COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2265-CR **Cir. Ct. No. 02CF005902**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANITON G. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Aniton G. Thomas appeals from a judgment convicting him of possession of cocaine with intent to deliver. He claims evidence found on his person should have been suppressed and that information from his

juvenile record should have been excluded. We agree that the suppression motion should have been granted, and reverse on that ground.[1]

BACKGROUND

¶2 Officer David Feldmeier testified at the suppression hearing that in the early afternoon of October 13, 2002, he and his partner, Officer Gregory Hunter, were dispatched to arrest a subject on an outstanding warrant at the request of his probation agent. According to Feldmeier, the probation agent had informed the police that the subject was a black male juvenile wearing a gray sweatshirt standing with another black juvenile male in a black jacket in the middle of a specified block, and the probation agent was sitting in a car at the end of the block watching his client.[2] Feldmeier testified that he was familiar with the area, and it was a residential area he knew to be a high-crime area.

¶3 The officers, both uniformed and in a marked squad car, drove to the specified block and observed two teenagers who they believed matched the description they had been given.[3] When the squad car pulled up, the teenagers looked at the officers, then turned, reversed direction and started to walk into the yard of the house they were passing. Officer Hunter exited the vehicle first, called for the teenagers to stop, and jumped over the fence to stand in front of them,

[1] In light of our reversal, we do not address successor counsel's pending motion to file a substitute brief.

[2] Officer Hunter testified that they were not told anyone was with the young male in the grey hooded sweatshirt.

[3] In response to a question from the court after the close of evidence, one of the witnesses explained that neither of the two teenagers were the ones the probation officer had asked the police to arrest.

while Officer Feldmeier came up behind them. Officer Hunter conducted pat down searches for weapons on both persons and found no weapons. The officers explained that both teenagers were stopped to eliminate the possibility that the individuals had switched clothing to throw off the police. Officer Hunter acknowledged that he had the two continuously in sight prior to their seeing him until he stopped them, and they did not switch clothing during that time. Officer Feldmeier testified he did not observe anything to lead him to believe that the teenager in the black jacket was engaging in any criminal activity, and the officers had no information at the time that the companion of the wanted subject was wanted for anything.

¶4 After they stopped the teenagers, the officers asked their names. Thomas, who was wearing the black jacket, initially gave a false name. The officers walked the teenagers over to the squad car and on the way, Officer Feldmeier testified, Thomas said he had been arrested before. The officers ran a check under the false name Thomas had given, and, when they told him that the name did not show up, Thomas gave the officers his correct name. Feldmeier testified that Thomas was not free to leave at any point during this discussion.

¶5 The officers then ran a second check with Thomas's real name and discovered he had an outstanding warrant. Feldmeier conducted a search of Thomas near the squad car. At one point Feldmeier testified that he conducted this search while the check with Thomas's correct name was being conducted, and at another point he testified that he conducted the search after learning of Thomas's outstanding warrant. Hunter testified that the second search was conducted after the warrant information came back. During the search Feldmeier conducted of Thomas, he felt something in Thomas's jacket pocket. Thomas told him it was tissue and that he was free to look. When Feldmeier pulled the wad of

tissue from the jacket pocket, a small cut corner of crack cocaine dropped on the ground.

¶6 The trial court concluded that the officers had reasonable suspicion to stop Thomas. The court stated that the information on the probation warrant came from a reliable source, the description given matched the two persons the officers saw, the officers reasonably believed the two were trying to put some distance between themselves and the police, and stopping both teenagers was reasonable. It was reasonable, the court explained, because of the officers' experience that people switch clothes to throw off the police and this was a high-crime area where the officers could reasonably expect to encounter this tactic; also the officers knew the agent had recently been in the vicinity of the wanted subject and his companion.

¶7 The court concluded it was not necessary to resolve the issue whether Feldmeier's second search of Thomas had been conducted before or after the warrant information came back: either way, the court decided, the crack cocaine was admissible. If the warrant information came back first, the court reasoned that the search was permissible incident to arrest on the outstanding warrant. If the warrant check was still pending, the court reasoned that the inevitable discovery rule applied.

¶8 The State moved prior to trial to admit testimony about prior statements and actions of Thomas relating to drug activity to demonstrate his intent under WIS. STAT. § 961.41(1m) (2001-02).[4] Thomas objected on the

[4] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

grounds that the information the witnesses would testify about was contained in juvenile records and should therefore be confidential under WIS. STAT. § 938.396. The trial court deemed the prior statements and activity evidence admissible both under § 961.41(1m) and based on an analysis under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

DISCUSSION

Prior statements and activities

¶9 Addressing the second issue first, Thomas contends that the testimony regarding his prior drug activities should have been excluded under WIS. STAT. §§ 938.396 and 48.396(2)(a), because the juvenile court had not authorized disclosure of his confidential files. His contention is flawed in several respects.

¶10 Both the provisions cited by Thomas apply to "records." Here, the State was not seeking to introduce any records, but rather direct testimony about the conduct underlying those records. We see nothing in either statute which prohibits such testimony. In any event, even if WIS. STAT. § 938.396 could be construed to apply to direct testimony about events described in juvenile files, the section does not apply to "juveniles 10 years of age or older who are subject to the jurisdiction of the court of criminal jurisdiction."

¶11 We conclude, as did the trial court, that the testimony was admissible under the plain language of WIS. STAT. § 961.41(1m), as well as under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

Suppression Issue

¶12 When we review a suppression motion, we defer to the trial court's credibility determinations and uphold its findings of fact unless they are clearly erroneous. ***State v. Marty***, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds*, ***State v. Sanchez***, 201 Wis. 2d 219, 542 N.W.2d 69 (1996); WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). We independently decide, however, whether the facts establish that a particular search or seizure violated constitutional standards. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶13 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures.[5] A police officer may detain a suspect for investigative questioning consistent with the Fourth Amendment if there is reasonable suspicion that the suspect has engaged in or may be engaged in criminal activity. ***Terry v. Ohio***, 392 U.S. 1, 21-22, 88 S. Ct. 1868 (1968). Reasonable suspicion must be based on specific and articulable facts that, together with rational inferences drawn from those facts, are sufficient to lead a reasonable law enforcement officer to believe that the person detained may be involved in criminal activity. ***Id***. "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 and experience?" ***State v.***

[5] Due to the similarity of these provisions, Wisconsin courts look to the supreme court's interpretation of the Fourth Amendment for guidance in construing the state constitution. ***State v. Roberts***, 196 Wis. 2d 445, 452-53, 538 N.W.2d 825, 828 (Ct. App. 1995).

Jackson, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). The test is designed to balance the personal intrusion into the suspect's privacy occasioned by the stop against the societal interests in solving crime and bringing offenders to justice. ***State v. Guzy***, 139 Wis. 2d 663, 680, 407 N.W.2d 548 (1987).

¶14 Evidence that is obtained in violation of the Fourth Amendment may nonetheless be admitted under the inevitable discovery doctrine if the State can show: (1) a reasonable probability that the evidence in question would have been discovered by lawful means without the police misconduct; (2) that the leads making discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search, the government also was actively pursuing some alternate line of investigation. ***State v. Schwegler***, 170 Wis. 2d 487, 499-500, 490 N.W.2d 292 (Ct. App. 1992).

¶15 Both the State's incident-to-arrest and inevitable discovery arguments presuppose that the police properly stopped Thomas, asked his name, and detained him while they ran a check on the name he had given. Like other investigative stops, the validity of detaining a person to ascertain identity depends on whether the officers had reasonable suspicion to believe that the individual was involved in criminal activity. *See* ***Brown v. Texas***, 443 U.S. 47, 53, 99 S. Ct. 2637 (1979) (invalidating an identification detention made without reasonable suspicion) *and* ***Hiibel v. Sixth Judicial District Court of Nevada***, ___ U.S. ___, 124 S. Ct. 2451, 2458 (2004) (upholding an identification detention made with reasonable suspicion).

¶16 In this case, the officers certainly had reasonable suspicion to believe that the person Thomas was with was the person wanted by the probation agent: he was wearing a grey hooded sweatshirt as described by the agent and was in the

location and with a person (Thomas) who met the general description of the wanted probationer's companion given by the agent. However, as Officer Hunter acknowledged, the officers had no basis for believing that the companion of the wanted probationer was also wanted, nor did they observe anything suggesting that the person wearing the black jacket (Thomas) was engaged in criminal activity.

¶17 We agree with the trial court that the officers could reasonably believe that turning into the yard—which both teenagers did—was an effort to evade or avoid the officers, and action to evade or avoid the police is a pertinent factor in determining reasonable suspicion. ***Illinois v. Wardlow***, 528 U.S. 119, 124, 120 S. Ct. 673 (2000). However, we are aware of no case holding that action of the type here—walking in a different direction away from police—is sufficient to constitute reasonable suspicion for a temporary stop. Our supreme court has held that fleeing from an officer, in itself, is sufficient to constitute reasonable suspicion, ***State v. Anderson***, 155 Wis. 2d 77, 82, 454 N.W.2d 763 (1990), and the United States Supreme Court has held that there is reasonable suspicion to stop a person who is standing in an area known for heavy narcotics trafficking, looks in the direction of the officers, and then runs away. ***Illinois v. Wardlow***, 528 U.S. at 121-22, 124-25. However, the Court in ***Wardlow*** distinguished between "headlong flight, [which] is the consummate act of evasion," and an individual's refusal to cooperate when an officer approaches to ask questions and instead to go about his or her business. ***Id.*** at 124-25. While police officers are free to question an individual without reasonable suspicion to believe he or she is involved in criminal activity, the individual may refuse to cooperate, and that refusal does not,

without more, constitute justification for a detention. ***Florida v. Bostick***, 501 U.S. 429, 437, 111 S. Ct. 2382 (1991).[6] If the act of walking away from the police into the yard were sufficient to establish reasonable suspicion to stop them, the right to refuse to cooperate with police officers when they do not have reasonable suspicion for a detention is significantly diminished. We therefore conclude that, while the act of walking away from the officers was an appropriate factor for a reasonable officer to consider in deciding whether there is reasonable suspicion to stop both teenagers, it is not, by itself, sufficient. Thus, we look to see if there is sufficient additional facts that would create reasonable suspicion.

¶18 The additional evidence the State relied on in the circuit court was the officers' testimony that in their experience individuals have switched clothing to "throw off" the police. The State points to no other evidence that, in combination with turning away from the officers and going into the yard, would provide a reasonable basis for an officer to suspect that the teenager in the black jacket was involved in criminal activity. In other words, the State did not argue in the circuit court and does not argue on appeal that there was a reasonable basis to suspect the teenager in the black jacket of being involved in criminal activity apart from the possibility that he, and not the teenager in the grey hooded sweatshirt, was the wanted probationer. We therefore consider whether the officers' experience that people sometimes switch clothing to "throw off" the police in combination with both teenagers turning away from the police and going into the

[6] The right to walk away from police questioning when there is no reasonable suspicion is the reason that such questioning, without surrounding circumstances indicating a person is not free to leave without answering does not constitute a seizure for Fourth Amendment purposes. ***State v. Williams***, 2002 WI 94, ¶22, 255 Wis. 2d 1, 646 N.W.2d 834.

yard constitutes reasonable suspicion that the teenager in the black jacket, that is, Thomas, was the wanted probationer.

¶19 The trial court concluded it was reasonable for the officers to be concerned that the two teenagers had switched clothing before they spotted the two teenagers, particularly because the officers knew the probation agent had very recently seen them. We understand the court to mean that it was reasonable for the officers to infer from that information that the wanted probationer knew his agent was or might be looking for him or might tell the police where he was and what he was wearing. We agree that is a reasonable inference for an officer to draw. However, we see no basis in the record for concluding that it is reasonable to believe that the wanted probationer would switch clothing with his companion to avoid being found by the police or his probation agent. The problem with this line of thought is that the probationer remained with his companion. This does not "throw off" the police, as the officers have experienced in the past—such as might be the situation when a suspect, after leaving the scene of a crime, switches clothing with someone else so the suspect will not be able to be identified by the police by the clothing he or she wore at the scene of the crime. In the circumstances of this case, if the teenagers switch clothing and remain together, when the officers learn that the teenager with the grey hooded sweatshirt is not the wanted probationer, the wanted probationer is standing right there.

¶20 We conclude it is not reasonable, in the circumstances of this case, to believe that the teenagers switched clothing to throw off either the probation agent or the police. Therefore, the officers did not have reasonable suspicion to believe that the teenager wearing the black jacket—Thomas—was the wanted probationer. And, as we have already explained, the fact that both teenagers turned away from the police and walked into the yard does not in itself constitute a

reasonable suspicion that Thomas was involved in some other criminal activity. Thus, while it was perfectly reasonable for the officers to stop the teenager in the grey hooded sweatshirt, they lacked reasonable suspicion to stop his companion, Thomas.

¶21 Because the officers did not have the requisite reasonable suspicion to detain Thomas, the evidence obtained during his detention should have been suppressed. Accordingly, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

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