

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 15, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-0628-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 03CF003665**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ROBERT SIMMONS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

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

¶1 CURLEY, J. Robert Simmons appeals from the judgment, entered following his guilty plea, convicting him of possession of a controlled substance, cocaine, with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(cm)1r.

(2003-04).<sup>1</sup> Simmons maintains that the trial court erred in denying his motion to suppress the cocaine found in his shoe during a search, following his arrest for a municipal ordinance violation. He argues that, initially, the officers did not have reasonable suspicion to conduct a *Terry* stop, and furthermore, the officers did not have probable cause to arrest him for the municipal ordinance violation.<sup>2</sup> We are satisfied that the officers had reasonable suspicion justifying the initial stop and that they also had probable cause to arrest him for a municipal ordinance violation. Thus, we affirm.

### I. BACKGROUND.

¶2 On June 24, 2003, at approximately 9:00 p.m., two on-duty Milwaukee police officers were driving a marked squad car through an area known for drug activity. Both officers had received training in identifying illegal drug dealing. The officers' attention was drawn to Simmons and his companion, Gary Pirtle, when they observed the two men approaching numerous people and having brief conversations with them. They also allegedly saw some "furtive movements." Later, when it appeared that the men may have noticed the police car, they ducked behind a corner of a building.<sup>3</sup> After observing them for about

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1, 22 (1968) ("[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.").

<sup>3</sup> In regard to Simmons and Pirtle ducking around the corner of the building, the officer testified: "I guess what I observed is one of two things could have occurred. He could have seen where we were parked or there was something else going on. But when he ducked around the corner, there was a purpose behind his movements." He later testified, however, that he had no idea why Simmons quickly ducked around the corner, and that is why he decided to conduct a field interview.

ten minutes, the officers believed the men's actions were unusual and suggested possible drug activities. As a result, the police decided to conduct a *Terry* stop.

¶3 After this decision was reached, but before stopping them, the police saw Simmons and Pirtle separate and begin walking in different directions. The officers called for an additional squad car and Simmons and Pirtle were stopped. They gave conflicting explanations as to what they were doing. As a result, the police decided to arrest them for violating a municipal ordinance, “loitering—illegal illegal drug activity,” and took the two men into custody. When Simmons was searched, sixteen individually wrapped chunks of an off-white substance, later confirmed to be crack cocaine, were discovered in his shoe.

¶4 After Simmons was charged, he brought a motion to suppress the cocaine, claiming that there was no reasonable suspicion to permit the police to conduct a *Terry* stop and no probable cause to arrest him for a municipal ordinance violation. The trial court concluded that the police had reasonable suspicion to stop Simmons and conduct a “field interview.” However, the trial court stated that the police did not have probable cause to arrest Simmons for violating the loitering—illegal drug activity ordinance. Nevertheless, the trial court reasoned that probable cause did exist to arrest him for violating the general ordinance prohibiting loitering. Consequently, the trial court denied the motion to suppress. Following the trial court's decision, Simmons pled guilty and was sentenced to three years of confinement, and two years of extended supervision.<sup>4</sup>

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<sup>4</sup> 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).

## II. ANALYSIS.

¶5 When reviewing a trial court's ruling on a motion to suppress evidence, we will uphold a trial court's factual findings unless they are clearly erroneous. *State v. Eskridge*, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434. Whether a search is reasonable under the Fourth Amendment, however, is a question of law that we review *de novo*. *Id.*

¶6 Moreover, the temporary detention of a citizen constitutes a seizure within the meaning of the Fourth Amendment and triggers Fourth Amendment protections. *See State v. Harris*, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). As such, the determination of reasonable suspicion for an investigatory stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We review the determination of reasonable suspicion *de novo*. *Id.*

¶7 The standard for a valid investigatory stop is less than that for an arrest; an investigatory stop requires only "reasonable suspicion," and not probable cause. *See State v. Allen*, 226 Wis. 2d 66, 70-71, 593 N.W.2d 504 (Ct. App. 1999). The reasonable suspicion standard requires the officer to have "'a particularized and objective basis' for suspecting the person stopped of criminal activity." *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (citation omitted). When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the circumstances. *See State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990). Stated otherwise, to justify an investigatory stop, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from

those facts, that an individual is [or was] violating the law.” *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. “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. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶8 At the motion hearing, one of the arresting officers, Officer Simmert, testified that he and his partner were in a squad car, stationed in an area of two-story multi-unit apartment buildings. The buildings were described as being separated by green spaces, with a communal parking lot located behind them. Officer Simmert indicated that they observed Simmons and Pirtle “engaging numerous people in very brief conversations.” Additionally, although the officers never witnessed any hand-to-hand contact, Officer Simmert testified: “I couldn’t completely articulate what [Simmons’s] furtive movements were[,] based on the fact of the low lighting conditions, but certainly there was enough movement that it raised my suspicions.” He also stated that, based on his training and experience, he thought these actions were: “what I’ve been taught in training to be consistent with a person purchasing narcotics or a person delivering narcotics.” Officer Simmert related that, while he observed Simmons and Pirtle, “they ducked around a corner of one of the apartment buildings,” after, Officer Simmert surmised, they saw the squad car for the first time. Officer Simmert explained that they drove the squad car around the corner “to get a better look at what was going on.” As they did so, they decided to conduct an investigatory *Terry* stop.

¶9 After the officers made the decision to stop the men, Simmons and Pirtle, “upon sight of [the] marked squad car, separate[d] from each other” and walked in opposite directions. After calling for backup, one of the officers approached Pirtle, who explained that he was visiting a friend, but could not provide a name or an address for the “friend.” The officer had had prior contact with Pirtle and knew he did not live in the area. Another officer stopped Simmons. Simmons stated, in response to the officer’s question, that he was out for a walk.

¶10 As such, based on the fact that the area was known for drug activity, the officers’ belief that some of the men’s conduct was consistent with drug dealing, the actions of the two in separating and walking in different directions, and the two conflicting reports as to what Simmons and Pirtle said they were doing in the area, Simmons was arrested for loitering—illegal drug activity, a municipal ordinance violation. A subsequent search of his person revealed the illicit drugs in his shoe.

¶11 After hearing argument from both Simmons and the State, the trial court said: “Did the police have the right to do an investigatory stop of the defendant? The answer to that is very clearly yes.” We agree.

¶12 Under the totality of the circumstances present here, the officers, who were trained in investigating illegal drug dealing, could reasonably suspect that something was amiss and that the situation needed to be clarified by stopping and asking the men to explain their actions. It was a summer evening, and while not completely dark outside, it was apparently dark enough to obscure the men’s actions. The officers were in an area known for drug activity, and they saw the two men initiate numerous brief conversations with other people—behavior the

officers knew to be consistent with drug purchasing or dealing. Further, there was no outdoor party going on, which eliminates any explanation suggesting, for example, that Simmons' and Pirtle's conduct was that of two partygoers simply talking to other guests. And finally, the men seemed to be trying to avoid the police by ducking behind a building.

¶13 Like the circumstances present in *Allen*, any one of the police observations here might not have constituted "reasonable suspicion," but the combination of all of them did:

[The defendant] and his companion being in a high-crime area, standing alone, would not be enough to create reasonable suspicion. A brief contact with a car, standing alone, would not be enough to create reasonable suspicion. Hanging around a neighborhood for five to ten minutes, standing alone, would not be enough to create reasonable suspicion. On the other hand, when these three events occur in sequence and are combined with the officers' experience and training, the reputation of the area and the time of day, there is enough to create a reasonable suspicion to justify a *Terry* stop.

*Allen*, 226 Wis. 2d at 75. Similarly, we are satisfied that, applying a common-sense test, given all of the officers' observations, there existed "a particularized and objective basis" for the police to suspect Simmons of criminal activity. *See Ornelas*, 517 U.S. at 696.

¶14 Next, however, we must determine whether the police had probable cause to arrest Simmons for a municipal ordinance violation. "Whether probable cause to arrest exists based on the facts of a given case is a question of law [that this court] review[s] independently of the trial court." *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). "Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that

the arrestee is committing, or has committed, an offense.” *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). It is a common-sense test, not a technical determination, *see id.*, and does not require “proof beyond a reasonable doubt or even that guilt is more likely than not[.]” *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (citation omitted). That is, “the facts faced by the officer ‘need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.’” *Sharpee*, 154 Wis. 2d at 518 (citation omitted).

¶15 Moreover, it has long been established that, in Wisconsin, “a law enforcement officer may make a warrantless arrest of a person if the officer has ‘probable cause to believe the person was committing ... an ordinance violation.’” *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 458, 439 N.W.2d 562 (1989) (citation omitted); *see also* WIS. STAT. § 800.02(6) (“A person may be arrested without a warrant for the violation of a municipal ordinance if the arresting officer has reasonable grounds to believe that the person is violating or has violated the ordinance.”). However, unless other factors existed, an officer may only make a warrantless arrest “if the ordinance violation was ‘committed in the officer’s presence[.]’” *Nelson*, 149 Wis. 2d at 458 (citation omitted).

¶16 Furthermore, the legality of an arrest does not, generally speaking, depend on whether the arresting officer articulates the correct legal basis for the arrest. That is, the legality of an arrest does not depend on the subjective motivation of the arresting officer. *See State v. Repenshek*, 2004 WI App 229, ¶10, No. 03-3089-CR; *see also State v. Kiekhefer*, 212 Wis. 2d 460, 484, 569 N.W.2d 316 (Ct. App. 1997) (“The probable cause standard is an objective one; the officers’ subjective state of mind is irrelevant.”); *Whren v. United States*, 517 U.S. 806, 813 (1996) (the existence of probable cause is determined objectively



without regard to the “actual motivations” or “[s]ubjective intentions” of the arresting officer). “More specifically, even when an officer acts under a mistaken understanding of the crime committed, an objective test is used to determine the legality of the arrest.” *Repenshek*, 2004 WI App 229, ¶11. Thus, the fact that the officers intended to arrest the men for loitering—illegal drug activity, while the trial court concluded that probable cause existed to arrest for another municipal ordinance—the general ordinance prohibiting loitering—is of no consequence. The key is whether probable cause existed for the police to arrest Simmons and Pirtle for a municipal ordinance violation.

¶17 On this issue, the trial court determined: “I do think the elements of simple loitering are made out and it was a valid arrest. And so based upon that, the search was legal and the cocaine recovered is not suppressed.”<sup>5</sup> Again, we agree.

¶18 The ordinance defining simple loitering states:

**106-31. Loitering or Prowling.** Whoever does any of the following within the limits of the city of Milwaukee may be fined not more than \$500 or, upon default of payment thereof, shall be imprisoned in the house of correction of Milwaukee county for not more than 90 days.

1. LOITERING. Loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to

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<sup>5</sup> We note that the trial court appeared to believe that the officers learned that Simmons was on probation at the time of the initial stop. The officers testified that they became aware of his probation status after the two had been arrested, not before. In any event, sufficient other facts support a conclusion that the officers had probable cause to arrest.

identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

MILWAUKEE, WIS., CODE OF ORDINANCES § 106-31 (2004).

¶19 As noted, the arresting officers had a reasonable suspicion to justify a *Terry* stop. However, after deciding to stop Simmons and Pirtle, the police obtained additional information that ripened their reasonable suspicion into probable cause to believe that the two men were guilty of a municipal ordinance violation. First, after witnessing the unusual behavior of the two men, Simmons and Pirtle split up and began walking in opposite directions. Second, the two men gave conflicting accounts of their actions. Simmons claimed to be out for a walk and Pirtle said he was visiting a “friend.”

¶20 Here, we are satisfied that Simmons’ actions fell within the ambit of the ordinance. It is undisputed that Simmons and Pirtle were “loitering” as that term is defined: “To be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind.” BLACK’S LAW DICTIONARY 1092 (4th ed. 1962). The two men were also seemingly acting in a manner not usual for law-abiding citizens in that they were approaching numerous people and engaging in short conversations, in an area known for drug activity, which would warrant alarm for the safety of others. The conduct of the two men also warranted alarm for the safety of others because the men appeared to be avoiding the police by ducking

out of sight and splitting up. Finally, Simmons and Pirtle could not reasonably explain either their presence or their conduct. Under the totality of the circumstances, the officers had probable cause to believe that the two were violating the loitering ordinance. As a consequence, the suppression motion was properly denied. Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

