COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2438-FT **Cir. Ct. No. 2007JV70**

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

IN THE INTEREST OF ADRIAN S., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ADRIAN S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

¶1 NEUBAUER, J.[1] Adrian S. appeals from an order adjudicating him delinquent after the trial court denied his motion to suppress evidence of marijuana found on his person during a weapons pat-down. We conclude that the search was constitutionally permissible because, given the totality of the circumstances, a reasonable person in this officer's position would have believed that his or her safety was in danger. The suppression motion was properly denied; we affirm the delinquency order.

¶2 The undisputed facts come from the suppression hearing testimony. On a below-zero night in early February 2007, City of Racine Police Officer Daniel Tredo received a report of a minivan stolen when its owner left it running with the keys inside to warm it up. Within about ten minutes, Tredo spotted the minivan, which he verified to be the stolen one. No one was inside; Adrian stood about five feet away from the driver's door. Adrian took off running and Tredo drove after him.

¶3 Adrian ran into a backyard and Tredo lost sight of him for ten or fifteen seconds until Adrian came out the front yard and began walking down the sidewalk. Based on having seen Adrian near the driver's door of the minivan and begin running, Tredo stopped Adrian to ask him about the vehicle. Adrian told Tredo he was coming from a nearby supermarket, a statement at odds with what Tredo had seen. The incident occurred in a neighborhood considered to be a fairly high-crime area. Racine police have targeted that part of town for increased

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

patrol, overtime positions and a Community Oriented Policing house because a lot of gang activity, gunshots and narcotics dealing occur there.

¶4 Because Adrian ran from the vicinity of the stolen vehicle, ran through yards, and seemed to have lied about his direction of travel, and given the high-crime nature of the area, Tredo testified he felt concerned for his own safety and decided to frisk Adrian for weapons. During the pat-down over Adrian's puffy jacket, Tredo could hear plastic crinkling due to the cold and could feel "individually packaged soft material," which in his experience was "consistent with THC or possibly crack cocaine." Tredo retrieved from Adrian's inside jacket pocket a plastic bag containing thirteen individual bags of marijuana. He found no user paraphernalia.

¶5 Adrian was charged with possession with intent to deliver THC, contrary to WIS. STAT. § 961.41(1m)(h)1. Adrian moved to suppress evidence of the contraband on grounds that the stop was unreasonable and the warrantless search was unconstitutional. After a hearing, the court denied the suppression motion. The court based its decision that the search was reasonable on several findings: Tredo saw Adrian near the driver's door of a vehicle Tredo knew to be recently stolen; Adrian fled and lied about his route; no one else was out and about on that "extremely cold" night; the neighborhood is a high-crime area targeted for extra police enforcement; and, based on Tredo's training and experience, it would not be unusual for a person involved with a stolen vehicle to have either a weapon or tools for breaking into a vehicle which might be used as weapons. The court expressly found Tredo's testimony to be credible. The matter then proceeded to a bench trial, and the court found Adrian delinquent as charged. Adrian appeals.

¶6 Adrian does not challenge the reasonableness of the stop. The sole issue is whether Tredo's protective search for weapons—the "frisk"—was a violation of the constitutional prohibition against unreasonable searches. Adrian contends it was unconstitutional because a reasonably prudent person in Tredo's shoes would not have believed that his and other's safety was in danger "following a stop to investigate a possible joyride."

¶7 When we review a trial court's ruling on a motion to suppress, we uphold its factual findings unless they are clearly erroneous. ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347. Whether the facts satisfy constitutional principles is a question of law for this court to decide. ***State v. Kyles***, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449. We are not bound by the trial court's decision on questions of law, but we benefit from its analysis. *See* ***id.***

¶8 Adrian's suppression motion was rooted in his Fourth Amendment guarantee of freedom from unreasonable searches. U.S. CONST. amend. IV.; *see* ***State v. Kelsey C.R.***, 2001 WI 54, ¶29, 243 Wis. 2d 422, 626 N.W.2d 777. A frisk or pat-down of a person being questioned during an investigatory stop is reasonable if the stop itself is reasonable and if the officer has reason to believe that the person might be armed and dangerous. ***State v. Allen***, 226 Wis. 2d 66, 76, 593 N.W.2d 504 (Ct. App. 1999); *see also* WIS. STAT. § 968.25.[2]

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[2] WISCONSIN STAT. § 968.25 provides in relevant part:

> When a law enforcement officer has stopped a person for temporary questioning pursuant to [WIS. STAT. §] 968.24 and reasonably suspects that he or she or another is in danger of physical injury, the law enforcement officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury and

(continued)

¶9 Adrian contends that a reasonable person in Tredo's shoes would not have believed he was armed and dangerous. He argues that Tredo did not know whether he had taken the van and that, even had Tredo been certain of it, "the act of joyriding in a van … left running in the street" creates no particularized reason to believe Adrian posed a threat to Tredo's safety.

¶10 A frisk for weapons must be confined in scope to an intrusion reasonably designed to discover instruments that could be used to assault the officer. ***Allen***, 226 Wis. 2d at 76. The officer must be able to point to specific, articulable facts, which, when considered along with rational inferences drawn from them, reasonably warrant the intrusion. ***Kyles***, 269 Wis. 2d 1, ¶9. Reasonableness is measured against an objective standard: would the facts available to the officer at the moment of the search warrant a person of reasonable caution to believe that the action taken was appropriate. ***State v. Mohr***, 2000 WI App 111, ¶13, 235 Wis. 2d 220, 613 N.W.2d 186.

¶11 Adrian asserts that the facts of his case largely mirror those in ***Kyles***, where the supreme court held that the officer lacked an articulable, reasonable and objective basis to believe that Kyles was armed and dangerous and affirmed the order suppressing the marijuana found during the frisk. *See* ***Kyles***, 269 Wis. 2d 1, ¶1. Kyles was a passenger in a vehicle stopped at 8:45 p.m. in an area of "pretty active" criminal activity for operating without headlights after dark. ***Id.***, ¶¶11, 17. No one in the vehicle was suspected of a crime. ***Id.***, ¶11. Kyles wore a down coat appropriate to the December weather. ***Id.***, ¶13. Kyles exited the vehicle when

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> of a sort not ordinarily carried in public places by law abiding persons.

requested and did not try to flee. ***Id.***, ¶¶12-13. The officer thought Kyles behaved suspiciously because he "appeared nervous," looked around and put his hands in and out of his pockets, but the officer thought the gestures were "like a nervous habit" and he personally did not feel threatened. ***Id.***, ¶¶13-14, 17. A few seconds later, the police officer frisked Kyles and found marijuana. ***Id.***, ¶15. The supreme court affirmed the suppression order because it concluded that under the totality of the circumstances, the officer's belief that Kyles was armed and dangerous was more an unparticularized hunch than a reasonable inference. ***Id.***, ¶72.

¶12 Granted, similarities exist: Kyles was in a "pretty active" crime area at 8:45 p.m. on a cold December night, Adrian in a "fairly high crime" area at 9:00 p.m. on a cold February night, and both wore fluffy jackets appropriate to Wisconsin winters. The similarities end there. Kyles was only a passenger in a car stopped for driving without headlights, was suspected of no wrongdoing and did not flee. The police officer frisked Kyles despite testifying that he felt no particular threat and interpreted Kyles' hand movement as a nervous habit. Here, by contrast, Tredo testified he had personal safety concerns based on Adrian's position near the stolen vehicle, his flight, his fabricated path of travel, and the crime level of the neighborhood, coupled with Tredo's own experience that persons arrested for stealing a vehicle may have on them either weapons or tools which can double as weapons. We agree with the State that any resemblance between ***Kyles*** and Adrian's case is superficial and does not compel reversal.

¶13 As the "building blocks of fact accumulate," we can draw reasonable inferences about their cumulative effect until the "whole is greater than the sum of its individual parts." ***Allen***, 226 Wis. 2d at 75. In addition, actions consistent with innocent behavior also may give rise to the reasonable suspicion required for a frisk when considered in the context of the particular facts and circumstances with

reasonable inferences and as part of the total picture. *See* ***Kyles***, 269 Wis. 2d 1, ¶53. Trial courts decide the reasonableness of the officer's suspicion on a "case-by-case basis." *See* ***State v. Johnson***, 2007 WI 32, ¶22, 299 Wis. 2d 675, 729 N.W.2d 182. Tredo's concern for his personal safety, Adrian's attire and actions, the time and place of the stop, and the area's crime level all factor into the totality of the circumstances. *See* ***Kyles***, 269 Wis. 2d 1, ¶30 and n.22, ¶¶49, 53, 54, 61-62.

¶14 We see no error. Police officers are not required to take unnecessary risks in the performance of their increasingly hazardous duties. ***State v. Beaty***, 57 Wis. 2d 531, 539, 205 N.W.2d 11 (1973). The trial court made numerous findings, including that Tredo's testimony was credible. It was for the trial court to determine witness credibility and the weight to be given to the testimony. *See* ***State v. Anson***, 2005 WI 96, ¶32, 282 Wis. 2d 629, 698 N.W.2d 776. These findings are not clearly erroneous. Based on the totality of the circumstances of this case as found by the trial court, we agree that the pat-down was reasonable. We affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.