COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1426-CR **Cir. Ct. No. 2004CF4382**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOSEA A. HINES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge.[1] *Affirmed*.

[1] The Honorable Charles F. Kahn, Jr., denied Hosea A. Hines's motion to suppress. The Honorable Joseph R. Wall accepted Hines's guilty plea, sentenced him, and entered the judgment of conviction.

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Hosea A. Hines appeals a judgment entered on his guilty plea convicting him of unlawful possession of cocaine. *See* WIS. STAT. § 961.41(3g)(c). He claims that the trial court improperly denied his motion to suppress the cocaine.[2] We affirm.

I.

¶2 The essential facts are not disputed. The only persons who testified at the suppression hearing and the preliminary examination were the two police officers who arrested Hines.[3]

¶3 Milwaukee Police Officers Andrew Bell and Brian Burch testified that they were patrolling an area of Milwaukee in mid-August of 2004 at

[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] The trial court and the lawyers discussed whether the testimony of one of the arresting officers at the preliminary examination could be considered at the suppression hearing even though that testimony would, under the circumstances here, be hearsay, *see* WIS. STAT. RULE 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."), and hearsay is generally not admissible, WIS. STAT. RULE 908.02 ("Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute."). Ultimately, the trial court received under RULE 908.01(4)(a)1 (A statement "[i]nconsistent with the declarant's testimony" is not hearsay if the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement.") only those portions of the preliminary examination offered by Hines as inconsistent with the officer's testimony at the suppression hearing. The rules of evidence, however, other than the rules protecting privileged communications, do not apply at suppression hearings. WIS. STAT. RULE 901.04(1) ("Preliminary questions concerning … the admissibility of evidence shall be determined by the judge. … In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05."); ***State v. Jiles***, 2003 WI 66, ¶29, 262 Wis. 2d 457, 476, 663 N.W.2d 798, 807. We may thus consider the preliminary-examination testimony by the officer in determining whether the trial court's findings of fact are supported by the Record, and in our *de novo* review of the trial court's denial of Hines's motion to suppress.

approximately 10:25 p.m. when they saw Hines, whom they knew as a result of his prior brushes with law enforcement. Officer Bell testified that Hines "walked away from us as we approached," and that the officer "asked Mr. Hines to come over and talk to us, and I asked him how he's been." According to Bell, Hines returned to talk to the officers in response to the request.

¶4 When, according to Officer Bell, Hines "gave a mumbled response that I could not understand," Bell said that he noticed that Hines "was attempting to chew something down, I believe." At that point, Bell said that he took his flashlight and "illuminated [Hines's] face, and I saw some cocaine in his mouth." Bell then told Hines to, as phrased by Bell, "spit it out." The "it" was, according to Bell, "[f]our corner cuts containing suspected cocaine base." He explained that a "corner cut is a corner of a plastic bag that's tied into a knot."

¶5 Officer Burch confirmed Bell's testimony, and also told the trial court that before Hines spit out what he had in his mouth, Burch saw in Hines's mouth "what I believed to be plastic bags," and that Hines "appeared to be attempting to chew them up." Burch testified that based on his "[p]ast training and experience," he believed the bags had cocaine in them. Bell testified that he was not "sure" it was cocaine, however, "until it actually came out and was on the hood of the [squad] vehicle."

¶6 Hines did not, however, voluntarily spit out the plastic bags. Rather, Officer Bell testified that he had first taken "physical control of Mr. Hines," testifying that Bell was "worried about him ingesting or choking on whatever was in his mouth, and I directed him to spit it out." Bell then testified as follows in response to the State's questions on direct-examination:

> Q Physically, what did you do with him?

A I took control of him. I believe I started to take control of his neck, and I tilted him down and told him to spit it out.

Q Was that over the hood of the squad?

A Yes.

Q Why did you think it was important to get him to spit out what he had in his mouth?

A I have children. I am afraid of people choking on things. I had to save an infant who was dying of sudden death who was choking, and choking has always kind of been a problem for me. I was concerned that he was going to possibly choke on something, and I wanted him to expel that item.

Bell fleshed out this testimony on cross-examination:

Q And is it-- From what you remember, he did not spit it out until you actually grabbed him and physically grabbed a hold of his neck; is that right?

A As I recall, I took control of his right arm with my left hand and began to put my hands up around his chest or upper neck area to take control of it. Again, I bent him down in a semi-Heimlich type maneuver in case he would have started to choke.

Q Okay. He didn't appear to be in any distress prior to you doing that, correct?

A No.

Q He wasn't asking for any assistance, correct?

A No.

Q He wasn't turning red or anything like that or appeared to be short of breath, correct?

A No.

Q He was simply chewing on something; is that right?

A Yes.

¶7 The trial court originally granted Hines's suppression motion, determining that the officers had unlawfully stopped Hines when they asked him to talk to them. Later, however, after considering additional research and argument, the trial court reversed itself and denied the motion, finding that the "initial stop was not a custodial conversation, and it was not an interference with Mr. Hines' constitutional rights."

¶8 As for the critical elements of this appeal, the trial court found "that Mr. Hines was walking away from the officers at the time that Officer Bell did ask Mr. Hines to come over; that is, walk over to the officers to talk with them." The trial court also found that the officers had "probable cause [to believe] that Mr. Hines had illegal drugs in his mouth," which, according to the trial court, were "in plain view with his chewing." Although the trial court found that the officers' expressed concern "that they were trying to save Mr. Hines' life from choking [was] a little bit harder for me to accept," it determined that the direction to Hines "to spit out and the search of Mr. Hines' mouth was proper because at that point it was evident that there was the [potential] destruction of property," and that there were thus "exigent circumstances [requiring] that Mr. Hines be stopped from chewing or swallowing the drugs."

II.

¶9 In reviewing an order suppressing or refusing to suppress evidence, we uphold a trial court's findings of historical fact unless they are clearly erroneous; however, we review *de novo* a trial court's conclusion whether a stop and search comported with the Fourth Amendment. ***State v. Harris***, 206 Wis. 2d 243, 249–250, 557 N.W.2d 245, 248 (1996). Based on the officers' testimony, the trial court's findings of fact are not clearly erroneous, and we do not understand

Hines to contend otherwise. The issue on appeal thus turns on whether: (1) the officers' initial interaction with Hines was a "stop" or was consensual, and, if consensual (2) the forced disgorgement of the drugs was lawful. We address these matters in turn.

A. *Initial interaction.*

¶10 It is settled law that law enforcement officers may seek to talk to someone in a public place. *See, e.g.*, ***Florida v. Royer***, 460 U.S. 491, 497 (1983) ("law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen"); ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, ___, 717 N.W.2d 729, 737 ("As long as a reasonable person would have believed he was free to disregard the police presence and go about his business, there is no seizure and the Fourth Amendment does not apply."). The critical element is whether the police display either "physical force" or other "show of authority" to overcome a person's refusal to comply with the officer's request to talk. ***Ibid.*** (quotation marks and quoted source omitted).

> If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure. As this court noted in [***State v.***] ***Williams***[, 2002 WI 94, ¶23, 255 Wis. 2d 1, 13, 646 N.W.2d 834, 840], "most citizens will respond to a police request," and "the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."

Young, 2006 WI 98, ¶37, 294 Wis. 2d at ___, 717 N.W.2d at 741. Given that Hines was not confronted with a "police presence" that involved a show or implementation of force (until the forced disgorgement of the cocaine, which we

discuss in Part B below), his walking back to talk with the officers at their request was consensual, and thus, as the trial court determined, did not violate the Fourth Amendment. *See* ***Royer***, 460 U.S. at 497.

B. *Disgorgement of the cocaine.*

¶11 As the trial court recognized, the potential destruction of evidence is an "exigent circumstance" that may justify a warrantless search. *See* ***State v. Payano-Roman***, 2006 WI 47, ¶32, 290 Wis. 2d 380, 396, 714 N.W.2d 548, 556. Here, as we have seen, Officer Bell used force to get Hines to spit out what the officer testified he believed were plastic bags of cocaine in Hines's mouth. The principles enunciated in ***Payano-Roman*** govern our analysis.

¶12 ***Payano-Roman*** concerned the medically supervised administration of a laxative to a person who had swallowed what a police officer believed was heroin. ***Id.***, 2006 WI 47, ¶¶6, 9–11, 290 Wis. 2d at 386, 387, 714 N.W.2d at 551, 551–552. The officers did not have a search warrant. ***Id.***, 2006 WI 47, ¶30, 290 Wis. 2d at 395, 714 N.W.2d at 555. After first determining that despite the hospital setting, "the search was a government search," ***ibid.***, ***Payano-Roman*** determined a warrant was not required because Payano-Roman was "under lawful arrest" when he was given the laxative, ***id.***, 2006 WI 47, ¶33, 290 Wis. 2d at 396, 714 N.W.2d at 556. ***Payano-Roman*** then determined that the community's interest in preserving the suspected heroin so as to permit a fair and accurate determination of guilt or innocence, as well as ameliorating the potential danger to Payano-Roman, justified the bodily intrusion of giving the laxative. ***Id.***, 2006 WI 47, ¶¶37–62, 290 Wis. 2d at 397–406, 714 N.W.2d at 557–561.

¶13 Here, in contrast to ***Payano-Roman***, the intrusion on Hines's bodily integrity was minimal, and, given the trial court's finding of fact that the officers

had reason to believe that the plastic they saw in Hines's mouth contained cocaine, the trial court correctly determined that there were exigent circumstances that permitted the warrantless search and seizure. *See* ***id.***, 2006 WI 47, ¶32, 290 Wis. 2d at 396, 714 N.W.2d at 556 (potential destruction of evidence is an "exigent circumstance" that may justify a warrantless search).[4]

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

[4] It may very well be, although we do not further analyze it, that the officers' suspicion that Hines had cocaine in his mouth would have justified their arrest of Hines at that point. *See* ***State v. Sykes***, 2005 WI 48, ¶18, 279 Wis. 2d 742, 753–754, 695 N.W.2d 277, 283 ("There is probable cause to arrest 'when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. … The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility.'") (quoted source omitted). Officers may search a person without a warrant immediately prior to an arrest so long as the arrest is not triggered by the fruits of the search. ***Id.***, 2005 WI 48, ¶16, 279 Wis. 2d at 753, 695 N.W.2d at 283.