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February 21, 2018

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

2017AP227-CR State of Wisconsin v. William Travis Hines (L.C. # 2015CF3009)

Before Brennan, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

William Travis Hines appeals a judgment of conviction, contending that the circuit court erroneously denied his motion to suppress evidence police obtained following an encounter with him on a city street. Upon our review of the briefs and record, we conclude at conference that

this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

The State charged Hines with theft and possession of burglarious tools, both as a party to a crime. Hines moved to suppress the evidence against him, alleging that police found the evidence following an unconstitutional seizure. Specifically, he claimed that police acted unlawfully by approaching him on a city sidewalk and asking him questions.

Milwaukee Police Officer Brian Wunder was the sole witness to testify at the suppression hearing. He said that on June 29, 2015, he and a fellow officer were in uniform and in a marked squad car patrolling in an area of Milwaukee, Wisconsin, that had recently suffered numerous burglaries. At approximately 1:00 p.m., the officers saw two men, one of whom was subsequently identified as Hines, pushing a shopping cart on the sidewalk. Wunder thought "th[e] picture just didn't look right." The presence of the shopping cart alone seemed strange because no businesses in the area had shopping carts. Additionally, the men were wearing gloves on a summer's day, and an industrial-sized sink approximately eight feet long was sticking out of the shopping cart. Wunder could also see the handle of a sledgehammer protruding from the cart, and in his experience, sledgehammers are commonly used to commit burglaries.

Wunder said that the officers pulled their marked squad car behind the two men, then approached on foot. Wunder described introducing himself to Hines and asking him some questions about why he had a shopping cart and where he got the sink. Hines responded that he

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

"found this stuff down the street," or words to that effect. Wunder then saw that Hines had a screwdriver sticking out of his pocket. Wunder asked Hines why he had a screwdriver, and Hines replied either that he didn't know the reason or that he had no reason. Eventually, Hines's companion said that he had received $20.00 from Hines to help take "the stuff" from inside a building.

At the conclusion of the hearing, the circuit court determined that Wunder was credible and, based on his testimony, the circuit court found that the officers had not seized Hines by approaching him and initiating a conversation. Accordingly, the circuit court denied the motion to suppress the evidence uncovered during the encounter.

Hines subsequently pled guilty as charged. He now appeals, challenging only the denial of his suppression motion.[2]

A two-part standard of review governs suppression motions. *See* ***State v. Conner***, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267. "[W]e uphold the [circuit] court's findings of fact unless they are clearly erroneous, but review *de novo* whether those facts warrant suppression." ***Id.***

Hines contends that the evidence against him should be suppressed because he was seized in violation of his constitutional rights. *See* ***State v. Ferguson***, 2009 WI 50, ¶21, 317 Wis. 2d 586, 767 N.W.2d 187 (when police conduct an unconstitutional search or seizure, the usual remedy is suppression of the evidence obtained). "The Fourth Amendment to the United States

[2] In an appeal from a judgment of conviction, we may review a circuit court's order denying a motion to suppress evidence notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10).

Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." ***State v. Artic***, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. We normally construe these Federal and State constitutional provisions "coextensively." *See* ***id.*** They permit police to conduct a constitutionally valid investigative stop if the officers '"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. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted; brackets in ***Colstad***). In this case, Hines argues that police seized him unreasonably when they approached and spoke to him on June 29, 2015, because, he contends, the officers lacked a reasonable suspicion that he was involved in any criminal activity. We reject his claim.

Not every encounter between citizens and police is a seizure for purposes of constitutional analysis. A seizure requires "either physical force or a show of authority sufficient to give rise to a belief in a reasonable person that he was not free to leave." ***State v. Young***, 2006 WI 98, ¶34, 294 Wis. 2d 1, 717 N.W.2d 729. An objective test determines whether police made a sufficient show of authority. *See* ***id.***, ¶39. The question is '"not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person."' ***Id.*** (citation omitted).

Thus, in circumstances similar to those in the instant case, the United States Supreme Court concluded that officers had not effected a seizure by driving up to and alongside a pedestrian. *See* ***Michigan v. Chesternut***, 486 U.S. 567, 575 (1988). The Court explained that the initial encounter involved neither physical force nor a show of authority:

> [t]he record does not reflect that the police activated a siren or flashers; or that they commanded [the pedestrian] to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block [the pedestrian's] course or otherwise control the direction or speed of his movement.

Id. The Court stated that merely approaching the pedestrian was not '"so intimidating' that [the pedestrian] could reasonably have believed that he was not free to disregard the police presence and go about his business." ***Id.*** (citation omitted).

Further, an encounter between an officer and a citizen is not converted into a seizure when the officer asks the citizen some questions. '"[I]f an officer merely walks up to a person standing or sitting in a public place ... and puts a question to him [or her], this alone does not constitute a seizure.'" ***County of Grant v. Vogt***, 2014 WI 76, ¶38 n.17, 356 Wis. 2d 343, 850 N.W.2d 253 (first set of brackets in ***Vogt***) (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(a) (5th ed. 2012)). Indeed, as a general rule, '"police questioning, by itself, is unlikely to result in a Fourth Amendment violation.'" ***Vogt***, 356 Wis. 2d 343, ¶24 (citation omitted).

In this case, the police stopped their squad car behind Hines and approached him on foot. They did not activate the squad car's lights or display a weapon. Wunder merely introduced himself to Hines and asked a few questions. ***Chesternut*** and ***Vogt*** teach that doing so did not constitute a seizure in the constitutional sense.

Hines suggests that reasonable citizens would not have believed themselves free to leave because the officers were wearing uniforms. We cannot conclude that this factor was significant. The Supreme Court has explained that officers' uniforms, like their sidearms, "should have little weight in the analysis. Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort." *See* ***United States v. Drayton***, 536 U.S. 194, 204

(2002). Similarly, we reject Hines's reliance on Wunder's testimony that the pedestrians were not free to leave. No evidence at the hearing suggested, let alone showed, that Wunder told Hines he was detained or that the officers physically restrained the men at the time Wunder approached, identified himself, and asked Hines some questions. An officer's uncommunicated intent to detain a person is not relevant to determining whether a seizure occurred. *See* ***Chesternut***, 486 U.S. at 575 n.7.

Hines does not dispute that his responses to the officer's questions and the officer's observations as the conversation continued reasonably aroused the officer's suspicions. Those suspicions warranted prolonging the encounter. *See* ***State v. Goyer***, 157 Wis. 2d 532, 537-38, 460 N.W.2d 424 (Ct. App. 1990). Accordingly, the circuit court properly denied Hines's motion to suppress the evidence that police ultimately uncovered.

The foregoing analysis is sufficient to reject Hines's claim. For the sake of completeness, however, we also consider the State's alternative contention that, assuming the police seized Hines by approaching him on the sidewalk, the seizure was constitutional. We agree with the State.

Reasonable suspicion is based on the totality of the circumstances and governed by a common sense test. *See* ***State v. Jackson***, 147 Wis. 2d 824, 833-34, 434 N.W.2d 386 (1989). The issue turns on a determination of what a reasonable police officer would reasonably suspect under all of the facts and circumstances in light of his or her training and experience. *See* ***Colstad***, 260 Wis. 2d 406, ¶8.

The totality of the circumstances here warranted initiating an investigative stop. First, the officers saw two men pushing a shopping cart that contained an industrial-sized sink. Wunder testified he had never before seen anyone pushing a large sink in a shopping cart and that he could not readily deduce why these men were doing so. The businesses in the area did not have shopping carts and so the men were not likely to have purchased the sink nearby. On appeal, Hines characterizes his behavior as merely "odd" rather than suspicious, but unusual and ambiguous actions are factors contributing to reasonable suspicion. *See* ***State v. Waldner***, 206 Wis. 2d 51, 60-61, 556 N.W.2d 681 (1996). Second, the officers observed Hines in an area that had recently suffered a rash of burglaries. The reputation of an area is a proper factor when determining the reasonableness of an officer's suspicion. *See* ***State v. Allen***, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999). Third, Hines and his companion were wearing gloves on a summer's day and travelling with a sledgehammer. Wunder testified that he knew, based on his training and experience, that sledgehammers are "commonly used in the commission of burglaries." Observations of activity reasonably associated with particular kinds of lawbreakers may contribute to the reasonableness of an officer's suspicion. *See* ***State v. Meyer***, 216 Wis. 2d 729, 752, 576 N.W.2d 260 (1998).

In light of the totality of the circumstances, the officers were justified in reasonably suspecting that criminal activity might be afoot in a burglary-prone area when they saw gloved men with a sledgehammer pushing an industrial-sized sink down the sidewalk in a shopping cart. Accordingly, the officers could reasonably detain the men for the purpose of an inquiry sufficient to confirm or dispel the officers' concerns. *See* ***Young***, 294 Wis. 2d 1, ¶¶20-21.

Upon the foregoing reasons,

IT ORDERED that the judgment of conviction is summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals