COURT OF APPEALS
DECISION
DATED AND RELEASED

December 20, 1995

No. 94-3065-CR

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JOSHUA FERRY,

Defendant-Respondent.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Reversed and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

NETTESHEIM, J. The State of Wisconsin appeals from a nonfinal trial court order suppressing evidence obtained during two searches of Joshua Ferry's apartment. Despite Ferry's consent to both searches, the trial court ruled that: (1) the initial search was invalid because the police did not have reasonable grounds for detaining Ferry pursuant to § 968.24, STATS., and *Terry v. Ohio*, 392 U.S. 1 (1968); (2) the scope of the initial search exceeded

Ferry's consent; and (3) the illegality of the initial search tainted the second search.

We conclude that the police did not detain Ferry under § 968.24, STATS., and ***Terry***. We also hold that the scope of the initial search did not exceed Ferry's consent. Therefore, we hold that both searches were valid consensual searches. Alternatively, we hold that even if the first search was illegal, the second search was sufficiently attenuated from the first search. We therefore reverse the suppression order and remand for further proceedings.

FACTS

The parties do not dispute the controlling facts of this case. On August 15, 1994, at 12:50 a.m., Officer Donald Wilson of the Oshkosh Police Department encountered two men fighting on the street in front of a restaurant. As Wilson approached the disturbance, he observed a person, later identified as Ferry, "about to grab the person off the top or he was lunging towards him when I pulled up." Wilson believed Ferry to be either an active participant in the fight or, at the very least, a witness to the incident. When Wilson asked Ferry his name, Ferry verbally identified himself as Samuel J. Brown.

Wilson then asked Officer Gary Sagmeister, who had since arrived on the scene, to procure some written identification which would positively identify Ferry. Ferry, however, was unable to produce any such identification. Sagmeister then asked Ferry if the two of them could go to Ferry's nearby apartment to obtain the identification. Ferry agreed.

Sagmeister and Ferry traveled together to Ferry's apartment. Once there, Ferry unlocked the door and he and Sagmeister entered. Sagmeister asked if he could look through the apartment for Ferry's written identification. Again Ferry agreed. Sagmeister first looked through the living room and kitchen areas for mail or other items which would identify Ferry. Finding nothing, Sagmeister next looked in Ferry's bedroom and found various belongings, but no identification. Ferry explained to Sagmeister that some of the belongings in the bedroom were his and others belonged to a prior tenant. This prompted Sagmeister to clarify that Ferry had control over the entire apartment and could authorize a search of the entire apartment. Ferry replied that he did have such control and authority.

Sagmeister then continued his search of the bedroom area, including two closets. On a shelf in one of the closets, Sagmeister found a hacksaw. In the other closet, he found a sawed-off portion of a shotgun barrel. Ferry stated, in response to Sagmeister's questions, that he had not seen the shotgun barrel before and that it might have belonged to a previous tenant. With Ferry's permission, Sagmeister took possession of the hacksaw and the sawed-off shotgun barrel and continued his search.

Meanwhile, back at the scene of the disturbance in the street, one of the participants in the disturbance told Wilson of Ferry's true identity. Wilson radioed this information to Sagmeister, who was still in Ferry's apartment. Sagmeister asked Ferry why he had lied about his name. Ferry replied that he thought there were some warrants outstanding against him.

Sagmeister continued his search of Ferry's apartment but found no identification. Sagmeister then left Ferry's apartment.

After Wilson had finished his investigation, he encountered some people who reported that they had been in Ferry's apartment after Sagmeister had left, that Ferry had told them that the police had missed a shotgun in their search, and that Ferry had displayed the shotgun to them. Wilson confronted Ferry with this information.[1] He asked Ferry whether the police could again search the apartment to look for the shotgun. Again Ferry agreed. For his personal safety, Wilson patted Ferry down. He then transported Ferry to his apartment. Sagmeister also traveled to the apartment by separate vehicle. Once at the apartment, the officers entered with Ferry's permission. They immediately found the shotgun in the location reported to Wilson by the third parties.

At no time prior to finding the shotgun did Sagmeister or Wilson place Ferry under arrest. Other than Wilson's pat down of Ferry after the third parties had reported that the shotgun was in the apartment, neither officer exercised any physical force or restraint against Ferry.

The trial court suppressed the evidence obtained as the result of both searches. The court reasoned that the officers' initial stop and detention of Ferry was unlawful because Ferry had neither committed nor was attempting to commit a crime pursuant to § 968.24, STATS.[2] Thus, the court concluded that the

[1] Ferry had returned to the scene of the disturbance after the initial search.

[2] Wisconsin's temporary detention statute, § 968.24, STATS., which is a codification of the

initial search was a product of the illegal detention. The court also concluded that the initial search was illegal as beyond the scope of Ferry's consent. In addition, the court concluded that the second search was tainted by the illegality of the first search. The State appeals.

(..continued)
standards in ***Terry v. Ohio,*** 392 U.S. 1 (1968), provides:

> **Temporary questioning without arrest.** After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

See ***State v. Goebel,*** 103 Wis.2d 203, 209, 307 N.W.2d 915, 918 (1981).

DISCUSSION

1. The Initial Encounter

The trial court ruled that the police had no authority to stop and detain Ferry because they did not have a reasonable suspicion to believe that Ferry had committed or was about to commit a crime. *See* § 968.24, STATS. Whether a search or seizure has occurred is a question of law for our independent review. ***State v. Garcia,*** 195 Wis.2d 68, 73, 535 N.W.2d 124, 126 (Ct. App. 1995). Although we are not certain, it appears that the trial court may have believed that such suspicion was a prerequisite to the authority of the police to approach and question Ferry in the first instance.

However, a seizure does not occur simply because an officer approaches an individual and asks a few questions. ***Florida v. Bostick,*** 501 U.S. 429, 434 (1991). As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual. ***Id.*** Such an encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. ***Id.*** Even when officers have no basis for suspecting an individual of criminal activity, the officer may generally ask questions of the individual and even ask to examine the person's identification, "*as long as the police do not convey a message that compliance with their requests is required*." ***Id.*** at 434-35 (emphasis added).

Bostick holds that a police officer may ask questions of an individual and may even ask for identification although there is no basis for suspecting that individual of criminal activity. ***Id.*** A seizure occurs only when

an officer restrains a person's liberty by means of physical force or show of authority. ***State v. Howard,*** 176 Wis.2d 921, 927, 501 N.W.2d 9, 12 (1993) (citing ***Terry,*** 392 U.S. at 19 n.16). Accordingly, not every citizen encounter with the police will amount to a seizure. ***Id***. at 929, 501 N.W.2d at 12. The question is whether a reasonable person would feel free to disregard the police and go about his or her business. ***Bostick,*** 501 U.S. at 434; *see* ***Howard,*** 176 Wis.2d at 929, 501 N.W.2d at 12-13. If so, the encounter is consensual, and no reasonable suspicion of criminal activity is required. ***Bostick,*** 501 U.S. at 434.

The trial court's ruling in this case focused on § 968.24, STATS. However, it is important to note that Wilson saw Ferry not only as a possible participant in the disturbance, *but also, "at the very least," as a material witness to the event*. Thus, even if we accept the trial court's holding that Wilson's suspicion about Ferry's culpable participation in the disturbance was not reasonable, Wilson's further belief that Ferry was at least a witness to the event is unassailable. As ***Bostick*** recognizes, not all police/citizen encounters are governed by the rules pertaining to detention or arrest. We suspect that many, if not most, such contacts fall outside a formal arrest or temporary detention situation.

Here, the State argued to the trial court that the initial encounter between Ferry and the police was consensual. We agree with the State. None of the circumstances suggestive of a seizure were present. The officers did not threaten or coerce Ferry; they did not display their weapons or attempt to physically touch or restrain Ferry; nor did Ferry testify that their language or

tone of voice indicated that their request for identification was compelled. *See* ***United States v. Mendenhall,*** 446 U.S. 544, 554 (1980). In fact, Ferry's testimony corroborated the officers' version of these events. It is of no consequence that the officers did not specifically tell Ferry that he was free to decline their request to verify his identification. *See* ***id.*** at 555.

In addition, we see no hint of chicanery or deceit on the part of the officers. Their need to obtain written verification of Ferry's identity was legitimate. Ferry was, at a minimum, a material witness to an event. As such, the police or the prosecuting entity might well have a need to contact Ferry in the future regarding the event.[3] To this end, the police asked Ferry to verify his identification. When Ferry declined or refused, the police asked if they could accompany Ferry to his apartment, a short distance away, in order to obtain such identification. Ferry readily agreed to this request, never indicating to the officers that he did not have any such identification at the apartment or that a search would be futile.

Nothing in the record even remotely suggests that Ferry was seized or detained. The police did not convey to Ferry, either expressly or impliedly, that compliance with their request was required. *See* ***Bostick***, 501 U.S. at 435. In short, this initial encounter was not a seizure or detention under § 968.24, STATS., and the law of ***Terry***. Instead, it was a consensual police/citizen encounter, exactly as Ferry and the police officers described it in their respective testimonies at the suppression hearing.

[3] Wilson testified that he issued a citation to one of the participants in the disturbance.

Ferry, of course, was not obligated to cooperate or comply with the police request. Just as the police committed no wrong in making their request, neither would Ferry have committed any wrong by rejecting it. However, Ferry never exercised this option. We conclude that the police did not detain Ferry and that the initial search was not rendered invalid as the result of the consensual contact between the police and Ferry.

2. The Initial Search

We now turn to the circumstances of the initial search.

The State first argues that Ferry's consent to this search was free and voluntary. However, we do not see this specific issue as raised by Ferry in the trial court. There, Ferry argued that his consent was invalid, not because it was the product of his illegal detention under § 968.24, STATS., and ***Terry v. Ohio***.[4] Moreover, the trial court did not address any issue as to the voluntariness of Ferry's consent in its ruling. Finally, we note that Ferry's respondent's brief does not address this argument made by the State. Having already concluded that the police did not seize or detain Ferry prior to the initial search, we conclude that we have fully addressed Ferry's challenges to the consent.

We therefore move to the State's further argument that the scope of the initial search did not exceed the scope of Ferry's consent to the search. Under the Fourth Amendment, a "search" occurs when law enforcement

[4] In addition, Ferry argued that the search exceeded the scope of the consent, a matter we will address later in this opinion.

officials infringe on an expectation of privacy that society considers reasonable. ***Garcia,*** 195 Wis.2d at 73, 535 N.W.2d at 126. However, the Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. ***Florida v. Jimeno,*** 500 U.S. 248, 250 (1991). Thus, consensual searches have long been approved because it is considered reasonable for the police to conduct a search once they have been permitted to do so. ***Id.*** at 250-51; *see also* ***Illinois v. Rodriguez,*** 497 U.S. 177, 181 (1990).

A consent search is constitutionally reasonable to the extent that the search remains within the bounds of the actual consent. ***State v. Douglas,*** 123 Wis.2d 13, 22, 365 N.W.2d 580, 584 (1985). A search pursuant to consent may not be more intensive than was contemplated by the consent. ***State v. Stevens***, 120 Wis.2d 334, 339, 354 N.W.2d 762, 765 (Ct. App. 1984), *rev'd in part on other grounds*, 123 Wis.2d 303, 367 N.W.2d 788, *cert. denied,* 474 U.S. 852 (1985). The scope of activities reasonably expected by the consenting occupant is a key consideration in deciding if consent was valid. ***Id***. A warrantless search and seizure is valid if consented to by the occupant and if conducted for the purpose contemplated by the occupant. ***Id***.; *see also* ***United States v. Ressler***, 536 F.2d 208, 211 (7th Cir. 1976) (quoting ***Lewis v. United States***, 385 U.S. 206, 211 (1966)).

The facts of this case are undisputed. In such a setting, whether a search is permissible under the Fourth Amendment is a question of law. ***State v. Krause***, 168 Wis.2d 578, 586-87, 484 N.W.2d 347, 350 (Ct. App. 1992). Thus, we review the constitutional requirement of reasonableness independent of the

trial court holding. *See* ***State v. Kennedy***, 134 Wis.2d 308, 316, 396 N.W.2d 765, 768 (Ct. App. 1986).

In this case, Sagmeister went to Ferry's apartment with Ferry's permission to look for written verification of his verbal identification. Once there, Sagmeister specifically asked if Ferry had the authority to consent to the search. Ferry replied that he did. Ferry offered no assistance as to where Sagmeister might find any identification. Nor did he place any limitations on where Sagmeister could search.

We reject Ferry's contention that the search of the two closet areas exceeded the intended scope of his consent. The search was for written confirmation of Ferry's identity. We disagree with Ferry that it would be unusual for an apartment dweller to store such materials in a closet area. This is especially so under the facts of this case which show that Sagmeister first looked in the more obvious places—the living room and kitchen—for evidence of mail or other items which would identify Ferry. Only when this proved fruitless did Sagmeister's search move to the bedroom and closet areas. And then only after Sagmeister again confirmed with Ferry that Ferry had the authority to permit a search of the entire apartment. There is nothing in this record which suggests or implies that the police were looking for anything other than Ferry's identification.[5]

[5] Even in a case where the police engaged in surreptitious conduct when obtaining a suspect's consent, the Wisconsin courts have held that the scope of the search did not exceed the suspect's expectations regarding his consent. *See* ***State v. Stevens***, 120 Wis.2d 334, 339-40, 354 N.W.2d 762, 765 (Ct. App. 1984), *rev'd in part on other grounds*, 123 Wis.2d 303, 367 N.W.2d 788, *cert. denied*, 474 U.S. 852 (1985).

We conclude that the searches of the closet areas were reasonable under the Fourth Amendment.

3. The Second Search: Consent/Attenuation

a. Consent

The record is clear and undisputed that the second search was also conducted with Ferry's express consent. After the first search, Wilson learned from third parties that Ferry had told them that Sagmeister had not discovered the shotgun and that Ferry had actually displayed the weapon to one of the parties. When Wilson confronted Ferry with this information, he asked for Ferry's permission to again search the apartment, specifically advising Ferry that the police would be looking for the shotgun. Again Ferry agreed. We need not say more.

b. Attenuation

We uphold the second search of Ferry's apartment on an alternative ground. Assuming that Sagmeister's initial search exceeded the scope of Ferry's consent, we nonetheless conclude that the second search was sufficiently attenuated from any illegality associated with the first search.

The primary concern in attenuation cases is whether the evidence objected to was obtained by exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint. ***State v. Anderson***, 165 Wis.2d 441, 447-48, 477 N.W.2d 277, 281 (1991). If the evidence was obtained by means sufficiently distinguishable from the prior search, then it is properly admitted. *See* ***id.*** at 448, 477 N.W.2d at 281. The factors which we

consider on such a question are the temporal proximity of the official misconduct, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. ***Id***.

Here, the two searches were conducted in close temporal proximity. This factor augurs in Ferry's favor.

However, we are not persuaded that the degree of official misconduct in the scope of Sagmeister's first search was of such purpose or flagrancy that it dooms the later search. As we have indicated, even if Ferry did not intend to allow Sagmeister to search the closet areas, it would not be unusual for a person living in an apartment setting to store identification materials in such an area.[6] Thus, Sagmeister's misreading of the scope of Ferry's consent would not constitute flagrant or purposeful misconduct. Any official misconduct in this case was minimal and marginal.

The intervening circumstances, however, represent the most compelling factor in support of attenuation. When Sagmeister left Ferry's apartment after the first search, he was finished with Ferry and was returning to the scene of the original disturbance. Although Sagmeister had reason to suspect that a shotgun might be in Ferry's apartment, there is no indication in this record that the police intended to pursue that matter further.[7]

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[6] Although it is not controlling, we note that Sagmeister testified that he, himself, stores such materials in a closet of his dwelling.

[7] While Sagmeister's discovery of the hacksaw and shotgun barrel raised a degree of suspicion, the possession of such items was not *per se* illegal.

The only reason the police ended up back at Ferry's apartment was Ferry's later revelation to third parties that Sagmeister had failed to discover the shotgun and the third parties passing this information on to Wilson. However, the police did not solicit or inspire either of these intervening events. Rather, it was Ferry's own "loose lips" which proved his undoing.

On this alternative ground, we uphold the second search of Ferry's apartment.

CONCLUSION

We reverse the suppression order and remand for further proceedings.

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

Not recommended for publication in the official reports.

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BROWN, J. (*dissenting*). I find it difficult to comprehend how consent to search for identification translates into consent to search someone's closet and look underneath socks lying on the floor of the closet. We are supposed to view the reasonableness of humankind's actions, including police officers', by reference to what "everyman" and "everywoman" would think to be reasonable. This being so, what "everyperson" would believe that consent to search for identification includes searching underneath some socks in a closet? The majority opinion does not tell us how or why searching a closet and the clothing within it is reasonably within the parameters of consent to search for identification. The opinion just makes the conclusory proposition that it is not unusual for an apartment dweller to store written confirmation of identification in a closet. While it may not be unheard of for an apartment dweller to store articles other than clothing in a closet, this supposition misses the whole point. The question is not whether articles other than clothing are sometimes stored in an apartment closet. The question is, rather, whether an apartment dweller would reasonably believe that consent to look for identification includes consent to search a closet. The majority has failed to answer that question, let alone ask it.

So while I agree that officers may request to search a person's apartment for identification without having to first satisfy the ***Terry*** prerequisites, and while I agree that Ferry consented to a search of his apartment for identification, I cannot agree that the scope of Ferry's original consent extended to the closet area of his apartment. A reasonable person

would believe that consent to search for identification would be limited to what the majority opinion refers to as "obvious places," such as the living room or kitchen where a wallet or mail may be kept.

Nor is it proper for the majority to justify what the trial court termed a "fishing expedition" by concluding that an officer twice asked for and received consent to search the *entire* premises. While it is true that Officer Sagmeister testified to this, Ferry testified only that he gave consent to search *for identification*. Ferry was not asked nor did he volunteer whether he gave specific consent to the officers to search the complete premises, including the closets.

This becomes important because the trial court made a finding of fact that Ferry's consent was limited in scope to a search for identification, which the trial court further found was limited to a search in the "general area … where mail is kept … and not a closet." I always thought the rule to be that we, as appellate tribunals, may make our own findings of fact on whether a defendant voluntarily consented to a search only if the trial court has *not* done so. ***State v. Kraimer,*** 99 Wis.2d 306, 318, 298 N.W.2d 568, 574 (1980), *cert. denied*, 451 U.S. 973 (1981). Here, the trial court *has* made a factual finding. The majority therefore departs from our own established rules regarding the standard of review when it makes a finding that Ferry consented to a search of the "entire premises."

Furthermore, I am cognizant that this court will independently examine the circumstances of the case to determine whether the constitutional

requirement of reasonableness is satisfied. *See* ***id.*** at 319, 298 N.W.2d at 574. However, before doing so, this court must accept the findings of fact made by the trial court unless clearly erroneous. *See* ***id***. So, the real question before us should not be whether Ferry gave consent to search the entire premises for identification and whether such a search is then reasonable in light of the consent given. Instead, the real question should be whether officers may search a closet when given limited consent to search for identification. In my opinion, the trial court made the necessary findings of fact, asked the right question based on those facts and gave the right answer.

What bothers me about the majority's holding is that our United States Supreme Court has consistently found the scope of any search to be limited to the terms of its authorization. *See* ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991) (the scope of a search is generally defined by its expressed object). The majority's opinion can be read to say that once an officer is given consent to search for an expressed object that may lie within an apartment, the whole of the apartment is open for inspection regardless of what the object is. If that is the court's holding, I find it troubling.

Finally, the majority concludes that the second search was not attenuated by the first search. Again, the logic of this conclusion escapes me. The search of the closet produced the sawed-off barrel to a shotgun. People on the street told the officers that they missed finding the gun itself. So, the officers went back to find the gun. I do not know how the subsequent search could be

more tainted by the first one. I would affirm the trial court's order of suppression.