WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

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Reasonable Suspicion Under a Totality of Circumstances Analysis

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In a pair of decisions released on June 4, 2021, the Wisconsin Supreme Court applied a "totality of circumstances" analysis to determine whether law enforcement officers had sufficient reason to detain, or seize, persons suspected of criminal activity. In one of the cases, the Court additionally applied the totality of circumstances analysis to determine whether, and at what point in an encounter with police, the person had been seized.

This issue brief summarizes *State v. Genous*, 2021 WI 50, in which the Court held that, under the totality of the circumstances, a law enforcement officer had reasonable suspicion of drug activity to stop a vehicle and question its occupants. A separate issue brief summarizes *State v. VanBeek*, 2021 WI 51, in which the Court applied two separate totality of circumstances analyses: one to determine that what was initially a consensual encounter between law enforcement and the defendant was transformed into a seizure that required reasonable suspicion and one to determine that the law enforcement officer did not have sufficient reasonable suspicion to justify the seizure.

BACKGROUND

In the *Genous* case, the parties were in agreement that the defendant, James Genous, had been seized when a law enforcement officer stopped his vehicle; the question was whether the officer had reasonable suspicion that Genous was engaged in criminal activity to justify the stop. The court of appeals reversed the circuit court's denial of a motion to suppress evidence of a firearm that was found in Genous' vehicle and the Supreme Court granted the State's petition for review.

MAJORITY OPINION

The Court's majority[1] began its analysis by noting that under the jurisprudence established by the Supreme Court of the United States in *Terry v. Ohio*, 392 U.S. 1 (1968), and subsequent cases, a police officer may detain someone briefly to investigate criminal behavior if the officer has "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." The Court characterized this as a "low bar," distinguishing it from the higher level of proof of probable cause, required to make an arrest, but acknowledged that, under *Terry,* a "mere hunch" is not sufficient.

The Court stated that when determining whether a police officer lawfully detained a person for an investigative stop, the appropriate question is: "What would a reasonable police officer reasonably suspect in light of his or her training and experience?" and that a "reasonable suspicion determination is based on the totality of the circumstances." Applying this analysis to the facts at hand, the Court concluded that the stop was lawful.

The Court listed the facts known to the officer at the time he decided to detain the defendant: he observed the defendant engaging in a brief meeting, in a vehicle, at 3:36 a.m., in an area with a reputation for drug-trafficking. In addition, he was with a woman the officer had good reason to believe was a known drug user. The Court held that the totality of these circumstances constituted reasonable suspicion that the defendant was engaging in illegal activity, and justified a *Terry* stop.

The Court acknowledged that each individual fact could have an innocent explanation and that any one of those facts might be insufficient to warrant reasonable suspicion, but averred that "the reasonable suspicion test is not an exercise in evaluating individual details in isolation. It is the whole picture, evaluated together, that serves as the proper analytical framework." In other words, the Court held that a

consideration of the totality of the circumstances, as seen through the eyes of a trained and experienced police officer, is appropriate to determine the reasonableness of the seizure.

The Court also declined to exercise its supervisory authority over lower courts to establish evidentiary prerequisites that circuit courts must consider when determining whether an area is known as an area of high drug-trafficking activity. Noting that its "supervisory authority is not to be invoked lightly," the Court concluded that it is well-established that an area's reputation for criminal activity is a relevant factor in determining reasonable suspicion and that circuit courts are expected and entrusted to weigh that factor appropriately in their consideration of a particular case.

DISSENT

Three dissenting justices[2] concluded that, under the totality of the circumstances, there were insufficient specific, articulable facts particularized to the defendant, to warrant the seizure. The dissent stressed that each fact known to the officer could apply to "large numbers of law-abiding citizens in a residential neighborhood, even [one] that has a high incidence of drug trafficking" and that the officer could identify no fact particular to the defendant to suggest that the defendant was engaged in any criminal activity. Describing the facts listed by the officer to justify his suspicion as "a collection of generic facts," the dissent noted that the officer had no information that the defendant's car was connected in any way to drug activity, that the officer could not see what was happening inside the car, that he did not see the woman leave the car holding anything, and that his identification of the woman as a "known drug user" was a mere hunch. Considering these factors alone and in totality, the dissent determined that there was no reasonable suspicion that justified seizing the defendant.

The dissent took particular aim at the weight accorded to the officer's belief that the encounter took place in a high drug-trafficking area. Noting that the label can "cloak general hunches as particularized suspicion," the dissent opined that factor may play a disproportionate role in a totality of the circumstances analysis. The dissent urged the Court to establish "objective criteria for evaluating an assertion that an area is high in crime" because an area may be labeled as such without a reliable and consistently applied definition of the term.

The dissent acknowledged that a person's location may be a relevant factor in a totality of the circumstances analysis of reasonable suspicion, but asserted that both parts of the phrase "high-crime area" are ambiguous without further guidance. The dissent noted that an "area" may encompass five blocks, or 10. Without determining how many criminal incidents, and how close in time the incidents occurred relative to the incident at hand are required to find that an area is one of "high-crime," the phrase is highly malleable.

The dissent stated that an assertion that an incident took place in a high-crime area is often accorded disproportionate weight amid a totality of circumstances analysis, and "accepting without scrutinizing a claim that an area is a 'high-crime area' unwittingly makes all residents and visitors in such areas more susceptible to searches and seizures, thereby treating them as though they are 'less worthy of Fourth Amendment protection.'" Accordingly, the dissent urged the Court to establish a test that identifies relevant criteria in making the determination of whether an area is truly a "high-crime area." The dissent described several tests established by courts or proposed by legal commenters, most of which involve defining a limited geographic boundary, requiring that the types of crimes committed in the area have a relation to the crime investigated in the seizure at hand, and requiring that crimes committed in the area occurred only a short time before the seizure at hand. The dissent did not favor one approach over the other, but urged that whichever formula the Court adopts, it should be objective and should not allow a court to give determinative weight to an unverified assertion that an area is a high-crime area.

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[1] Justice Hagedorn wrote the majority opinion, joined by Justices Roggensack, Ziegler, and Grassl Bradley.
[2] Justice Dallet wrote the dissenting opinion, joined by Justices Walsh Bradley and Karofsky.