

**COURT OF APPEALS
DECISION
DATED AND FILED**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1007-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMETRI MANTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHHEL, Judge. *Affirmed.*

PETERSON, J. Demetri Manto appeals a judgment of conviction and a portion of the trial court's order denying postconviction relief for resisting a police officer and possession of drug paraphernalia. Manto contends that the trial court erred by refusing to suppress evidence because the police officer lacked probable cause to arrest him for resisting an officer. This court disagrees and affirms.

FACTS

On April 25, 1998, a routine check of Manto's vehicle by Green Bay police officer Daniel Yantes revealed that its license plates were registered to a different vehicle. After Yantes stopped the vehicle, Manto identified himself and admitted that he did not have a valid driver's license because it had been revoked. Yantes also learned that Manto's female passenger did not know Manto and had only recently gotten into his car. She explained to Yantes that she was attempting to show Manto road directions.

Yantes was dissatisfied with this explanation, and motioned to a passing colleague that he wanted assistance. Yantes had initially intended to issue Manto a citation for operating after revocation. However, given his new-found suspicions, Yantes intended to search Manto's car for any other criminal evidence. After informing Manto that he would be receiving a citation, Yantes asked Manto to exit the vehicle. Manto asked Yantes why this was necessary, and Yantes told Manto that he intended to quickly search Manto's vehicle.

Manto refused to comply with Yantes' order, and after several more orders to exit the vehicle were ignored, Yantes opened the driver's door and placed his hand on Manto's shoulder. Manto tensed up and moved his hand toward the center console. Yantes testified that because he felt his safety was threatened and because he was unsure what Manto was reaching for, he pulled Manto from his vehicle and attempted to search him for any possible weapons. A struggle ensued requiring the assistance of the other officer and prompting Yantes to eventually arrest Manto for resisting an officer. After a subsequent search of Manto, Yantes discovered two glass tubes that resulted in a charge for possession of drug paraphernalia.

DISCUSSION

Manto argues that the trial court erred by denying his motion to suppress evidence based on his claim that he was the subject of an unreasonable search and seizure. He argues that Yantes did not have lawful authority to search his vehicle after issuing him a traffic citation. *See Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 486 (1998). Consequently, Manto contends that this court should reverse his conviction for resisting an officer on the grounds that it is not a crime to resist unlawful police conduct. He further asserts that the drug paraphernalia evidence should be suppressed as the fruit of an illegal search.¹

The State concedes that Yantes did not have authority to search Manto's car because Yantes was not arresting Manto. However, it points out that an officer issuing a citation, rather than arresting, does have lawful authority to order the driver out of the vehicle. *See Pennsylvania v. Mimms*, 434 U.S. 106, 109-10 (1977). The State reasons that the officer's subjective intent to unlawfully search the vehicle could not negate his lawful authority to order Manto out of the vehicle.

This court concludes that it is unnecessary to resolve this dispute because Manto's intervening conduct gave Yantes cause to arrest and search Manto. Specifically, Manto gave Yantes reason to fear for his safety and Manto then unreasonably resisted the officer.

¹ Section 946.41, STATS., makes it a Class A misdemeanor for "Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and *with lawful authority*" (Emphasis added.)

In reviewing a circuit court order concerning the suppression of evidence, this court will uphold findings of fact unless they are clearly erroneous. *See State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether the circuit court's findings of fact pass statutory or constitutional muster is a question of law that this court reviews de novo. *See id.*

The United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), enunciated the test for determining the constitutionality of a frisk for weapons during an investigatory stop. The Court held that "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

In this case, Yantes was in the vulnerable position of investigating a suspicious traffic stop. He had already discovered that Manto's female passenger claimed that she did not know Manto and had just gotten into his vehicle. Yantes was not satisfied with the reasons Manto and his passenger gave for their association. Manto refused to cooperate with Yantes' orders to get out of the vehicle and, when Yantes opened the driver's door and touched him, Manto tensed up and reached toward the center console. Yantes testified that at this point he feared for his safety and that he "didn't know if [Manto] had been reaching for a weapon or what the reason was." He consequently pulled Manto out of his vehicle and attempted to conduct a pat down search for weapons.

The trial court apparently accepted Yantes' testimony as credible because it found that "the defendant provided the officer with an extremely legitimate reason to order him removed from the car when he reached toward the console." Even if Manto had the right to resist Yantes' earlier order to exit the

vehicle, he could only do so in a reasonably necessary manner. *See State v. Hobson*, 218 Wis.2d 350, 377, 577 N.W.2d 825, 836 (1998). He certainly did not have the right to reach for a weapon, which was Yantes' subjective concern.

Manto argues that everything occurring after Yantes' order to exit the vehicle must be suppressed because it all arose out of an unlawful order. This court concludes, however, that Manto's act of reaching toward the center console constituted an intervening event justifying a lawful *Terry* weapons search, because Yantes believed Manto was reaching for a weapon.

Yantes was lawfully authorized to conduct a *Terry* frisk for weapons, regardless whether Manto had been lawfully resisting Yantes' order prior to Manto's reaching toward the center console. Manto refused to comply with Yantes' frisk for weapons, and instead fought back and wrestled with Yantes and another officer for at least a minute. His conduct constituted resisting the officers' lawful authority, and Yantes properly arrested him. A lawful search incident to that arrest produced the drug paraphernalia. *See New York v. Belton*, 453 U.S. 454, 460-61 (1981). The trial court properly did not suppress the lawfully obtained evidence.

This court therefore affirms the trial court's judgment and order denying postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

