COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2811-CR **Cir. Ct. No. 2005CF3703**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY D. HARWELL,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, Fine and Kessler, JJ.

¶1 FINE, J. Anthony D. Harwell appeals from a judgment entered after he pled guilty to unlawfully possessing more than one but fewer than five

grams of cocaine. *See* WIS. STAT. § 961.41(1m)(cm)1r.[1] Harwell claims that the circuit court erred when it denied his motion to suppress the cocaine. We affirm.

I.

¶2 The police stopped Harwell's car while investigating an alleged battery, and found the cocaine in small flashlights on Harwell's key ring. Harwell sought to suppress the cocaine and all derivative evidence, arguing that the police violated the Fourth Amendment to the United States Constitution when they stopped him, questioned him, and opened the flashlights.[2]

¶3 Milwaukee police officer William Esqueda was the only witness to testify at the suppression hearing. He told the circuit court that approximately one week before the battery, he was sent to 322 West Center Street in Milwaukee to investigate a robbery complaint. According to Esqueda, witnesses to the robbery told him that a man named "Tony" drove a gold Pontiac and was "known" to sell crack cocaine from a parking lot across the street from a bar known as "The Wash."

¶4 Esqueda further testified that approximately one week later, he and his partner were sent to 321 West Center Street at 5:10 p.m. to investigate a

[1] Harwell was also charged with felony bail jumping. *See* WIS. STAT. § 946.49(1)(b). In exchange for Harwell's guilty plea, the State agreed to dismiss the charge and it was read-in at sentencing. A defendant may appeal the denial of a motion to suppress evidence even though he or she has pled guilty. *See* WIS. STAT. § 971.31(10).

[2] Harwell did not separately seek suppression under the Wisconsin Constitution. "The interpretation of our state constitution's analogous provision[, WIS. CONST. art. I, § 11,] has evolved in virtual lockstep with the United States Supreme Court's jurisprudence construing the Fourth Amendment." ***State v. Malone***, 2004 WI 108, ¶15, 274 Wis. 2d 540, 550–551, 683 N.W.2d 1, 6 (footnote omitted). He does not argue for a different rule on this appeal.

battery complaint at "The Wash." According to Esqueda, when they arrived, two "people on the scene" told him that a woman had committed the battery and left the area in a gold two-door Sunfire driven by a man and going west. The people also told Esqueda that the man driving the Sunfire sold crack cocaine, which he kept in a small flashlight on his key ring. Esqueda told the circuit court that when he initially drove up to the scene, he saw a car matching the informants' description come out of an alley and drive west.

¶5 Esqueda testified that he felt "[t]ime was of the essence," so he got into a marked police van with his partner and drove west. Esqueda told the circuit court that approximately three blocks later, he saw at a stop light a car matching the informants' description. He pulled the car over. Esqueda testified that he could not see "how many [people] were exactly in [the car] until we stopped": "At a block and a half away, [I] could see there was one person in the car, … but I didn't--that doesn't mean somebody couldn't be leaning down or just laying--lot of people lay real low in the car while they're driving."

¶6 According to Esqueda, after he pulled the car over, he saw that there was one person in it, whom Esqueda identified in court as Harwell. Esqueda testified that he walked up to the car, introduced himself, and asked Harwell, who identified himself to Esqueda as "Anthony," if he saw a fight at "The Wash." Harwell ultimately told Esqueda that he had been at "The Wash," but did not have anything to do with the battery.

¶7 Esqueda testified that because the traffic was "extremely busy," he then asked Harwell to get out of the car to talk to him about the battery:

> So what I ended up asking him is for my safety if, since he was there, since he said he was there at the scene when it happened, perhaps he might have some information that I

> might, that would help during the investigation. So I asked if he could come out of the car and talk to me regarding the incident at 321 West Center.

According to Esqueda, Harwell turned the engine off and got out of the Sunfire with his keys. Esqueda told the circuit court that during the conversation, he noticed two small flashlights hanging from the key ring and asked Harwell if he could "see" the key ring. Esqueda testified that Harwell gave the key ring to him and that Esqueda pushed the buttons on the "tail end" of the flashlights. According to Esqueda, the flashlights did not work, so he shook them and heard a rattling noise. Esqueda told the circuit court that based on the rattling noise and the information that he had learned about a "Tony" who drove a two-door gold Pontiac Sunfire and sold drugs near the area of the battery from a flashlight on his key ring, he suspected there was crack cocaine or "some kind of drug" inside the flashlights: "When I seen [*sic*] the flashlights and then the car and then his name as Anthony, things started to click to me, they started clicking or possibly they may be one in the same gentleman." Esqueda then opened the flashlights and found eight "corner cuts" of crack cocaine.

¶8 On cross-examination, Esqueda testified that he did not see Harwell commit any traffic violations. According to Esqueda, his intent was to investigate the battery:

> This would be more of a field interview regarding what had happened at the scene for the battery and that this is--this all happened very quickly now. We-- I reacted based on what they told me going on word on what they said, and I--the car was already leaving so if we had any chance, we had to leave right then and there. Now the car was going. We did see it. We were able to safely stop it. We did, but I wouldn't call it a traffic stop. It would be more of a FI, a field interview regarding what had happened and what happened at the scene.

¶9 Esqueda also told the circuit court that he and the people in the area knew one another because he had policed the area for nine and one-half years: "lots of people have come to know me …. I earned a lot of trust with different people so a lot of times if they see me in an area, they may flag me down outright or they may take me off to the side right now or what's hopping or what's going on in the area." Esqueda also testified that, in addition to believing during the stop that Harwell may have seen the battery, he thought that Harwell could have knowingly helped the suspect get away.

¶10 The circuit court denied Harwell's motion, concluding, as material, that: (1) Esqueda had reasonable suspicion to stop Harwell's car, *see* ***Terry v. Ohio***, 392 U.S. 1 (1968); (2) Esqueda reasonably detained and questioned Harwell; and (3) Harwell consented to Esqueda's search of the flashlights.

II.

¶11 Neither party disputes the circuit court's factual findings. *See* ***State v. Wallace***, 2002 WI App 61, ¶8, 251 Wis. 2d 625, 634, 642 N.W.2d 549, 553 (appellate court will not reverse circuit court's factual findings unless they are clearly erroneous); WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Accordingly, we review *de novo* whether the stop and search violated the Fourth Amendment. *See* ***Wallace***, 2002 WI App 61, ¶8, 251 Wis. 2d at 634, 642 N.W.2d at 553.

A. *Investigative Stop.*

¶12 Law enforcement officers may temporarily stop a car when they reasonably suspect, considering the totality of the circumstances, that its driver or occupants were involved in some type of unlawful activity. *See, e.g.*, ***Terry***, 392

U.S. at 21–22; ***State v. Rutzinski***, 2001 WI 22, ¶14, 241 Wis. 2d 729, 737, 623 N.W.2d 516, 520–521. "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training or experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84, 88 (Ct. App. 1997).

¶13 Here, in addition to wanting to see if Harwell had any information about the battery, Esqueda also reasonably suspected, based on what the people in the area told him, that the car Harwell was driving could have helped the batterer get away. Harwell contends, however, that the investigative stop was unreasonable because there was, according to him, nothing that indicated that the informants were reliable because they did not identify themselves or give Esqueda sufficiently detailed information. We disagree.

¶14 In some circumstances, an informant's tip may justify an investigative stop. ***Rutzinski***, 2001 WI 22, ¶17, 241 Wis. 2d at 738, 623 N.W.2d at 521. In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity, and (2) the basis for his or her knowledge. ***Id.***, 2001 WI 22, ¶18, 241 Wis. 2d at 739, 623 N.W.2d at 521. "These considerations should be viewed in light of the 'totality of the circumstances,' and not as discrete elements of a more rigid test: '[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.'" ***Id.***, 2001 WI 22, ¶18, 241 Wis. 2d at 739, 623 N.W.2d at 522 (quoted source omitted; brackets in ***Rutzinski***).

¶15 Both factors are satisfied here. While the circuit court characterized the informants as "anonymous" in the sense that Esqueda did not know their

names, the informants risked possible obstruction charges if the things they told Esqueda were not true because they talked face-to-face with him, who, according to the undisputed evidence, was a familiar figure in the area he had policed for some nine years. *See, e.g.*, ***United States v. Heard***, 367 F.3d 1275, 1279 (11th Cir. 2004) (face-to-face anonymous tip presumed to be inherently more reliable than anonymous telephone tip); ***State v. Young***, 2006 WI 98, ¶¶61–62, 294 Wis. 2d 1, 35, 717 N.W.2d 729, 746–747 (officer's experience and familiarity with neighborhood factor in reasonable-suspicion analysis); ***State v. Williams***, 2001 WI 21, ¶35, 241 Wis. 2d 631, 649, 623 N.W.2d 106, 114–115 ("Risking one's identification intimates that, more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster.").

¶16 What the persons at the scene told Esqueda was further bolstered by Esqueda's corroboration of significant details. *See* ***Williams***, 2001 WI 21, ¶41, 241 Wis. 2d at 655, 623 N.W.2d at 117 ("'[t]he 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'") (citation omitted; brackets in ***Williams***). The persons described the get-away car as a gold two-door Sunfire heading west. *See* ***Rutzinski***, 2001 WI 22, ¶33, 241 Wis. 2d at 748, 623 N.W.2d at 526 (informant's tip reliable when, among other things, informant described pickup truck and direction in which it was headed). And, as we have seen, Esqueda saw a car matching that description leave an alley and drive west as he was arriving.

¶17 Finally, as Esqueda testified, "[t]ime was of the essence," and the imminent escape of the suspect, whom Esqueda reasonably believed could have been in the car, albeit crouched down or hiding, called for his prompt follow-up. *See* ***id.***, 2001 WI 22, ¶26, 241 Wis. 2d at 743, 623 N.W.2d at 524 ("exigency can

in some circumstances supplement the reliability of an informant's tip in order to form the basis for an investigative stop").

¶18 Based on all of the above, Esqueda did not violate Harwell's rights by stopping him to, at the very least, see whether the batterer was in the car or whether the driver knew where she was.

B. *Detention.*

¶19 Harwell also contends that Esqueda had to let him go once he saw that Harwell was the only person in the car. We disagree. A person may be temporarily stopped and detained to allow the officer to investigate the circumstances that provoke suspicion as long as the scope of the questions asked bear a reasonable relationship to the reasons for which the stop was made. *See* ***United States v. Brignoni-Ponce***, 422 U.S. 873, 881 (1975); *see also* ***Terry***, 392 U.S. at 29 (stop and inquiry must be "reasonably related in scope to the justification for their initiation").

¶20 Here, Esqueda testified, and the circuit court found, that the stop's purpose was to investigate the battery. As the circuit court found, not only was Harwell a potential witness to the battery, but he could have been involved in that crime by helping the suspect escape. Accordingly, Esqueda was justified in briefly detaining and questioning Harwell.

¶21 Harwell also claims that the "illegal detention" continued when Esqueda asked him to get out of the car for further questioning. We disagree. Based on Esqueda's undisputed testimony and the circuit court's finding, it was reasonable for Esqueda to ask Harwell to get out of the car so that he could continue to ask Harwell about the battery away from what the circuit court found

was "busy … traffic." *See* ***Maryland v. Wilson***, 519 U.S. 408, 413–415 (1997) (officer may order driver and passengers out of car in the interest of officer safety); ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 (1977) (removing the driver from a car reduces risk posed from oncoming traffic).

¶22 Finally, Harwell claims that Esqueda unreasonably asked to see his key ring because the request was not related to the purpose of the traffic stop. Again, we disagree.

> If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

State v. Betow, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499, 502 (Ct. App. 1999). Here, Esqueda had information sufficient to reasonably expand the scope of the battery investigation. When Harwell got out of the car, Esqueda saw hanging from Harwell's key ring two small flashlights, corroborating what the circuit court found to be "very, very particularized" information that a "Tony" carried drugs inside a small flashlight on his key ring. As we have seen, Harwell told Esqueda that his name was "Anthony," of which "Tony" is a derivative variant. Esqueda had the requisite reasonable suspicion that drugs might be inside the flashlights, justifying his request to see them.

C. *Search.*

¶23 Harwell does not dispute but that he voluntarily gave the key ring with the flashlights to Esqueda. *See* ***State v. Johnson***, 177 Wis. 2d 224, 233, 501

N.W.2d 876, 879 (Ct. App. 1993) (consent recognized exception to Fourth Amendment warrant requirement). Rather, he argues that Esqueda exceeded the scope of that consent when he opened the flashlights. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect." ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991).

¶24 Esqueda did not exceed the scope of Harwell's consent. First, Harwell did not place any explicit limitation on Esqueda's inspection of the flashlights. *See* ***ibid.*** By handing the entire key ring, including the flashlights to Esqueda, a reasonable officer in Esqueda's position would have considered this consent to look at everything on the key ring, including the insides of the flashlights if there was an articulable reason to do so. *See* ***United States v. Stewart***, 93 F.3d 189, 192 (5th Cir. 1996) (consent to look at medicine bottle included what was in bottle). Second, and most significant, once the flashlights did not work, and Esqueda heard noises that reasonably indicated that they were used as containers rather than for light, he was fully justified in opening them, given that citizens had previously told him that a "Tony" kept cocaine in a flashlight attached to his key ring. Accordingly, we affirm the circuit court's denial of Harwell's motion to suppress.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.