COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1218-CR **Cir. Ct. No. 2005CF316**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. LEWER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*[1]

Before Fine, Curley and Kessler, JJ.

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[1] The Honorable Mel Flanagan denied Daniel J. Lewer's motion to suppress. The Honorable William Sosnay accepted Lewer's guilty plea, sentenced him, and denied his postconviction motion.

¶1 FINE, J. Daniel J. Lewer appeals from a judgment entered after he pled guilty to the unlawful possession of heroin, *see* WIS. STAT. § 961.41(3g)(am), discovered during a pat-down search, which the trial court concluded was consensual. He also appeals from an order denying his postconviction motion to withdraw his plea. Lewer claims that: (1) he did not consent to the pat-down search, and (2) his trial lawyer was ineffective and, for that reason, he should be able to withdraw his plea.[2] We affirm.

I.

¶2 This case began when the police stopped Lewer's car because Lewer did not use a turn signal and the car had shattered taillights. During a subsequent pat-down search, an officer found the heroin in Lewer's front pants pocket. Lewer did not challenge the stop, and does not here. He did, however, seek to suppress the heroin because, he claimed, the search violated ***Terry v. Ohio***, 392 U.S. 1 (1968). The trial court held an evidentiary hearing on Lewer's suppression motion.

¶3 Officer Andrew Tischer testified at the suppression hearing that he stopped Lewer's car and that after the stop he asked Lewer for identification and that Lewer gave him either a driver's license or a state identification card, but that he was "not a hundred percent sure which one."[3] Tischer told the trial court that

[2] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. WIS. STAT. § 971.31(10).

[3] An operator's license, or what is commonly referred to as a driver's license, authorizes a person to drive, *see* WIS. STAT. § 343.03, and has, among other things, the name, date of birth, address, and photograph of the person, *see* WIS. STAT. § 343.17(3). An identification card is issued to persons who do not possess a valid operator's license, *see* WIS. STAT. § 343.50(2), and contains the same information as an operator's license, *see* § 343.50(3).

Lewer "wouldn't look me in the eyes[, his] hands were visibly shaking, and his voice stumbled as I spoke with him." Tischer also testified that Lewer's "right hand was making continued movements towards his right pants pocket and his right jacket pocket." At this point, Tischer testified that he asked Lewer to get out of the car because he thought that Lewer might have a weapon. Tischer estimated that one to one and one-half minutes had passed from when he walked up to Lewer's car and when he asked Lewer to get out of the car.

¶4 Tischer testified that after Lewer got out of the car, Tischer asked Lewer if he had "any weapons or contraband on his person." Tischer testified that Lewer told him, "no, you can go ahead and check," so he patted-down the outside of Lewer's clothing. According to Tischer, he felt a hard object surrounded by plastic with a knot just above it in Lewer's pocket, which, he suspected, based on his training and experience, was narcotics packaging. Tischer testified that he then asked Lewer what it was and Lewer told him that it was heroin.

¶5 On cross-examination, Tischer testified that he stopped Lewer's car around dusk in an area where there was "a lot of traffic." Tischer told the trial court that "[t]o the best of [his] knowledge" he went back to his car and checked the status of Lewer's license, but could not remember when. Tischer also testified that he asked Lewer where he was coming from and that he "might have" asked Lewer if he was on probation or parole, although Lewer "might have volunteered that information."

¶6 Lewer testified that after he was pulled over, Tischer asked him for his driver's license and went back to his squad car for five to ten minutes. According to Lewer, Tischer came back, gave him his license, and asked whether he was on probation or parole, and whether he had been using drugs. Lewer

testified that he replied that he was on probation, and had not been using drugs. According to Lewer, Tischer then "ordered" him out of his car. Lewer told the trial court that he asked Tischer if he was under arrest and the officer said "no." Lewer testified that Tischer then opened his car door and he got out.

¶7 According to Lewer, he again asked the officer if he was under arrest and the officer again told him "no." Lewer testified that he did not, however, feel that he was free to leave. According to Lewer, the officer then patted-down the outside of his clothing and went "through his front pants pocket[]," where the officer found the heroin. Lewer claimed that he: (1) was not nervous during the stop; (2) did not move his hands from his jacket to his pants pocket while he was in his car; and (3) did not give Tischer permission to search him.

¶8 The trial court denied Lewer's motion, finding credible Tischer's testimony. It concluded, among other things, that Lewer consented to the pat-down search, and that Tischer validly seized the heroin under the plain-feel doctrine. *See* ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311, 317 (1992) (plain-feel doctrine). As noted, Lewer then pled guilty.

¶9 Lewer asserted in his postconviction motion seeking to withdraw his guilty plea after sentencing that his trial lawyer was ineffective because the lawyer did not seek to suppress Lewer's statements to Tischer under ***Miranda v. Arizona***, 384 U.S. 436 (1966). The trial court denied Lewer's motion without an evidentiary hearing, concluding, as material and based on the evidence presented at the suppression hearing, that ***Miranda*** warnings were not required because Lewer was not in custody.

II.

A.

¶10 "A [trial] court's ruling on a motion to suppress evidence presents a mixed question of fact and law." ***State v. Wallace***, 2002 WI App 61, ¶8, 251 Wis. 2d 625, 634, 642 N.W.2d 549, 553. "We will not reverse the [trial] court's factual findings unless they are clearly erroneous." ***Ibid.***; *see also* WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). "However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law that we review de novo." ***Wallace***, 2002 WI App 61, ¶8, 251 Wis. 2d at 634, 642 N.W.2d at 553. We also examine the Record to ascertain whether there are facts that support the trial court's legal conclusions. ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 311–312, 470 N.W.2d 873, 878–879 (1991) (trial court's findings are implicit in its rulings).

¶11 Lewer contends that the trial court erred when it denied his motion to suppress the heroin because he claims that the officer did not have reasonable suspicion to search him under ***Terry***. ***Terry***, however, deals with *nonconsensual* searches, and here the trial court concluded that Lewer consented to the search, and on our *de novo* review of the constitutional issue, considering the evidence in a light most favorable to the trial court's legal conclusion, we agree. *See* ***Katz v. United States***, 389 U.S. 347, 358 & 358 n.22 (1967) (consent exception to Fourth Amendment's warrant requirement).

¶12 Lewer points to nothing in this Record showing that the trial court's finding that he agreed to let Tischer pat him down is clearly erroneous. *See* ***Estate of Dejmal v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980) (determination of witness credibility left to trial court). Rather, he claims, in a

fairly undeveloped argument, that his consent was invalid because he was illegally seized, that is, he did not feel free to leave when Tischer asked him if he had any weapons or contraband.[4] We disagree.

¶13 "[M]ere police questioning does not constitute a seizure." ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." ***United States v. Drayton***, 536 U.S. 194, 201 (2002). The test is objective: whether a reasonable innocent person would feel free to decline the officer's requests or otherwise terminate the encounter. ***Bostick***, 501 U.S. at 436, 438.

¶14 We conclude, as did the trial court, that a reasonable innocent person in Lewer's circumstances would not have felt compelled to answer Tischer's question. Indeed, according to Lewer, he asked Tischer twice whether he was under arrest and each time Tischer said that he was not. There is no evidence that Tischer coerced Lewer to agree to the pat-down search. *See* ***Drayton***, 536 U.S. at 203–204 (no seizure when police boarded bus and began to question passengers). The mere fact that Lewer claims that subjectively he did not feel free to leave does not transform Tischer's question into an illegal seizure. *See* ***Bostick***, 501 U.S. at 434–438 (absent police coercion, a person's mere subjective perception does not vitiate the voluntariness of consent). Indeed, ***Terry*** itself recognizes that police

[4] Any sub-issue mentioned by Lewer in his briefs and not discussed in this opinion was inadequately briefed. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may "decline to review issues inadequately briefed").

officers may assure themselves that they are not at risk. ***Terry***, 392 U.S. at 19 n.16 ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."), 23–24 (police officers are at substantial risk whenever they approach someone). Crediting the trial court's explicit and implicit findings, that is all that Tischer did here. If Lewer had refused to let the officer pat him down, the analysis would then be whether the officer had the requisite objective suspicion to permit an unconsented pat-down search under ***Terry***. But that is not the situation here, given the trial court's findings. Accordingly, the trial court did not err in refusing to suppress the heroin.

B.

¶15 Lewer claims that the trial court erred when it denied his motion to withdraw his guilty plea because his trial lawyer was ineffective for not raising a ***Miranda*** challenge.[5] Specifically, Lewer contends that he should have been given ***Miranda*** warnings because he was in custody when Tischer asked if he had any weapons or contraband. Again, we disagree.

¶16 A defendant may withdraw a plea after sentencing upon showing, by clear and convincing evidence, a manifest injustice. ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331, 335 (Ct. App. 1993). There is a manifest injustice when a defendant's plea is the result of the ineffective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50, 54 (1996).

[5] Lewer also claims that his trial lawyer was ineffective because the lawyer did not challenge the trial court's alleged "errors in the application of ***Terry*** [***v. Ohio***, 392 U.S. 1 (1968)]." We do not address this issue, however, because we have already concluded that Lewer voluntarily consented to the pat-down search.

¶17 A defendant claiming that his or her lawyer gave ineffective representation must establish that: (1) the lawyer gave deficient performance, and (2) the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Lewer's lawyer was not "ineffective" under ***Strickland***. Under our *de novo* review of the constitutional issue, *see* ***State v. Morgan***, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 612, 648 N.W.2d 23, 28, we agree with the trial court that ***Miranda*** warnings were not required because Lewer was not in custody.

¶18 In determining whether an individual was in custody for purposes of ***Miranda***, a court must consider the totality of the circumstances. ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728, 732–733 (Ct. App. 1998). "The test is 'whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'" ***Gruen***, 218 Wis. 2d at 593, 582 N.W.2d at 732 (quoted source omitted). This determination depends on the objective circumstances, "not on the subjective views harbored by either the interrogating officers or the person being questioned." ***Stansbury v. California***, 511 U.S. 318, 323 (1994).

¶19 The factors relevant in determining whether a person is "in custody" for ***Miranda*** purposes include: the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. ***Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d at 612, 648 N.W.2d at 28. Important factors in our examination of the degree of restraint are: whether the suspect was handcuffed, whether the police drew a weapon, whether there was a frisk, how the suspect was restrained, whether the suspect was moved to another location, whether questioning took place in a police car, and the number of officers involved. ***Id.***, 2002 WI App 124, ¶12, 254 Wis. 2d at 612–613, 648 N.W.2d at 28.

¶20 We conclude that a reasonable person in Lewer's circumstances would not have believed that he or she was in custody. Implicit in the trial court's conclusion that Lewer was not in "custody" was the transitory nature of the traffic stop, until Tischer found the heroin after the pat-down search to which Lewer consented. Moreover, Tischer did not tell Lewer that he was under arrest, and did none of the other things that can add up to "custody." Indeed, as we have seen, Lewer testified that he twice asked Tischer whether he was under arrest and each time Tischer said that he was not. The trial court properly denied Lewer's motion to withdraw his guilty plea. Accordingly, contrary to Lewer's additional, albeit related contention, the trial court did not err in not holding a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437 ("if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing"). He presented nothing in his motion to withdraw his guilty plea that asserted that the evidence at a ***Machner*** hearing would be anything other than that the trial court had already heard.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.