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DISTRICT II

April 12, 2017

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

2016AP714-CR State of Wisconsin v. Zisirtike Z. McMillian (L.C. #2014CF1702)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

The State appeals an order of the circuit court granting Zisirtike Z. McMillian's motion to suppress evidence. The circuit court concluded that McMillian was seized without probable cause. Based on our review of the briefs and the record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We disagree with the ruling and so reverse and remand this matter for further proceedings.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Village of Mount Pleasant Police Officer Eric Giese testified at the suppression hearing that, while on patrol about 1 p.m. in a "high-crime, high-drug" residential area, he noticed an occupied vehicle legally parked at the curb. A license plate check revealed that the vehicle was registered to "a female not from the area." The occupied vehicle was still there after Giese circled the block. He parked his unmarked squad car two or three car lengths behind the parked vehicle and walked up to the driver's side. Without being prompted, the driver lowered the window. Two males were inside watching basketball videos on a cellular device. McMillian was in the passenger seat. Giese said, "How's it going?"

Giese testified that "[a]t the same time" that the driver lowered the window, "the odor of marijuana[2] hit" him, an odor he recognized "based on training and experience from multiple other traffic stops and arrests in [his] career," and which, in his mind, transformed a theretofore consensual stop into a ***Terry***[3] stop. Both men said there was no marijuana in the car and denied smoking in the car. Without telling them, Giese called for a K-9 backup and continued conversing with them.

Before the K-9 officer arrived, McMillian got out of the vehicle and began walking away. Giese commanded, "Don't. Stop. Police. Get back in the car." McMillian took off. Giese gave

[2] On cross-examination, defense counsel asked, "[Y]ou'd indicated … you smelled what you thought was the odor of burned marijuana, right?" Giese answered, "Just marijuana."

[3] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

chase and deployed his Taser.[4] McMillian removed a bag of marijuana from his pants pocket and threw it. Giese apprehended and arrested McMillian.

McMillian was charged with possessing THC with intent to distribute, obstructing an officer, and three counts of felony bail jumping. He moved to suppress the evidence seized, alleging an improper stop. The circuit court found that the arrest was illegal as, under the totality of the circumstances, Giese did not have probable cause to seize McMillian and inhibit his progress away from the car. The court granted the motion to suppress and stayed further proceedings pending the State's appeal.

We apply the same standard in reviewing the denial of a motion to suppress and a determination as to whether a seizure occurred. ***County of Grant v. Vogt***, 2014 WI 76, ¶17, 356 Wis. 2d 343, 850 N.W.2d 253. We uphold the circuit court's factual findings unless they are clearly erroneous and independently review the application of those facts to constitutional principles. ***Id.***

Not all police-citizen encounters are seizures. ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980). A seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." ***Terry v. Ohio***, 392 U.S. 1, 20 n.16 (1968). The test is whether, under the totality of the circumstances, a reasonable person "would feel free to leave." ***Vogt***, 356 Wis. 2d 343, ¶30.

[4] "Taser" is an acronym created by the NASA scientist who invented the weapon. It stands for "Thomas A. Swift's Electric Rifle" in homage to *Tom Swift and His Electric Rifle, or, Daring Adventures in Elephant Land* (1911), penned under the pseudonym "Victor Appleton." ***Cockrell v. City of Cincinnati***, 468 F. App'x 491, 492 n.3 (6th Cir. 2012).

Vogt assists our analysis. At about 1 a.m. on Christmas Day, a sheriff's deputy saw a vehicle pull into a parking lot next to a closed park and boat landing. ***Vogt***, 356 Wis. 2d 343, ¶4. Curious, the deputy parked his marked squad car behind Vogt's vehicle, walked up to the driver's side window, rapped on it, and motioned for Vogt to roll it down. ***Id.***, ¶¶6-7. When Vogt complied, the deputy noticed the smell of intoxicants and that Vogt's speech was slurred. ***Id.***, ¶8. Vogt testified at trial that the deputy knocked "hard" on the window and "commanded" him to open it, ***id.***, ¶¶11, 40, yet the supreme court held that the interaction did not constitute a seizure under the totality of the circumstances; thus the Fourth Amendment was implicated only once Vogt rolled down his window exposing the grounds for a seizure. ***Id.***, ¶¶2-3.

We agree with the State that Giese's initial contact fits easily within ***Vogt***. The car was parked on a street. It was midday. Giese did not activate his unmarked squad's lights or sirens, block the other vehicle, or display a weapon. He simply walked up to the car and, when the driver spontaneously opened the window, said, "How's it going?"[5] Giese simply approached the car as anyone on the street could have done. The Fourth Amendment was not implicated.

Once the driver rolled the window down and Giese detected the odor of marijuana, however, Giese had reasonable suspicion to effect a ***Terry*** stop. "[T]he odor of a controlled substance provides probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the circumstances in which the odor is discovered." ***State v. Secrist***, 224 Wis. 2d 201, 204, 589 N.W.2d 387 (1999). Giese reasonably suspected, in

[5] We decline the State's invitation to fit Giese's initial contact with the parked vehicle into a community-caretaker framework. *See* ***County of Grant v. Vogt***, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253, ¶¶55-63 (Ziegler, J., concurring). Community caretaking has no applicability here.

light of his experience, that some kind of criminal activity had taken or was taking place. *See* ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). His suspicion was based on specific, articulable facts—they were in a "high-crime, high-drug area"; the odor of marijuana as soon as the window was opened—and reasonable inferences from those facts—there was marijuana in the car itself or on the person of at least one occupant. *See* ***id.*** Giese's linkage of the "unmistakable odor of marijuana … to a specific person or persons" was "reasonable and capable of articulation." ***Secrist***, 224 Wis. 2d at 216-17.

Therefore, when Giese detected an odor that, by his experience he believed to be marijuana, he had authority to detain the pair long enough to conduct an inquiry to determine whether "criminal activity may be afoot." ***Vogt***, 356 Wis. 2d 343, ¶27 (citing ***Terry***, 392 U.S. at 30); *see also* WIS. STAT. § 968.24. By the time Giese tased McMillian to get him to halt, Giese had probable cause to believe McMillian had committed the crimes of possessing marijuana and obstructing an officer: McMillian had exited the car, ignored Giese's orders to stop and get back inside, and discarded a bag of marijuana as he ran away. *See* ***Secrist***, 224 Wis. 2d at 212; *see also* ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710 (flight generally admissible as circumstantial evidence of guilt). We therefore reverse the order granting McMillian's motion to suppress evidence. Therefore,

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded for further proceedings.

Diane M. Fremgen
Clerk of Court of Appeals