

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP425-CR

Cir. Ct. No. 2012CF412

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. MOTEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
EUGENE A. GASIORKIEWICZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. James A. Moten appeals a judgment, entered on a guilty plea, convicting him of possession of THC (\leq 200 grams) with intent to deliver, second and subsequent offense. He contends that his motion to suppress

was wrongly denied because the informant's tip was too unreliable to give police reasonable suspicion to stop him and frisk him or to put police in a position such that the marijuana was in plain view. We disagree and affirm the judgment.

¶2 The following facts are from testimony at Moten's suppression hearing. Racine Police Department Detective Kevin Klinkhammer received a call from a confidential informant with whom Klinkhammer had worked for nine months. During that time the informant had supplied accurate information leading to over a dozen misdemeanor and felony arrests. The informant advised Klinkhammer that a thirty-year-old, heavy-set black male that the informant knew as "JJ" was sitting in a chair in a front yard at the southeast corner of 9th and Villa and was wearing a gray baseball hat, a black hooded sweatshirt or coat, and blue jeans. The informant said "JJ" had several bags of marijuana in his pocket. Klinkhammer gave the information to Police Officer Pete Boeck, who was assigned to "Area 4," an area known to have a relatively high volume of calls for gunshots, homicides, assaults, prostitution, and drug dealing.

¶3 Boeck arrived at the specified location within fifteen minutes and saw a black male about thirty years old with a heavy build seated in a chair on the southeast corner of 9th and Villa. The man was wearing a gray baseball cap, a black sweatshirt, and gray jeans. The eight or nine people standing around or seated on porches were not wearing anything similar to what the informant described. The seated man was identified as Moten.

¶4 Boeck asked Moten to step away from the group, apparently Moten's friends. Moten denied having marijuana or anything else illegal. As Moten was much larger and, Boeck suspected, stronger than he and the friends' looks and comments indicated that they were not happy about his presence, Boeck

called for backup. Boeck told Moten he was going to detain and search him. Moten did not comply with Boeck's effort to handcuff him but put his hands into his front jacket pockets. As the officers grabbed Moten's arms and put them behind his back, the right pocket bowed out, revealing clear plastic baggies containing what appeared marijuana. Boeck seized the baggies. The contents proved to be marijuana.

¶5 Moten moved to suppress the evidence. The circuit court found that the reliability of the confidential informant's tip provided reasonable suspicion to stop Moten, that the search was a reasonable protective frisk for weapons, and that Moten's constitutional rights were not violated because the marijuana was in plain view. The court denied the motion. Moten was convicted after entering a guilty plea. He now appeals.

¶6 Upon review of a ruling on a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous but independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48.

¶7 An informant's tip may give rise to reasonable suspicion if, considering the informant's veracity and basis of knowledge viewed in light of the "totality of the circumstances," the tip "exhibit[s] reasonable indicia of reliability." *State v. Rutzinski*, 2001 WI 22, ¶¶17-18, 241 Wis. 2d 729, 623 N.W.2d 516 (citation omitted). In determining overall reliability, "a deficiency in one [consideration] may be compensated for ... by a strong showing as to the other." *Id.* (citation omitted). The tip alone may suffice to justify an investigatory stop if it is from an informant who police reasonably believe to be truthful, such as where

the informant's identity is known and he or she has provided reliable tips in the past. *See id.*, ¶¶19-21.

¶8 Here, a known informant that Klinkhammer knew to be reliable gave Moten's description, location, and activity. Minutes later, Boeck verified those details. Because that information was correct, Boeck reasonably detained Moten to see if he also possessed marijuana. *See State v. Lopez*, 207 Wis. 2d 413, 426, 559 N.W.2d 264 (Ct. App. 1996) ("When an informant is shown to be right about some things he or she has alleged, it is probable that the informant is also right about others."). The investigative stop was justified.

¶9 Once a suspect is justifiably stopped, the officer may conduct a pat-down search when the officer reasonably concludes that the suspect may be armed. *Terry v. Ohio*, 392 U.S. 1, 24 (1968). The officer must identify "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (citing *Terry*, 392 U.S. at 21). The officer need not be able to rule out innocent explanations for the suspicious conduct. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Reasonableness is based on the totality of the circumstances. *State v. Williams*, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106.

¶10 The circuit court found that Boeck reasonably feared for his safety before the cover officer arrived, given Moten's physical stature, the nearby group's evident displeasure with Boeck's presence, and that, based on his experience, Boeck knew the location to be a high-crime area. It found that, once backup did arrive, Boeck reasonably decided to handcuff Moten to confirm or dispel Boeck's suspicion that criminal activity was afoot, and that, instead of

complying with Boeck's order to put his hands behind his back, Moten "furtive[ly]" put his hands in his pockets. These findings are not clearly erroneous. The totality of the circumstances justified the *Terry* frisk.

¶11 When the officers removed Moten's hands from his pockets, the right pocket bowed out and Boeck saw what he believed to be baggies of marijuana. Having concluded that he was justified in both stopping and frisking Moten, Boeck also was justified in seizing the marijuana. "[O]bjects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence." *State v. Buchanan*, 2011 WI 49, ¶23, 334 Wis. 2d 379, 799 N.W.2d 775.

¶12 Having determined that the search and seizure were legitimate, we need not consider the State's secondary argument that exigent circumstances also justified the warrantless search. *See Jankee v. Clark Cnty.*, 2000 WI 64, ¶105, 235 Wis. 2d 700, 612 N.W.2d 297 (when resolution of one issue is dispositive, we need not reach other issues the parties raise).

By the Court.—Judgment affirmed.

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

