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DISTRICT I

September 12, 2023

To:

Hon. David A. Feiss
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Michael S. Holzman
Electronic Notice

Michael C. Sanders
Electronic Notice

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

2022AP1442-CR State of Wisconsin v. Derrick E. Jones (L.C. # 2018CF2598)

Before White, C.J., Donald, P.J., and Dugan, J.

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).

Derrick E. Jones appeals his judgment of conviction for armed robbery as a party to a crime, first-degree reckless injury with the use of a dangerous weapon as a party to a crime, and being a felon in possession of a firearm, all with habitual criminality repeater enhancers. The sole issue Jones raises on appeal is whether the circuit court improperly 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. § 809.21(1) (2021-22).[1] We summarily affirm.

The charges against Jones stem from an incident that occurred in March 2018. Around 10:30 a.m. on March 25, 2018, an officer from the Milwaukee Police Department was on the front porch at a residence on North 36th Street regarding another matter when he heard two gunshots close by. Approximately thirty to sixty seconds later, the officer observed a man jogging from an open yard down the street, from the direction that the officer had heard the gunshots. The officer noticed that the man appeared to be grasping something with his right hand in the front pocket of his hoodie. When the man noticed the officer on the porch, he crossed to the other side of the street.

The officer made contact with the man, later identified as Jones, directing him to take his hand out of his pocket. The officer could see that there was something still in the pocket, as it was "weighted down." The officer believed it was a firearm, so he drew his service weapon and ordered Jones to the ground. The officer also took out his handcuffs when he approached Jones laying on the ground.

When Jones laid down, the officer observed the grip of a revolver sticking out of Jones's hoodie pocket. The officer took Jones into custody. He was questioned regarding an armed robbery and shooting that had occurred on North 35th Street, just before the officer's contact with Jones. A bullet recovered from that victim matched the revolver recovered from Jones.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Jones filed a motion to suppress challenging the stop by the officer, arguing that it was an arrest without probable cause. The officer testified regarding the incident, as described above. The circuit court ruled that based on the circumstances, this was an investigative ***Terry*** stop.[2] The court further found that the officer had reasonable suspicion that Jones had a weapon, and was, therefore, justified in taking "safety precautions" in his contact with Jones. The court, therefore, denied the motion.

Jones filed a *pro* se motion for reconsideration.[3] The circuit court maintained that the officer's stop of Jones was a ***Terry*** stop, not an arrest, and thus, the officer needed only to establish that he had reasonable suspicion that a crime had been committed, as opposed to demonstrating probable cause. Furthermore, citing federal case law—primarily, ***United States v. Sanders***, 994 F.2d 200 (5th Cir. 1993), and ***United States v. Bautista***, 684 F.2d 1286 (9th Cir. 1982)—the court found that the officer's actions to secure Jones were permissible during the ***Terry*** stop because under the circumstances, there was a legitimate concern that Jones was armed. The court, therefore, denied the motion for reconsideration.

The matter proceeded to a court trial. Jones testified in his defense, stating that he was trying to flag down the officer after hearing gunshots; however, the circuit court found that his actions in crossing the street were more consistent with trying to avoid the officer. Jones further

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

[3] Jones requested to proceed *pro se* in this matter, and his request was granted after the circuit court held an appropriate colloquy.

We also note that Jones's suppression motion was heard and decided by the Honorable T. Christopher Dee. Jones's motion for reconsideration and his court trial were before the Honorable David A. Feiss.

explained that he was in possession of the gun used in the robbery and shooting—which belonged to Jones's girlfriend—because a person Jones knew as "Champagne" approached him shortly after he had heard the gunshots, and gave the gun to him. The court deemed that to be "a difficult story" to believe.

The circuit court found Jones guilty of all charges.[4] He was sentenced to a total of twelve years of initial confinement to be followed by eight years of extended supervision. Jones appeals.

The review of a circuit court's decision on a motion to suppress presents a mixed question of fact and law. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We will not reverse the circuit court's findings of fact unless they are clearly erroneous; however, we review *de novo* the application of constitutional principles to those facts. ***Id.***

On appeal, Jones reiterates his argument that this was an arrest rather than a ***Terry*** stop, and that the officer did not have probable cause. An investigatory ***Terry*** stop is constitutional "if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." ***State v. Young***, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. An arrest, on the other hand, requires probable cause, for which there must be "more than a possibility or suspicion that the defendant committed an offense[.]" ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). However, the evidence to establish probable cause "need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." ***Id.***

[4] The parties stipulated to Jones's possession of the gun.

"The standard to determine the moment of arrest is whether a reasonable person in the defendant's position would have considered himself to be 'in custody' given the degree of restraint under the circumstances." ***State v. Wilson***, 229 Wis. 2d 256, 267, 600 N.W.2d 14 (Ct. App. 1999). Here, the degree of restraint included the officer drawing his weapon and ordering Jones to lay on the ground, as well as pulling out his handcuffs when he approached Jones. However, these actions did not necessarily transform an investigative stop of Jones into an arrest. *See* ***State v. Washington***, 120 Wis. 2d 654, 662, 358 N.W.2d 304 (Ct. App. 1984) ("[a]n investigative stop is not necessarily transformed into an arrest by the officers drawing their guns and blocking the front of the suspect's car with a patrol car"); ***Sanders***, 994 F.2d at 207, 210 (ordering a person to lie down when police reasonably believe he or she is armed "may well be within the scope of an investigative detention" in certain circumstances, and frisking a person who is handcuffed may also be "well within the permissible bounds of an investigatory detention under ***Terry*** and its progeny"); ***Bautista***, 684 F.2d at 1289 ("[a] brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a ***Terry*** stop and does not necessarily convert the stop into an arrest").

In fact, an officer's actions during an investigatory stop such as drawing his or her weapon "may constitute 'necessary measures for [the officer's] own protection' or a 'necessary use of force to compel the person to acquiesce in the nonarrest investigative detention.'" ***Washington***, 120 Wis. 2d at 662 (citation omitted; brackets in ***Washington***). Indeed, an "exercise of authority" during a ***Terry*** stop can be justified if the officer is able to present "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Washington***, 120 Wis. 2d at 660 (citations omitted). This requirement seeks to "strike[] a proper balance between two important interests: the safety of

law enforcement officers and the right of persons to be free from unreasonable government intrusions." ***State v. Johnson***, 2007 WI 32, ¶22, 299 Wis. 2d 675, 729 N.W.2d 182. The reasonableness of the officer's actions is determined "on a case-by-case basis" by "evaluating the totality of the circumstances." ***Id.***

Based on the totality of the circumstances here—the officer hearing gunshots, seeing Jones jogging from that direction with something in his pocket the officer suspected was a firearm, and Jones crossing the street when he saw the officer—we conclude that there was reasonable suspicion for the officer to conduct an investigatory stop of Jones. *See* ***Young***, 294 Wis. 2d 1, ¶¶20, 55. Furthermore, the officer's actions of drawing his weapon during the stop, ordering Jones to the ground, and pulling out his handcuffs to secure Jones's hands, were a justified exercise of authority based on these circumstances, to ensure the safety of the officer and other people in the vicinity. *See* ***Washington***, 120 Wis. 2d at 660; ***Johnson***, 299 Wis. 2d 675, ¶22. Jones was then placed under arrest after the officer saw the grip of the revolver sticking out of Jones's hoodie pocket, at which time the officer had probable cause that Jones had committed an offense. *See* ***Secrist***, 224 Wis. 2d at 212.

Therefore, the circuit court did not err in denying Jones's motion to suppress. *See* ***Eason***, 245 Wis. 2d 206, ¶9. Accordingly, we affirm his judgment of conviction.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals