COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1278-CR **Cir. Ct. No. 2007CF805**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BARRY L. WATTERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Barry Watters appeals a judgment of conviction for felony bail jumping and an order denying his postconviction motion. The bail

jumping charge was based on an allegation of obstructing an officer.[1] Watters argues he should be permitted to withdraw his no contest plea because the officer lacked reasonable suspicion to detain him and, therefore, his flight from the officer did not constitute obstructing. Watters also argues he should be permitted to withdraw his plea because his trial counsel was ineffective for pursuing a suppression motion and recommending that Watters accept the State's plea offer. We reject Watters' arguments and affirm.

BACKGROUND

¶2 The following facts are taken from testimony given at Watters' preliminary hearing and suppression motion hearing. Green Bay police received a report of a stolen red Ford Escort around 2:30 a.m. on August 15, 2007. Officer Richard Meves was on patrol with his training officer, Patrick Childs, when at 5:58 a.m. they spotted a red Ford Escort parked at a gas station. As Meves drove into the station, Childs announced he observed a man running from the Escort. Meves saw two men exiting the store and pulled his vehicle in between the men and the Escort. He ordered the men to "stay right there." Watters looked at him and ran. When Meves found him hiding nearby, Watters stated he ran because he does not like the police and his mother told him to avoid the police.

¶3 Meves testified the two men were ten to fifteen feet from the Escort and were "heading toward it." There were other cars in the station, but the closest was about thirty feet from Watters, off to the side of the Escort. There were also

[1] As part of the plea deal, a charge of obstructing an officer was dismissed and read in.

six or seven other people in the station lot. Meves explained he ordered Watters to stop because:

> He was the closest of all the people that were in the area at the time. He was facing the vehicle, he actually appeared to be walking towards the vehicle. I wanted to see what he could tell me about somebody running from the vehicle, if that person would be placed inside the vehicle through his testimony. I just wanted to get an idea of what he knew about the incident, and as there was a stolen vehicle involved, everyone in that scene, including Mr. Watters, was a potential suspect.

¶4 The circuit court denied Watters' suppression motion on two independent grounds. The court primarily denied the motion based on a conclusion that the police were authorized to freeze the scene and briefly detain Watters as a witness. Alternatively, the court determined Meves had reasonable suspicion to detain Watters as a potential suspect. Following the denial of a postconviction motion requesting plea withdrawal, Watters appeals.

DISCUSSION

¶5 Watters first argues he is entitled to withdraw his no contest plea to obstructing an officer because there was no factual basis for the charge. Before accepting a plea, the court must ensure a factual basis exists to support the plea. WIS. STAT. § 971.08;[2] ***State v. Bangert***, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986). Failure to ascertain that the defendant in fact committed the crime charged is an erroneous exercise of discretion and constitutes a manifest injustice, which is grounds for the withdrawal of a plea. ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997).

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 The State charged Watters with bail jumping because he obstructed Meves when he ran. WISCONSIN STAT. § 946.41(1) provides that "Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty ...." Resisting or obstructing under this section includes fleeing a lawful attempt to detain. ***State v. Grobstick,*** 200 Wis. 2d 242, 248-51, 546 N.W.2d 187 (Ct. App. 1996). Watters asserts Meves was not acting with lawful authority when he ordered him to "stay right there" because Meves lacked reasonable suspicion to detain Watters.

¶7 A temporary stop to investigate possible criminal behavior may be permissible even in the absence of probable cause to make an arrest. Determining the reasonableness of a seizure is a balancing test, weighing the need for the search against the invasion it produces. ***Terry v. Ohio,*** 392 U.S. 1, 21 (1968). In order for a seizure to be considered reasonable, the police officer must be able to point to "specific and articulable facts" which, taken together with rational inferences from those facts, reasonably warrant the intrusion. ***Id.*** The ultimate question is whether the facts available to the officer at the moment of the seizure would warrant a person of reasonable caution to believe that the appropriate action was taken. ***Id.*** at 22. Determining whether an investigative stop was reasonable is a question of law this court reviews independent of the circuit court. ***State v Guzy***, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987).

¶8 Watters argues there was no reasonable suspicion that he was involved in criminal activity because the police did not know whether the red Escort was the stolen vehicle, there was nothing connecting him with the Escort, and he was not doing anything suspicious. We disagree.

¶9 Watters is correct that the officers did not know whether the red Escort parked at the gas station was the stolen vehicle. However, when the officers pulled in to investigate and a man ran from the vehicle, it was then reasonable to suspect the red Escort was the one reported stolen. Further, Watters is mistaken when he claims there was no connection between him and the Escort. While Meves did not know whether Watters had occupied the car, Watters was walking toward it when Meves drove up. Given the totality of the circumstances, Meves had sufficient reason to suspect Watters was involved in an auto theft and was authorized to briefly detain Watters to confirm or dispel his suspicions.[3] That Watters was engaged in otherwise innocent behavior—walking out of a gas station—does not undermine the reasonable suspicion of criminal activity. *See* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

¶10 Watters also argues he should be able to withdraw his plea because his counsel was ineffective for pursuing a suppression motion and recommending that Watters accept the State's plea offer. We reject the first assertion because Watters does not explain how pursuing a suppression motion prejudiced him in any way. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant alleging ineffective assistance must demonstrate both deficient performance and prejudice).

¶11 We also reject the argument that counsel was deficient for recommending the plea. Had the case proceeded to trial, Watters intended to

[3] The State argues Watters' flight contributed to Meves' reasonable suspicion. Because the flight was the act giving rise to the obstruction charge, Meves' order to stay had to have been made with legal authority. Thus, any facts occurring after Meves' order are irrelevant to the present inquiry.

testify he did not see the officers and instead ran for some independent reason. Watters then would have been impeached by his statement to Meves when he was apprehended, acknowledging he had intentionally run because he did not like police. Because a defense based on this explanation was likely doomed to fail, and would have reflected poorly on Watters at sentencing, counsel's strategic recommendation was not only reasonable, but wise. A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel. ***State v. Felton***, 110 Wis. 2d 485, 501-03, 329 N.W.2d 161 (1983).

By the Court.—Judgment and order affirmed.

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