COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1786-CR **Cir. Ct. No. 2003CF104**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES L. KURTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. James L. Kurtz appeals from a judgment of conviction for possession with intent to deliver one to five grams of cocaine,

contrary to WIS. STAT. § 961.41(1m)(cm)1r (2003-04).[1] He contends the trial court erred in denying his motion to suppress certain evidence that he asserts was obtained by way of an illegal stop and arrest. We conclude the trial court properly denied the motion to suppress, because law enforcement officers had reasonable suspicion to stop Kurtz and the officers' actions during the stop did not transform the stop into an arrest. We therefore affirm.

Background

¶2 Wood County sheriff's department investigator Mark Neuman received tips from two informants linking a Scott E. Fuller to drug activity. A "confidential" informant took Neuman to Fuller's residence and told him that it was the site of a large Fourth of July party frequented by drug users at which drugs were used. Neuman averred that previously this informant had provided reliable information in other drug cases.

¶3 A second tip came from a citizen informant[2] who told Neuman that Kurtz and Fuller were involved in trafficking drugs to the area. Neuman knew about Fuller from the confidential informant, but this was the first that he had heard about Kurtz. Two weeks later, the informant told Neuman that Kurtz and Fuller were gathering money and getting ready to make a trip.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Investigator Neuman described the difference between "confidential" and "citizen" informants: "[A] confidential informant … is typically somebody that is working for us, either working off charges or getting consideration for charges …. [A] citizen informant … [is] just a normal citizen who will provide information to us about X—any number of things for concern of what's going on in the community."

¶4 In three or four additional calls, the informant provided more details to Neuman, explaining that the men would be making a trip to either the southern part of the state or Illinois to pick up a large quantity of cocaine on March 20, 2003, and would be traveling in a green or bluish-colored, small, two-door Chevrolet with a white stripe owned by a man named Buckley. Officers confirmed that the vehicle was registered to a Richard Buckley. The informant told Neuman that on previous trips Kurtz and Fuller had taken State Highway 80 south out of the area to the Interstate and would return with between five and eighteen ounces of cocaine. The informant also stated that Fuller had a violent temper but said nothing about Kurtz's temperament. The informant did not indicate whether Kurtz or Fuller carried firearms.

¶5 On the morning of March 20, investigators with the Wood County sheriff's department began surveillance of Kurtz and Fuller. They observed two men who fit the informants' descriptions of Kurtz and Fuller checking over a teal-colored Chevy with a white stripe in a manner consistent with preparing for a trip. They then observed the vehicle travel southbound on State Highway 80.

¶6 That evening, Neuman briefed the officers who would be a part of the stop. Neuman told these officers that Kurtz had been arrested for something akin to substantial battery, and Fuller had once been interviewed about a substantial battery incident. Neuman and another officer waited in an unmarked vehicle along Highway 80. Neuman testified that it was raining and foggy. At approximately 7 p.m., Neuman saw the teal Chevy traveling northbound. Neuman began to follow the vehicle and radioed Officer Ray Starks, who was stationed in a marked squad car up the road.

¶7 Starks pulled behind the defendants' vehicle and made the stop. Four officers, in full tactical gear[3] and with guns drawn, joined by Starks and Neuman, approached the vehicle. Deputy Todd Johnson was responsible for removing Kurtz from the passenger's side, and Deputy Jayme Shroda was assigned to extract Fuller from the driver's side of the vehicle. Shroda testified that they ordered the men to raise their hands and exit the vehicle several times. Johnson and Shroda testified that they could not see Kurtz's or Fuller's hands, and that the suspects did not immediately open the doors of the vehicle.

¶8 Neuman testified that thirty seconds to a minute passed before Johnson opened the passenger's side door and pulled Kurtz from the vehicle. Johnson testified that Kurtz did not resist as he pulled Kurtz from the vehicle, took him to the ground and handcuffed him. Johnson then performed a pat-down frisk of Kurtz, during which 217.4 grams of cocaine were discovered. Kurtz and Fuller each pled no contest to possession. Kurtz appeals.

Standard of Review

¶9 In reviewing a denial of a motion to suppress evidence, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Knight***, 2000 WI App 16, ¶10, 232 Wis. 2d 305, 606 N.W.2d 291. In this case, the issue is whether evidence against Kurtz should be suppressed as the fruit of an unreasonable search and seizure contrary to the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution.[4]

[3] Investigator Neuman averred that the officers' full tactical uniform included a heavy vest, a ballistic helmet, knee pads and gloves.

[4] We construe article I, section 11 of the Wisconsin Constitution to provide the same quantum of protection from unreasonable searches and seizures as the Fourth (continued)

"Whether those facts satisfy the constitutional requirement of reasonableness is a question of law, which [we] review[] de novo." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (1997).

Analysis

Reasonable Suspicion for Investigative Stop

¶10 Kurtz contends that officers lacked a sufficient factual basis on which to justify the investigative stop. He asserts the information provided by the two informants was too generalized and not suggestive of criminal behavior. A law enforcement officer may lawfully stop an individual if he or she has reasonable suspicion, based upon the officer's experience, "that criminal activity may be afoot." ***Terry v. Ohio***, 392 U.S. 1, 30 (1968). Wisconsin codified the ***Terry*** stop standard in WIS. STAT. § 968.24.[5] We determine whether a stop was lawful in light of ***Terry*** and its progeny. ***State v. Waldner,*** 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). To determine whether a ***Terry*** stop was conducted with reasonable suspicion, we consider the totality of the circumstances. ***Alabama v.***

Amendment to the federal constitution. *See* ***State v. Griffith***, 2000 WI 72, ¶24 n.10, 236 Wis. 2d 48, 613 N.W.2d 72 ("[O]ur holding also applies to art. 1, § 11, because this court consistently follows the United States Supreme Court's interpretation of the Fourth Amendment when construing the related provisions of Wisconsin's constitution.").

[5] WISCONSIN STAT. § 968.24 reads:

> TEMPORARY QUESTIONING WITHOUT ARREST. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

White, 496 U.S. 325, 328 (1990). Under this standard, both the content of the information and its reliability factor into the calculus. ***U.S. v. Cortez***, 449 U.S. 411, 417-18 (1981). The standard is one of reasonableness, and "[t]he 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).

¶11 Here, information provided by a confidential informant and a citizen informant supported the stop. When an anonymous tip is corroborated by independent police work, the tip may provide sufficient indicia of reliability to meet the standard for reasonable suspicion. ***Florida v. J.L.***, 529 U.S. 266, 270 (2000). Assessing whether a tip is reliable requires this court to give due weight to the informant's veracity and the informant's basis of knowledge, with the totality of the circumstances considered. ***State v. Rutzinksi***, 2001 WI 22, ¶18, 241 Wis. 2d 729, 623 N.W.2d 516. "[A] deficiency in one [consideration] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." ***Illinois v. Gates***, 462 U.S. 213, 233 (1983). Additionally, indicia of reliability may be enhanced if the informant is exposed to the possibility of arrest for providing false information. ***Adams v. Williams***, 407 U.S. 143, 147 (1972). Thus, with sufficient corroboration with respect to reliability, informant tips may provide a basis for reasonable suspicion.

¶12 The information the informants provided was corroborated by independent police work, giving the information indicia of reliability. The citizen informant told police that Kurtz and Fuller had been trafficking drugs and were planning to make a drug trafficking trip on the morning of March 20 to the southern part of Wisconsin or Illinois. Additionally, the citizen informant

informed law enforcement officers that Kurtz and Fuller would be traveling in a small, teal, two-door Chevy with a white stripe. This information, coupled with information provided by the confidential informant indicating where Fuller lived and that large drug parties were hosted at his house on the Fourth of July, was specific in detail. Officers corroborated much of this information prior to the stop. On the morning of March 20, officers observed two individuals checking a parked teal-colored Chevy with a white stripe in a manner consistent with taking a trip. In addition, the officers saw the vehicle traveling southbound on Highway 80. Lastly, officers noted that the description of Kurtz and Fuller provided by the informants matched the appearance of the men under surveillance.

¶13 Kurtz asserts that despite corroboration of nearly all of the information provided to officers, investigators did not corroborate any details of illegality and therefore the evidence could not support a reasonable suspicion of criminal activity. We disagree. The Supreme Court has concluded that if "an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." ***White***, 496 U.S. at 331. Our supreme court explained that "the corroborated actions of the suspect, as viewed by police acting on an anonymous tip, need not be inherently suspicious or criminal in and of themselves … to supply the reasonable suspicion that crime is afoot and to justify the stop." ***Richardson***, 156 Wis. 2d at 142. Here, the information informants gave to law enforcement officers turned out to be mostly correct and corroborated by police. Thus, law enforcement officers sufficiently corroborated the informants' information to meet the standard of reasonable suspicion.

¶14 It is also significant that "the [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the

tip, but to future actions of third parties ordinarily not easily predicted." ***Gates,*** 462 U.S. at 245. The citizen informant told police that Kurtz and Fuller were taking a trip to the southern part of the state or Illinois and would be traveling in a small, teal, two-door Chevy with a white stripe. This was an accurate prediction of future behavior. In general, relatively few people are privy to an individual's itinerary, and therefore it was reasonable for police to believe that a person with access to such insider information is likely to also have access to reliable information about that individual's illegal activities. ***White***, 496 U.S. at 332. Because significant aspects of the predictions were verified, there was reason to believe that the informants were honest and well informed, giving officers reasonable suspicion to stop Kurtz and Fuller. ***Id.***

Reasonableness of the Stop

¶15 Kurtz contends that the officers escalated the ***Terry*** stop into a full-blown arrest before they had probable cause to arrest him. Although this is a close case, we disagree.

¶16 In recent years, courts have greatly expanded the scope of permissible police conduct under ***Terry***, itself an exception to the Fourth Amendment's requirement that all searches and seizures be based upon probable cause. *See discussions in* ***State v. Morgan***, 2002 WI App 124, ¶13 n.8, 254 Wis. 2d 602, 648 N.W.2d 23, and ***U.S. v. Tilmon***, 19 F.3d 1221, 1224-25 (7th Cir. 1994). "[A]n otherwise valid stop is not inevitably rendered unreasonable merely because of [a use or show of force], though sometimes the magnitude of such police activity will compel the conclusion an arrest had occurred." 4 Wayne R. LaFave, *Search and Seizure*, § 9.2(d) pp. 305-06 (4th ed. 2004). "[C]ourts have rather consistently upheld such police conduct when the circumstances …

indicated that it was a reasonable precaution for the protection and safety of the investigating officers." ***Id***. In examining the reasonableness of the precautions taken here, we begin with the officers' show of force as they approached the car with guns drawn.

¶17 The officers' most intrusive tactic, the drawing of weapons, has been found to be reasonable in circumstances similar to those of the present case. *See, e.g.* ***U.S. v. Heath***, 259 F.3d 522, 530 (6th Cir. 2001) (concluding drawing of weapons justified where defendant suspected of drug trafficking); ***U.S. v. Navarrete-Barron***, 192 F.3d 786, 791 (8th Cir. 1999) (holding that "drug trafficking, which very often is accompanied by dangerous weapons" justified drawing of guns); ***U.S. v. Diaz-Lizaraza***, 981 F.2d 1216, 1221 (11th Cir. 1993) ("Drug dealing is known to be extremely violent, and [the drawing of guns] was a reasonable way for the agents to protect themselves from a possible concealed weapon.").

¶18 The Seventh Circuit reached the same conclusion in ***U.S. v. Chaidez***, 919 F.2d 1193 (7th Cir. 1990). There, officers stopped individuals riding in two vehicles on reasonable suspicion of involvement in the drug trade. ***Id.*** at 1195-96. In ***Chaidez***, as here, several officers approached the vehicles with guns drawn, though pointed downwards. ***Id***. The ***Chaidez*** court acknowledged that the drawing of guns "place[d the stop] at the outer edge of investigatory stops," but that the action was justified by the circumstances. ***Id.*** at 1198. "This intrusion, both in terms of invasion of privacy and inconvenience, is a good deal less than that involved in an arrest," the court concluded. ***Id.*** at 1199.

¶19 We find ***Chaidez*** to be persuasive and conclude that officers were justified in approaching the car with guns drawn. Kurtz and Fuller were suspected

of trafficking in drugs, an activity in which guns are "tools of the trade." ***State v. Guy***, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992); *see also* ***State v. Richardson***, 156 Wis. 2d 128, 144, 456 N.W.2d 830 (1990) ("Several cases have found that drug dealers and weapons go hand in hand …."). Investigator Neuman had information from a citizen informant that Fuller had a short temper. Further, visibility was poor; the stop occurred at night in a rural area and it was raining and foggy. A reasonably prudent law enforcement officer in the position of these officers would have been justified in believing that his or her safety was in jeopardy.

¶20 We turn now to whether the officers were justified in removing Kurtz from the vehicle, taking him to the ground and handcuffing him prior to the frisk. We observe that handcuffing a suspect, though not ordinarily proper during an investigatory stop, may be reasonable in many circumstances. ***State v. Wilkins***, 159 Wis. 2d 618, 465 N.W.2d 206 (Ct. App. 1990) (keeping man suspected of sexual assault handcuffed in back seat of squad car to await show-up identification for an hour-and-one-half found to be reasonable). Courts are likely to find temporary use of handcuffs permissible when the suspect is uncooperative, *see, e.g.* ***U.S. v. Jordan***, 232 F.3d 447, 450 (5th Cir. 2000) (handcuffing reasonable where suspect refused to comply with order to place hands on hood of car and jerked his hand away when officer attempted to grab his arm); ***U.S. v. Taylor***, 716 F.2d 701, 708 (9th Cir. 1983) (holding officers were justified in handcuffing person suspected of manufacturing amphetamines after pulling his vehicle over when suspect made furtive movements with his hands inside of vehicle and would not come out as ordered by officers), or is suspected of a crime associated with gun violence, such as drug trafficking. ***Heath***, 259 F.3d at 530 (use of handcuffs justified because suspect believed to be a drug trafficker); ***Navarrete-Barron***, 192

F.3d at 791 ("dangerous nature of the suspected crime of drug trafficking" warranted use of handcuffs).

¶21 These authorities persuade us that officers were justified in taking Kurtz to the ground and handcuffing him prior to performing the frisk. We believe that Kurtz's lack of responsiveness to the officers' commands to exit the vehicle and to raise his hands gave officers reason to believe that he may have been armed. It was dark, and the weather was inclement. Officers could not see what was happening inside the vehicle, and Kurtz and Fuller did not comply with requests to raise their hands and exit the vehicle. "[A] policeman making an investigatory stop should not be denied the opportunity to protect himself from attack by a hostile subject." ***Adams v. Williams***, 407 U.S. 143, 146 (1972). Finally, as previously noted, Kurtz was reasonably suspected of engaging in a crime with which dangerous weapons are associated. Under these circumstances, we conclude that the officers were justified in forcing Kurtz to the ground and handcuffing him to permit them to perform a frisk to ensure officer safety.

By the Court.—Judgment affirmed.

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