COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1641-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MACK A. KRADENYCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Mark A. Kradenych appeals from the judgment of conviction entered against him. The issue on appeal is whether the police officer who stopped and frisked Kradenych was justified in doing so. Because we

conclude that the police officer was justified in stopping and frisking Kradenych, we affirm.

¶2 Kradenych was charged with one count of burglary. He moved to suppress physical evidence obtained by the police as a result of a stop and frisk, alleging that the stop and frisk violated ***Terry v. Ohio***, 392 U.S. 1 (1968). The circuit court held a hearing and denied the motion. Subsequently, Kradenych pled no contest to the charge. He now appeals, arguing that the evidence obtained during the stop and frisk should have been suppressed.

¶3 The facts brought out at the suppression hearing were as follows. Officer Wanggaard was on duty on July 13, 1999, when he received a dispatch call of a possible burglary in progress and a suspicious person. The suspicious person had been seen near a garage and was described as being a black male wearing a brown shirt and blue jeans, and carrying a blue backpack, heading eastbound. Officer Wanggaard spotted Kradenych about eleven or twelve blocks east from where the person had been reported. The officer stopped Kradenych because he matched the description of the suspect and was carrying a blue backpack. The officer testified that he patted Kradenych down because he knew it was a possible felony and he did not know when any backup would arrive. He testified that he patted Kradenych down for "my safety."

¶4 The circuit court determined that the stop and frisk were reasonable under the circumstances and denied Kradenych's motion to suppress the evidence. In reaching this conclusion, the circuit court relied in part on the Wisconsin Supreme Court's decision in ***State v. Flynn***, 92 Wis. 2d 427, 434-35, 285 N.W.2d 710 (1979). On appeal, Kradenych argues, in essence, that the rule in ***Flynn***

conflicts with the United States Supreme Court's decision in ***Richards v. Wisconsin***, 520 U.S. 385 (1997), and therefore is no longer valid. We disagree.

¶5 In ***Flynn***, the Wisconsin Supreme Court held that an officer was justified in conducting a brief investigatory stop of a defendant when a burglary had been reported a half an hour earlier and the defendant was in the company of a man who fit the description of the suspect. ***Flynn***, 92 Wis. 2d at 434. The court stated that it would have been "poor police work indeed" for the officer not to have stopped the defendant. ***Id.*** (citation omitted). The court further concluded that the officer was justified in frisking the defendant before questioning him. ***Id.***

¶6 The court stated: "It is not simply the nature of the suspected offense but all of the circumstances under which the confrontation takes place that must be taken into consideration in determining whether an officer is entitled to conduct a limited weapons search of a person whom he has justifiably stopped." ***Id.*** at 435. The court further concluded that the fact that the officer knew that a burglary had occurred in the area was an important consideration. ***Id.*** The court stated that a burglary is the type of offense that would "warrant a man of reasonable caution" to believe that "one who committed the offense would be armed." ***Id.*** (citations omitted). This belief becomes even more justified considering the other circumstances surrounding the stop and frisk. *See* ***id.***

¶7 In ***Richards***, the United States Supreme Court held that the Fourth Amendment does not allow a per se exception to the reasonableness requirement to justify a no-knock entry to search a residence for evidence of drug possession and delivery. ***Richards***, 520 U.S. at 393-94. While it upheld the no-knock entry in that case based on the particular facts, the Court refused to allow a "criminal-category" exception to the no-knock requirement. ***Id.*** at 395.

¶8 Kradenych argues that the rule in ***Flynn*** creates, in essence, a "criminal-category" exception to the stop and frisk rule. We believe that this is an oversimplification of the holding in ***Flynn***. In that case, the Wisconsin Supreme Court considered the fact that a burglary had been committed as one factor, albeit an important one, in determining the reasonableness of the stop and frisk. The court also considered the closeness in time and location of the suspect, as well as other factors. ***Flynn***, 92 Wis. 2d at 435. The ***Flynn*** court never specifically created a "criminal-category" exception, stating, as quoted above, that it is not just the nature of the offense but all of the circumstances surrounding the confrontation which must be considered. ***Id.*** The fact that a felony has been reported, however, is certainly a very important factor. We do not agree that the ruling in ***Flynn*** conflicts with the United States Supreme Court's ruling in ***Richards***.

¶9 In this case, the circuit court considered all the circumstances surrounding the stop and frisk, and not just the fact that a burglary had been reported. First, Officer Wanggaard was justified in stopping Kradenych because there had been a burglary reported and Kradenych met the description of the suspect.[1] The suspect was described as a black male, wearing a brown shirt and blue jeans, carrying a blue backpack, and heading in an easterly direction. The officer found Kradenych moments afterwards about eleven or twelve blocks east of the place where the suspicious person had been reported. Kradenych met the description of the suspect, and was carrying a backpack. As was stated in ***Flynn***,

[1] Although the circuit court made some reference to the call being an anonymous tip, the facts as found by the circuit court do not seem to support this statement. The incident was reported, and once the police detained Kradenych, they took him to be identified by the person reporting the incident. If the report was anonymous, how did the police know who to ask to identify Kradenych? In any event, Kradenych does not raise this issue on appeal.

it would have been poor police work indeed if the officer had not stopped Kradenych. *See* ***Flynn***, 92 Wis. 2d at 434.

¶10 The officer was also justified in frisking Kradenych and checking his backpack for weapons. The officer testified that he decided to frisk Kradenych for weapons because he did not know when his backup would arrive and Kradenych was holding the backpack in his hands.[2] When the officer took the backpack from Kradenych, he noticed that it was heavy and had a metallic sound to it. Under these circumstances, the officer was justified in checking the backpack for weapons.[3]

¶11 We conclude that under all of these circumstances Officer Wanggaard was justified in stopping Kradenych and frisking him for weapons. The circuit court's ruling does not create a "criminal-category" exception to the ***Terry*** rule. The circuit court, therefore, properly denied the motion to suppress the evidence.

[2] There was conflicting testimony at trial concerning whether Kradenych was holding the backpack or had placed it on the ground. The circuit court accepted the testimony of the officer that Kradenych was holding the backpack. We see no reason to disturb that finding on appeal.

[3] Officer Wanggaard also testified that when he looked in the backpack and saw that it contained tools and not weapons, he closed it. This further supports his statement that he was looking for weapons and not evidence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.