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DISTRICT I

July 7, 2020

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

2019AP1014-CR State of Wisconsin v. Javier Rivera-Diaz (L.C. # 2017CF5007)

Before Blanchard, Dugan and Donald, 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).

Javier Rivera-Diaz appeals from a judgment, entered upon his guilty plea, convicting him on one count of possession of a firearm by a felon. 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 (2017-18).[1] The judgment is summarily affirmed.

Rivera-Diaz was charged with possession of a firearm by a felon, obstructing an officer, and felony bail jumping, all as a habitual criminal, after a fully loaded .380 semi-automatic pistol was discovered in his possession during a protective frisk conducted during what could be characterized as a traffic stop. Rivera-Diaz moved to suppress the gun, arguing that the officers lacked reasonable suspicion to conduct the frisk. After a hearing at which the two officers who conducted the stop testified, the circuit court denied the suppression motion. Rivera-Diaz then pled guilty to possession of a firearm by a felon without the enhancer. The other two charges were dismissed and read in, and Rivera-Diaz was sentenced to four years of imprisonment. He now appeals, challenging the denial of the suppression motion.

Review of the order denying the suppression motion is preserved despite Rivera-Diaz's plea. *See* WIS. STAT. § 971.31(10). Rivera-Diaz does not dispute that there was a lawful basis for the traffic stop; the only question on appeal is whether reasonable suspicion supported the frisk such that the decision to conduct the frisk comported with the Fourth Amendment. *See* ***State v. Nesbit***, 2017 WI App 58, ¶6, 378 Wis. 2d 65, 902 N.W.2d 266.

A frisk is a search. *See* ***State v. Morgan***, 197 Wis. 2d 200, 208, 539 N.W.2d 887 (1995). To comport with the Fourth Amendment, a search must be reasonable. *See* ***State v. McGill***, 2000 WI 38, ¶18, 234 Wis. 2d 560, 609 N.W.2d 795. On review of the constitutionality of a search, we uphold the circuit court's factual findings unless clearly erroneous. *See* ***Nesbit***, 378 Wis. 2d

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

65, ¶5. However, we independently apply constitutional principles to those facts. *See* ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97.

Protective frisks "are justified when an officer has a reasonable suspicion that a suspect may be armed." ***Morgan***, 197 Wis. 2d at 209. "[T]o justify a particular intrusion, 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.'" ***State v. Kyles***, 2004 WI 15, ¶9, 269 Wis. 2d 1, 675 N.W.2d 449 (quoting ***Terry v. Ohio***, 392 U.S. 1, 21 (1968)). This is an objective test that considers the totality of the circumstances. *See* ***McGill***, 234 Wis. 2d 560, ¶23. An officer's subjective reasons for conducting a frisk are not determinative. *See* ***State v. Sykes***, 2005 WI 48, ¶33, 279 Wis. 2d 742, 695 N.W.2d 277. The State has the burden to show that the search was reasonable. *See* ***Nesbit***, 378 Wis. 2d 65, ¶6.

Milwaukee police officers Richard Tolentino and Garrett Bong spotted a car with heavily tinted windows and an apparent registration issue and intended to stop the vehicle. Before they could do so, the car stopped in a loading zone, twenty inches from the curb. The officers activated their squad car lights and parked behind the other car as the driver got out and raised his car's hood. Tolentino exited the squad and called out to the driver, asking what was wrong; the driver responded that the car needed brake fluid and walked closer to continue speaking with Tolentino.

As the driver was speaking with Tolentino, the car's passenger—Rivera-Diaz—got out of the car. At the suppression hearing, Tolentino testified about the behaviors of Rivera-Diaz that the officer said made him suspect that Rivera-Diaz could be armed, leading to the frisk.

First, Rivera-Diaz got out of the car without being asked. Tolentino testified that, based on his training and experience, police expect individuals to "remain seated in the vehicle at all times unless directed to do otherwise."[2]

Second, once he was out of the car, Rivera-Diaz paced back and forth, glancing at the officers then looking back the other way while acting very nervous. *See* ***Kyles***, 269 Wis. 2d 1, ¶54 ("unusual nervousness is a legitimate factor" to consider in reasonable suspicion analysis); ***Morgan***, 197 Wis. 2d at 214-15 (nervousness may be considered as a factor in determining legality of a frisk). At one point, Rivera-Diaz walked about two car lengths away before walking back to Tolentino. Tolentino testified that, based on his training and experience, this behavior is often indicative of someone contemplating flight.

Third, when Tolentino asked Rivera-Diaz if he had any weapons on him, "he became very nervous and attempted to do whatever he could to stop [Tolentino] from checking him for weapons." When Tolentino asked Rivera-Diaz whether he would "mind just for your safety and mine if [Tolentino] just check[ed]" for weapons, Rivera-Diaz responded, "I can't, I can't …. I can't let you search me." He said twice that he was "paranoid" and twice that he felt like he was "having a heart attack." He also showed Tolentino that his hands were "shaking." He declined an ambulance, then requested an ambulance, then declined it again when told he would need to be handcuffed until it arrived. His speech patterns were fast and repetitive, saying things like "[f]or real, for real, for real," "I got stitches, I got stitches," and "I'm good, I'm good, I'm good."

[2] Although the driver also got out of the vehicle without being asked, Tolentino testified that he did not frisk the driver because the driver "was completely compliant with everything I said. He was calm and relaxed."

Rivera-Diaz also asked if he could "go in the car real quick." Unusual reactions to interactions with law enforcement are also a relevant consideration. *See* ***Nesbit***, 378 Wis. 2d 65, ¶12.

Tolentino testified that the combination of behaviors described above caused him to fear for his safety. *See* ***Kyles***, 269 Wis. 2d 1, ¶39 ("The officer's fear or belief that the person may be armed is but one factor in the totality of the circumstances that a court may consider in determining whether an officer had reasonable suspicion to effectuate a protective weapons frisk."). In ruling on the suppression motion, the circuit court noted in part that Rivera-Diaz got "out of the vehicle without being ordered," "pace[d] back and forth away from the vehicle," and was "not compliant." The circuit court further noted that Rivera-Diaz's behavior when Tolentino asked if he could search him "appeared more erratic to the police officer. It's simply not nervousness, it's just erratic behavior. And, I think, that justifies the officer's understanding of the fear that [Rivera-Diaz] may have been armed and that constitutes the rationale for the checking of the weapon[.]"

Because review of a frisk is based on objective factors, we additionally note that the stop occurred around 10:30 p.m. and, although the video suggests that the area in which the stop occurred was reasonably well lit, the illegally tinted windows prevented officers from seeing inside the vehicle.[3] *See* ***Kyles***, 269 Wis. 2d 1, ¶58 ("Various cases have held that darkness, visibility, isolation of the scene, and the number of people in an area may all contribute to the determination of reasonable suspicion."); ***McGill***, 234 Wis. 2d 560, ¶32 ("We have consistently

[3] The driver was issued three citations, including one for the window tint.

upheld protective frisks that occur in the evening hours, recognizing that at night, an officer's visibility is reduced by darkness[.]").

Rivera-Diaz argues that there were potentially innocent explanations for his behavior, noting, for example, that he got out to "to deal with the broken-down car" and that he walked back to Tolentino when asked. "But factors consistent with innocent behavior … might, under particular facts and circumstances with reasonable inferences, give rise to the requisite reasonable suspicion required for a frisk." ***Id.***, ¶53. Rivera-Diaz also suggests that any concerns must have dissipated because Tolentino took a phone call during the encounter. However, it does not necessarily follow that Tolentino was no longer concerned, or no longer had an objective basis for concern, about weapons simply because he responded to a phone call. *Cf.* ***McGill***, 234 Wis. 2d 560, ¶30 ("It turns ***Terry*** on its head to argue … that the officer cannot possibly have been concerned about the presence of a weapon if he initiated close proximity with the suspect in the first place.").

Based on the foregoing, we conclude that under the totality of the objective circumstances, there was reasonable suspicion to support the frisk. The circuit court properly denied the suppression motion.

IT IS ORDERED that the judgment is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals