COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1394-CR **Cir. Ct. No. 2009CM1564**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JON PAUL A. FERNANDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Reversed.*

¶1 NEUBAUER, P.J.[1] Jon Paul Fernandez appeals from a judgment of conviction for possession of tetrahydrocannabinols (THC). Fernandez contends

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

that the circuit court erred in denying his motion to suppress evidence derived from the illegal detention and search of his person. Because the officer was not able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted a pat-down of Fernandez's person, we conclude that the circuit court erred in denying Fernandez's motion to suppress evidence. We reverse the judgment.

BACKGROUND

¶2 Fernandez was the back seat passenger in a vehicle that was stopped by Officer James Murphy of the City of Muskego Police Department on March 14, 2009, at 2:15 a.m. Murphy stopped the vehicle because it was operating without headlights. Murphy obtained a valid driver's license from the driver, Jacob Johnson, and valid photo identification from Fernandez and the front seat passenger, Melissa Fernandez, who is Fernandez's sister.

¶3 Murphy ran the names through the police computer system and confirmed that the driver had a valid license and no warrants. Fernandez did not have any warrants either; however, his sister had a warrant for an unpaid $180 civil forfeiture. Consistent with police department policy, additional officers were dispatched to the scene to aid with Melissa's arrest. When the two additional officers arrived, Melissa was asked to exit the vehicle. She was taken into custody for a valid warrant and placed in a squad car. The officers then approached the vehicle to speak to the driver and Fernandez. Murphy testified that he "specifically spoke with the rear passenger [Fernandez] and asked him to exit the vehicle." When asked why, Murphy responded, "Incident to arrest…. We were going to search the vehicle because the front passenger had been arrested."

Murphy testified that he never searches a vehicle incident to arrest with people inside of it because of safety issues.

¶4 Murphy opened the door of the vehicle and asked Fernandez to step out. Fernandez complied. When asked what happened next, Murphy testified, "Due to the fact that he had not asked to leave the scene of the incident and he was going to be in close proximity to me while another officer actually searched the vehicle, I patted him down for safety reasons." Murphy testified: "In my mind, all traffic stops are inherently dangerous." Murphy confirmed that it is his practice to search and pat down everybody in a traffic stop, and he does so about "[n]inety percent of the time." Murphy agreed that in this instance Fernandez happened to fall within that ninety percent. When Murphy informed Fernandez that he would be conducting a pat-down, Fernandez did not object.

¶5 As Murphy began the pat-down, he noticed that Fernandez's front pockets were "bulged with articles, extremely bulged." Murphy asked Fernandez whether he could check inside Fernandez's pockets, Fernandez consented. Murphy discovered a container with trace "green plant material" and another container with what Fernandez acknowledged was cocaine. While handcuffing Fernandez, Murphy located a small baggie in his hands containing marijuana. Fernandez was placed under arrest and transported to the police department.

¶6 On July 16, 2009, Fernandez was charged with one count of possession of THC. Fernandez filed a motion to suppress evidence stemming from the search of his person and belongings on grounds that he was detained illegally prior to the warrantless search. The court denied Fernandez's motion. The court found that there was reasonable suspicion for the initial stop, the police were entitled to search the vehicle incident to arrest, and that Fernandez did not

object to the pat-down search of his person. Fernandez subsequently pled guilty to the charge and was convicted of possession of THC, contrary to WIS. STAT. § 961.41(3g)(e). He appeals.

DISCUSSION

¶7 At the outset, we clarify that Fernandez does not challenge the initial stop of the vehicle he was riding in nor does he challenge the circuit court's finding that he consented to the search of his pockets after the pat-down search revealed a bulge. Rather, Fernandez argues that the warrantless search of his pockets was unreasonable because he was illegally seized when he consented to the search. Fernandez argues in the alternative that, even if he was legally seized, his consent was tainted by the unlawful frisk or pat-down search. We conclude that Fernandez, although legally seized, was subjected to an unreasonable pat-down search just prior to consenting to the search of his pockets. The parties do not dispute that, if the pat-down search was unreasonable, Fernandez's consent to the search of his pockets was impermissibly tainted.

¶8 The right to be secure against unreasonable searches and seizures is protected by both the Fourth Amendment to the United States Constitution and article 1, section 11 of the Wisconsin Constitution. ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. With limited exceptions, Wisconsin courts have historically interpreted the Wisconsin Constitution's protections in this area identically to the protections under the Fourth Amendment as defined by the United States Supreme Court. ***Dearborn***, 327 Wis. 2d 252, 14 & n.7. When reviewing a denial of a motion to suppress evidence obtained in violation of the Fourth Amendment, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v.***

McGill, 2000 WI 38, ¶17, 234 Wis. 2d 560, 609 N.W.2d 795. However, we independently review those facts to determine whether the constitutional requirement of reasonableness is satisfied. ***Id.*** We turn first to whether Fernandez was legally seized when he consented to the search.

Fernandez was Legally Seized under ***Terry***[2] *at the Time of the Search.*

¶9 Once a motor vehicle has been lawfully detained for a traffic violation, law enforcement may order the driver and the passengers out of the vehicle without violating the Fourth Amendment. ***Arizona v. Johnson***, 555 U.S. 323, 129 S. Ct. 781, 786 (2009). The temporary seizure of the driver and passengers continues and remains reasonable for the duration of the stop. ***Id.*** at 788. Normally, the stop ends when the police have no further need to control the scene and inform the driver and passengers that they are free to leave. ***Id.*** Further, an officer's inquiry into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, as long as the inquiries do not measurably extend the duration of the stop. ***Id.***

¶10 As stated above, Fernandez does not challenge the validity of the investigative stop; he acknowledges that he was lawfully seized when the officer stopped the car he was riding in because of an equipment violation; and he concedes that, pursuant to ***State v. Gammons***, 2001 WI App 36, ¶¶11-13, 241 Wis. 2d 296, 625 N.W.2d 623, as part of that stop the officer could—and did—ask the vehicle's occupants for identification and run a warrant check on them.

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

Rather, Fernandez contends that there was no justification for his continued seizure past the point reasonably justified by the initial stop.

¶11 While the circuit court's decision did not address the duration of the traffic stop, we note Murphy's testimony indicating that the traffic stop was not yet completed at the time that he conducted a pat-down search of Fernandez.[3] Thus, the sequence of events is as follows. The vehicle was stopped for a traffic violation; the officer discovered the warrant which prompted the need for backup officers; the officers arrested Melissa and placed her in the squad car; the officer then conducted a pat down of Fernandez's person and a search of his pockets and arrested Fernandez. It was not until after Fernandez's arrest that Murphy returned to the matter of the traffic violation and issued a compliance order to the driver for operating with defective headlights. There is no argument or indication from the testimony that there were any unreasonable delays in conducting the stop.[4] Absent any indication of unreasonable delay, we view the order of events as nothing more than the officers' attempt to control the scene. We therefore conclude that the

[3] The record reflects that Murphy had not yet returned Fernandez's photo identification at the time of the pat-down search.

[4] Fernandez relies on our decision in ***Gammons***, 2001 WI App 36, 241Wis. 2d 296, 625 N.W.2d 623; ***State v. Kolk***, 2006 WI App 261, 298 Wis. 2d 99, 726 N.W.2d 337; and ***State v. Luebeck***, 2006 WI App 87, 292 Wis. 2d 748, 715 N.W.2d 639, in support of his contention that his continued seizure exceeded the justification for the initial stop. However, none of these cases involved the arrest of a passenger based on a lawful warrant check. *See* ***Gammons***, 241 Wis. 2d 296, ¶13 (a warrant check on a vehicle passenger is reasonably related to the purpose of the traffic stop). In each of these cases, the purpose of the initial traffic stop had concluded prior to the challenged search and no additional suspicious factors had come to the officer's attention during the initial traffic stop. *See* ***id.***, ¶24; ***Kolk***, 298 Wis. 2d 99, ¶¶19, 22-23; ***Luebeck***, 292 Wis. 2d 748, ¶12. Such is not the case here.

traffic stop was pending and Fernandez was lawfully seized when the search of his person and pockets occurred.[5]

The Pat-Down Search of Fernandez's Person was not Reasonable in Light of the Circumstances.

¶12 Having concluded that Fernandez was lawfully seized, we turn to whether the pat-down search of Fernandez's person was reasonable under the totality of the circumstances. We begin by addressing Fernandez's challenge to the circuit court's finding that he consented to the pat-down of his person. The record is clear that Murphy informed Fernandez that he would be conducting a frisk and Fernandez did not object. It is well established that a defendant's mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent. ***State v. Giebel***, 2006 WI App 239, ¶18, 297 Wis. 2d 446, 724 N.W.2d 402 (citing ***Bumper v. North Carolina***, 391 U.S. 543, 548-49 (1968)). Thus Fernandez cannot be found to have consented to the pat-down search, and the State does not develop any argument to the contrary.

¶13 Once outside the vehicle pursuant to a lawful traffic stop, law enforcement may pat down the driver and passengers for weapons if the officer reasonably concludes that they might be armed and presently dangerous. ***Johnson***, 129 S. Ct. at 786-87 (citing ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 n.6 (1977) (per curiam) (driver); ***Maryland v. Wilson***, 519 U.S. 408, 415 (1997) (passengers)); *see also* ***McGill***, 234 Wis. 2d 560, ¶22. The officer must be

[5] Based on our conclusion that Murphy was entitled to order Fernandez out of the vehicle while conducting the traffic stop and did not unlawfully detain him pending the completion of the traffic stop, we need not address Fernandez's contention that his continued detention "cannot be justified as a necessary part of the officers' search of the car incident to [Melissa's] arrest because that search was unlawful" under ***Arizona v. Gant***, 556 U.S. 332 (2009).

able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. ***State v. Johnson***, 2007 WI 32, ¶21, 299 Wis. 2d 675, 729 N.W.2d 182; ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). The test for whether a protective search for weapons is justified is an objective one. ***State v. Kyles***, 2004 WI 15, ¶10, 269 Wis. 2d 1, 675 N.W.2d 449. We must determine whether a reasonably prudent officer in the circumstances presented could believe that his or her safety and that of others was at risk because the individual may be armed and dangerous. ***Id.*** A court must evaluate the totality of circumstances in the particular case to decide whether an officer had reasonable suspicion to effectuate a protective search for weapons. ***Id.***, ¶49. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific and reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience." ***Terry***, 392 U.S. at 27. Fernandez argues that because there was no reasonable basis for suspecting that he might be armed and dangerous, the frisk was unlawful. We agree.

¶14 In assessing Fernandez's challenge, we are guided by the supreme court decision in ***Kyles***. There, the defendant was a passenger in a vehicle that was stopped for a traffic violation after dark, at 8:45 p.m., in an area with "pretty active" criminal activity. ***Kyles***, 269 Wis. 2d 1, ¶¶11-17. As here, no one in the vehicle was suspected of a crime. ***Id.***, ¶11. The officer testified that he did not feel any particular threat before searching the defendant. ***Id.***, ¶17. However, the defendant appeared nervous and twice inserted his hands into the pockets of his big, fluffy down coat after being directed by the officer to remove his hands from his pockets. ***Id.*** Even in light of the totality of the circumstances—including the

time of day and location—the ***Kyles*** court was not persuaded that the size of the defendant's coat and the placement of his hands in his pockets "were sufficient to create reasonable suspicion in the mind of a reasonable law enforcement officer that the defendant was armed and dangerous." ***Id.***, ¶¶69, 72. The court held:

> The officer's belief under the circumstances of this case that the defendant was armed and dangerous was more "an inchoate and unparticularized suspicion or 'hunch"' than a reasonable inference. There was not sufficient articulable, objective information to provide the officer with reasonable suspicion that the defendant was armed and dangerous to the officer or others.

Id., ¶72. Similarly in ***Johnson***, the court held that a surreptitious movement by a suspect in a vehicle, without more, did not provide the officer with reasonable suspicion to conduct a search of the defendant's person and car. ***Johnson***, 299 Wis. 2d 675, ¶36; *cf.* ***State v. Williams***, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106 (the officer's protective search was supported by articulable facts justifying a reasonable suspicion that the defendant may have been armed and dangerous when officers were responding to a complaint involving suspected drug activity, an offense associated with weapons possessions; defendant made a reaching movement behind the passenger seat when police pulled up behind his vehicle; and officers were in a vulnerable position vis a vis the defendant).

¶15 Here, the circuit court found:

> [W]hen they asked Mr. Fernandez … to exit the vehicle, it was 2:15 in the morning, it's dark, it's a traffic stop, with three people in a vehicle who had apparently been at a bar[.] [A]nd obviously, any time you have a traffic stop, particularly that late at night and particularly three people in a vehicle, it is inherently dangerous to the officers[.] [Murphy] did ask Fernandez to step out of the vehicle and I believe asked if he could pat him down for his safety. And that the defendant had no objection to that pat-down….

> I think it's clear that he was patting him down for his safety under a protective search. The defendant standing next to him on a highway at night, that a pat-down for his safety to make sure he doesn't have any weapons under ***Terry*** [] has been the standard procedure of police officers.

The circuit court determined that, based on the totality of circumstances—"it's dark, it's late, there [are] three people" standing in close proximity to the officer on a highway at night—the officer had a valid reason to conduct a protective search. The State similarly argues on appeal that "Murphy's actions were reasonable because Fernandez was an unrestrained individual, who may have been consuming alcoholic beverages, and had just seen his sister arrested." While these facts are supported in the record, the law requires more.

¶16 As Fernandez notes, the stop did not occur in a high crime area and it was not related to a criminal investigation such that an officer would suspect that the car's occupants had engaged in any criminal behavior, the arrest was made on a civil warrant for failure to pay a forfeiture, and at the time of the pat-down search there were three officers on the scene. Moreover, Murphy testified that all of the vehicle occupants—and Fernandez specifically—were cooperative.

¶17 Fernandez argues that Murphy failed to articulate a particularized suspicion that a weapon was present but rather was acting in conformity with his common policy of frisking persons during traffic stops. While we recognize the danger presented during a temporary seizure and the increased risk that accompanies an arrest, we agree with Fernandez that Murphy lacked the specific and articulable facts necessary to support an inference that Fernandez might have been armed and dangerous. Notably absent from Murphy's testimony was any indication that Fernandez, or any of the individuals, engaged in any suspicious

behavior, either in demeanor or actions.[6] We therefore conclude that the pat-down search of Fernandez's person was not reasonable under the circumstances.

CONCLUSION

¶18 We conclude that Fernandez was lawfully detained during the ***Terry*** stop. However, under the totality of circumstances, the officer lacked the requisite specific and articulable facts to justify a pat-down of Fernandez's person. Because there is no dispute that the search of Fernandez's pockets stemmed from an unlawful frisk of his person, we conclude that the circuit court erred in denying his motion to suppress the evidence uncovered during the search of his pockets. We reverse the judgment of conviction.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

[6] We reject the State's contention that the pat-down search was justified based on Murphy's observation of a bulge in Fernandez's pocket. As the State acknowledges, Murphy did not notice the bulge until after he had started the pat-down. *See* ***State v. Kyles***, 2004 WI 15, ¶10, 269 Wis. 2d 1, 675 N.W.2d 449 (in determining whether a frisk was reasonable, a court may look "to any fact in the record, as long as it was known to the officer at the time he conducted the frisk").