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May 12, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1869-CR State of Wisconsin v. Daniel J. Lux (L.C. # 2013CF1629)

Before Higginbotham, Sherman, and Blanchard, JJ.

Daniel Lux appeals a judgment of conviction for possession of narcotics. He asserts that when a police officer confronted him while he was urinating in a movie theater restroom and ordered him not to flush the urinal, it constituted a seizure for Fourth Amendment purposes. He further argues that because the seizure was not supported by reasonable suspicion, the circuit court erred when it denied his suppression motion. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm the judgment.

BACKGROUND

Lux was charged with one count of possession of narcotics and one count of possessing drug paraphernalia. Lux filed a pretrial motion to suppress, arguing that the evidence, an ounce of heroin found in his pocket and a straw used to snort it, was obtained during an illegal seizure. An evidentiary hearing was held on Lux's suppression motion.

Lux testified that he and his step-brother had stopped by an apartment where his step-brother was staying to pick up a sweatshirt before going to a movie. Once they arrived at the movie theater, Lux went to the bathroom. He said he was in the bathroom, urinating at a urinal, when police came into the bathroom. One officer came up behind him and, using an "authority tone," said, "Don't flush." Lux said that when the officer asked if the officer could talk to Lux, Lux said yes.

Two officers testified as well. An officer who had first seen the car Lux was in testified that he saw a vehicle park near an apartment building that the officer considered a "suspect address" based on citizen tips of drug dealing in that particular building. At the time, he was patrolling a block where drug activity was known to occur. Police had also observed short-term visits consistent with narcotics trafficking near that building. The officer saw Lux and his step-brother in the car. He saw them enter the building. They were inside for about three minutes.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

While the men were inside, the officer ran the license plates and ran a Department of Transportations records check and criminal history on the vehicle's owner. Those checks showed that the vehicle was registered to an address in a small town about thirty miles away, and it showed that the car's owner had a "narcotics history." The physical description in those records matched the driver's appearance. The officer then saw the men return to the car and drive away. He radioed for backup and followed the car in his unmarked vehicle about three miles to a movie theater. The men walked "kind of quickly" from the car to the theater, "possibly trying to avoid contact with the police." He and two other officers, all in uniforms, followed the men inside and found them in the bathroom.

A second officer testified that he was the one who approached Lux in the bathroom. He stated that he asked Lux if he could ask him a few questions. He stated that Lux volunteered that he had heroin in his pocket and a straw he used to ingest it. The contact lasted under two minutes.

The trial court denied the suppression motion. It first concluded that the stop had been a seizure and was subject to Fourth Amendment analysis. It applied the ***Mendenhall*** test[2] and concluded that a reasonable person in Lux's position would not have felt free to leave, given that Lux was confronted with "a command," more than one officer, and a "confined space." The court then concluded, applying the test adopted in the ***Terry v. Ohio***, 392 U.S. 1 (1968) and ***State v. Waldner***, 206 Wis. 2d 51, 556 N.W.2d 681 (1996) cases, that the investigatory stop was

[2] ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980) (holding that a seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

supported by reasonable suspicion. The facts that were significant to the court: the experience of the officers, specifically as to street-level narcotics; the officers' familiarity with the neighborhood; the area is known for high narcotics activity; the fact that police had received citizen tips about narcotics trafficking in this area; the brevity of the time inside the building; the out-of-town residence of the registered owner; the discovery that the car was registered to someone with a "fairly recent narcotics history"; and the observation that the two men walked quickly into the theater from the car.

Lux pled guilty to the possession charge, and the paraphernalia count was dismissed.

DISCUSSION

We assume without deciding that a seizure occurred, and turn to the question of whether the seizure was supported by reasonable suspicion.

Whether an investigative stop is supported by reasonable suspicion is a question of "constitutional fact." ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. "A question of constitutional fact is a mixed question of law and fact to which we apply a two-part standard of review." ***Id.*** We review the circuit court's findings of historical fact under the clearly erroneous standard, but we review de novo the application of constitutional principles to those facts. ***Id.*** Here, there is no dispute regarding relevant facts. Therefore we review de novo the question of whether the undisputed facts represent a constitutional violation. *See* ***id.***

The question of what constitutes reasonableness for an investigatory stop is a common sense test. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). "What would a reasonable police officer reasonably suspect in light of his or her training and experience[?]" ***Id.***

"This common sense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility." ***Id.*** "The societal interest involved is, of course, that of effective crime prevention and detection consistent with constitutional means." ***Id.*** "It is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." ***Id.*** An investigative stop is constitutional if the investigating officer is "'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***Post***, 301 Wis. 2d 1, ¶10 (quoting ***Terry***, 392 U.S. at 21). The intrusion is warranted if the officer reasonably believes the person is committing, is about to commit, or has committed a crime. WIS. STAT. § 968.24; ***Post***, 301 Wis. 2d 1, ¶13. The reasonableness of the stop is determined by considering the totality of the circumstances. ***Post***, 301 Wis. 2d 1, ¶13. "[T]he officer is not required to rule out the possibility of innocent behavior." ***State v. Fields***, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279 (citations omitted).

Also potentially relevant to the ultimate question of whether a stop is constitutionally reasonable are the following factors: (1) whether alternative means of further investigation are available, short of an investigative stop; (2) whether the opportunity for further investigation would be lost if the officer does not act immediately; and (3) what actions following the stop would be necessary for the officer to determine whether to arrest or release the suspected individual. *See* ***State v. Guzy***, 139 Wis. 2d 663, 678, 407 N.W.2d 548 (1987).

We conclude that the totality of the circumstances supports a conclusion that police here could reasonably suspect that a drug sale had occurred at the time of the temporary detention of

Lux for the purpose of investigating possible drug trafficking. Those circumstances, all of which are referenced as part of the background section above, include in particular the following. The circuit court found credible the testimony of the officer that the men were inside the building for three minutes, possibly consistent with drug trafficking behavior. The officer discovered that the owner of the car, whose description in criminal records matched that of the driver, had a "fairly recent" criminal record involving narcotics. The officer noted the combination of the car apparently being from out of town and the citizen tips about drug activity in this apartment building, which again was consistent with observed narcotics trafficking patterns of rural buyers driving in to urban locations to purchase drugs. The ***Guzy*** factors add weight to such a conclusion because it would appear that there were no other means of further investigation of whether the men bought narcotics at the apartment and the opportunity for further investigation would be lost if the officer did not act immediately. *See* ***id.*** The officer's observation that the men walked quickly is of less value to the analysis given the lack of evidence that the men even saw the unmarked car.

Lux argues that he "engaged in only one act"—the brief visit at the apartment—that was suspicious and that this is an insufficient basis for reasonable suspicion. This argument ignores the legal test, which requires consideration of the totality of the circumstances and does not limit the consideration to actions taken by Lux. By focusing exclusively on one fact known to the officer, Lux fails to address the full picture, which we have summarized above. Similarly, it is unavailing to cite to ***State v. Betow***, 226 Wis. 2d 90, 95 n.2, 593 N.W.2d 499 (1999), for the proposition that information about a person's criminal history, standing alone, is insufficient to create reasonable suspicion. The stop here was not based on a criminal history standing alone. Finally, while Lux argues that the officer made a decision to pursue and stop him at an earlier

point before the officer had sufficient information, it is irrelevant for purposes of Fourth Amendment analysis what the officer's subjective intent was, and the only relevant point in time is the moment of the seizure.

> The test we apply in determining whether an officer has the sufficient reasonable suspicion under the *Terry* line of cases is objective—that is, "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"

State v. Pugh, 2013 WI App 12, ¶11, 345 Wis. 2d 832, 826 N.W.2d 418 (quoting ***Terry***, 392 U.S. at 21–22). The standard is a reasonable suspicion that a crime is being or has been committed, a common-sense test grounded in specific, articulable facts, and reasonable inferences from those facts. That test is met here.

CONCLUSION

For these reasons, we conclude that the circuit court did not err in denying the suppression motion. Accordingly, we affirm the judgment.

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals