COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2753-CR **Cir. Ct. No. 2002CF285**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. WOOTEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Judge. *Affirmed*.

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

¶1 PER CURIAM. A jury convicted Robert J. Wooten of possession of cocaine with intent to deliver, failure to purchase a tax stamp, and possession of a controlled substance (ecstasy). Prior to trial, Wooten filed a motion contending that the police had lacked cause to stop and arrest him and seeking suppression of

evidence seized as a result of that stop and arrest. Wooten filed a separate motion seeking suppression of a statement he gave to police after his arrest. As a basis for that motion, Wooten argued that it was the "fruit" of the improper stop and arrest. He also maintained that police had not advised him of his constitutional rights and that, as a result, his statement was not given knowingly, intelligently, and voluntarily. The circuit court denied the motion, and Wooten proceeded to trial. Although Wooten now appeals the circuit court's suppression rulings, he declines to appeal that portion of the circuit court's ruling as to whether he was properly advised of his rights. We reject each of Wooten's contentions, and we therefore affirm the judgment of conviction.

¶2 Derell Bailey was arrested and charged with possession of ecstasy. Shortly after his arrest, he offered to help police catch the person who sold the drug to him. In return, Bailey expected to receive some consideration from the State during his own prosecution.

¶3 A Milwaukee police officer testified at the suppression hearing that Bailey had been a reliable informant for the police a few years prior. He testified that Bailey knew the dealer as "New York," and he gave police a physical description of the dealer, which included his estimate that the dealer weighed approximately 210 pounds. Bailey called "New York" on his cell phone while police were present, and he testified that he recognized the voice as that of the person from whom he had purchased the ecstasy. He arranged to purchase two ounces of crack cocaine and told "New York" that he would pick up the drugs at a Milwaukee address. When officers went to the address, Bailey called to tell the dealer he was outside. A few minutes later, police saw Wooten walking outside the residence, and police stopped him and searched him.

¶4 One of the arresting officers testified that, as they pulled up to the arranged location, he observed the suspect walking down the driveway. He further testified that, based on Bailey's description of the suspect, he was looking for a black male with medium to light complexion and a slight mustache, approximately thirty years old and weighing approximately 210 pounds. He testified that the person in the driveway started to walk toward their car and that, in his estimation, the person fit the description of the dealer as relayed to him. He testified that he and his partner stopped Wooten, searched him and found cocaine.

¶5 Wooten argued in support of suppression of the evidence seized pursuant to his stop and arrest that the police had not had probable cause to stop and arrest him. Wooten noted that although the police had been able to listen to Bailey's end of the telephone conversation with the dealer, they had not been able to listen to the dealer's statements. He argued that the police had had no way to corroborate whether Wooten was the person to whom Bailey had spoken. He argued that, even though police determined after his arrest that the number of the cell phone he was carrying at the time of his arrest matched the number called by Bailey, this after-the-fact corroboration did not establish probable cause to arrest. In addition, Wooten argued that his description did not match that given to police, noting that his weight was listed in police files as 175 pounds and that his complexion was lighter than that given to police.

¶6 The circuit court denied the suppression motion, finding the prosecution witnesses' testimony credible. Among other things, it noted that Bailey's statements and cooperation were against his penal interests because Bailey was in the process of being prosecuted for drug possession. The court noted that if Bailey lied to police, he could have been prosecuted on a separate obstruction charge. In addition, the court indicated that it found the account of the

language used in the phone call to be credible, and it also found Bailey's description of Wooten to have been "close," even taking into account that Wooten's complexion was somewhat lighter than Bailey had indicated. In particular, the circuit court noted that no one appeared to "know what weight the defendant is," and that people could "guess [Wooten] to be more than 175 pounds."

¶7 On appeal, Wooten argues that the information provided at the suppression hearing was inadequate to establish probable cause to arrest Wooten. We disagree.

¶8 Although Wooten suggests that there was insufficient justification for police to conduct an investigative stop, the record demonstrates otherwise. When this court is confronted with that issue, we uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). "Whether those facts satisfy the constitutional requirement of reasonableness is a question of law and therefore we are not bound by the lower court's decisions on that issue." ***Id.*** Under ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), "a police officer may, under the appropriate circumstances, detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." ***Waldner***, 206 Wis. 2d at 54-55. The fundamental focus is "reasonableness" and what constitutes reasonableness is determined by applying a "common-sense test" – "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***Id.*** at 55-56. Here, Wooten's presence and actions at the address given to police by the informant provided reasonable suspicion for an investigative stop. *See* ***State v. Richardson***,

156 Wis. 2d 128, 142, 456 N.W.2d 830 (1990) (corroborated actions of a suspect, as viewed by police acting on a tip, need not be inherently suspicious or criminal).

¶9 The more difficult question – and the one on which the circuit court focused – is whether there was probable cause to arrest Wooten. The standard of review is, of course, well-settled: probable cause for an arrest exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Kutz***, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. "While the information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is 'more than a possibility,' it 'need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.'" ***Id.*** (citations omitted). To determine whether probable cause to arrest existed, the circuit court must consider "the information available to the officer," including hearsay and "the collective knowledge of the officer's entire department." ***Id.*** (citations omitted). If the officer is faced "with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." ***Id.*** (citations omitted). "Whether information from a confidential informant is sufficient to establish probable cause to arrest depends on the totality of the circumstances, including the informant's 'veracity, reliability, and basis of knowledge.'" ***State v. McAttee***, 2001 WI App 262, ¶9, 248 Wis. 2d 865, 637 N.W.2d 774.

¶10 Here, Bailey, the confidential informant, was known to police because he had assisted them on a prior case. *See* ***id.*** (information from confidential informant may provide probable cause to arrest if police know the informant and know him or her to be reliable). Bailey was in custody and testified that he knew if he gave police false or incorrect information, he was unlikely to

receive consideration from the police on his own case and might even be charged for misleading the police. He was offering to set up a drug purchase with the person he claimed had sold him the drugs for which he had been arrested, and so had first-hand knowledge of the dealer's activities. Officer Ward testified that even though he could not hear the dealer's end of the conversation with Bailey, he knew from his experience that the slang being used by Bailey indicated that he was setting up a drug deal. The circuit court's determination that Bailey was a credible informant upon whom police reliance was reasonable was not erroneous.

¶11 In regard to whether there was probable cause to arrest, the record shows that within minutes of Bailey's final call to "New York," police found Wooten at the designated address. The police testified that they perceived Wooten as fitting the description relayed to them. The circuit court confirmed that Wooten roughly fit the description and, given Wooten's presence at the address, a reasonable police officer could have concluded that it was more than possible that Wooten might be involved in a crime. *See* ***Kutz***, 267 Wis. 2d 531, ¶11. Because the record demonstrates that police had reasonable suspicion to stop Wooten and probable cause to arrest him, the circuit court's ruling on the suppression motion must be upheld.

By the Court.—Judgment affirmed.

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