2353-55. The change was effective for all sentences imposed, rather than crimes committed, after January 1, 2014. *See* ***id.***, § 9426(1)(am).

¶20 When the circuit court sentenced Robertson in 2014, it imposed the mandatory $250 DNA surcharge under WIS. STAT. § 973.046(1r)(a), the law in effect at the time of sentencing. Robertson filed a postconviction motion to vacate the surcharge, arguing that it was an *ex post facto* violation because imposition of the DNA surcharge was discretionary when he committed the offense and because

he had been ordered to provide a DNA sample and pay a DNA surcharge in a 2009 case.[6]

¶21 We conclude that resolution of this issue is governed by our recent decision in ***State v. Williams***, 2017 WI App 46, __ Wis. 2d __, __ N.W.2d __, *petition for review pending* (2016AP883-CR). In that case, the defendant raised an *ex post facto* challenge to the imposition of the DNA surcharge in a single felony case where he was, in another case, previously ordered to provide a sample and pay the DNA surcharge. *See* ***id.***, ¶¶25-26. The defendant committed the felony in 2013 and was sentenced after January 1, 2014. ***Id.***, ¶25. In that context, we likened the imposition of the mandatory surcharge to a fine and concluded that it violated constitutional prohibitions against *ex post facto* laws. ***Id.***, ¶26. Consequently, we remanded the case with directions that the circuit court apply the DNA surcharge statute that was in effect when the defendant committed the crime. *See* ***id.***, ¶27.

¶22 Because Robertson is similarly situated to the defendant in ***Williams***, we will afford him the same relief. Accordingly, we reverse the portion of the judgment and postconviction order relating to the DNA surcharge and remand for further proceedings. On remand, the circuit court shall apply the DNA surcharge statute that was in effect when Robertson committed his crime. Under that statute, the circuit court exercises discretion to determine whether Robertson should be assessed a DNA surcharge of $250. *See* WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393.

[6] In deciding Robertson's motion, the circuit court noted that CCAP (Consolidated Court Automation Programs) records reflected a $0 balance for the DNA surcharge imposed in Robertson's 2009 case. It, therefore, presumed that the surcharge was paid.

By the Court.—Judgment affirmed in part, reversed in part; order reversed and cause remanded for further proceedings.

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