COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0771-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CONCEPCION RELERFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Reversed.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Concepcion Relerford appeals from a judgment convicting him of possession of cocaine with intent to deliver within 1,000 feet of a school, contrary to §§ 164.41(1m)(cm)2 and 161.495, STATS. Relerford claims that the trial court erred in denying his motion to suppress evidence because the officer: (1) lacked the reasonable suspicion required by the Fourth Amendment to

justify the stop; (2) lacked the reasonable suspicion required to justify a pat down for weapons; and (3) regardless of the initial legality of the pat down, exceeded the constitutionally permissible scope of the pat down for weapons and did not have the requisite probable cause to continue the search. We agree with the third contention and, as a result, it is unnecessary to address the first two. We therefore reverse.

BACKGROUND

The evidence relevant to this appeal was presented at the hearing on the suppression motion. Officer Bobby Pittman of the City of Beloit Police Department testified that at about 4:20 a.m. on February 18, 1996, he observed a dark gray four-door car traveling south at about fifty miles per hour in a twenty-five mile per hour zone on Skyline Drive in the City of Beloit. He did not notice the make of the car, the car's license plate, the number of people in the car or what any of them might have looked like because the car was speeding. Officer Pittman decided to follow the car, but by the time he turned onto Skyline Drive, the car disappeared.

Officer Pittman continued to drive south on Skyline Drive and then drove around two blocks in search of the car. Not finding the car, he drove back to Skyline Drive. While driving south on Skyline Drive, he saw two males walking in the middle of the street. Officer Pittman drove past them and started looking in driveways for the car. He found the car in one of the driveways down the street and called for backup.

He approached the two men, one of whom was Relerford, and asked for identification. The two men did not run. While Officer Pittman was talking to the two men, Relerford's companion, Scott Clemons, dropped a set of GM keys in

front of Relerford. Officer Pittman recognized Clemons and had prior knowledge that Clemons was arrested in Missouri for a weapons violation. Consequently, he decided to conduct a pat down of both Relerford and Clemons for his and the other officer's safety. Officer Pittman asked Relerford what was in his inside coat pocket and Relerford answered that it was only papers. Relerford was wearing a very thick winter coat and it was difficult to squeeze and to feel objects inside during the pat down. Officer Pittman could feel one or two cassette tapes in the pocket and something long and hard. He had Relerford put his hands on the front of his squad car, and he reached into the pocket to remove the items. He removed some papers, cassette tapes and the long slender item which was a toothbrush. When he pulled that out, a baggie was stuck in between his fingers. The baggie fell back into the pocket. Officer Pittman reached back into the pocket to make sure everything was out of the pocket and pulled out a baggie containing a yellowish rock substance. At that point, Relerford pushed away from the squad car, peeled off his coat and ran.

According to Officer Pittman, Relerford cooperated with his request for a pat down. However, Officer Pittman also testified that during the pat down, Relerford "kept reaching up towards his pocket." Officer Thomas Niman, who had arrived on the scene, described Relerford's action as "pushing his [Pittman's] arm away, bringing his hands up…."

Officer Niman took Relerford into custody and retrieved the coat and the items that Officer Pittman had removed from the coat's pocket. Officer Niman testified that he searched the coat and found crack cocaine in the coat's pocket and searched the car matching the keys that Clemons dropped, finding some fifteen individual packages of crack cocaine.

The trial court concluded that upon seeing Relerford and Clemons walking in the roadway and observing a car similar to the one he had seen speeding, Officer Pittman had a reasonable basis for stopping and making inquiries of the two individuals. The court concluded that Officer Pittman's knowledge of Clemons' record and his observation of the keys being dropped or thrown to the ground then gave rise to a reasonable suspicion that justified a pat down for weapons. Further, the trial court concluded that:

> [H]aving found something that was hard that could have been a weapon in this patdown, it was reasonable to examine what this was. And, having done so, and observing the toothbrush, as well as the baggy with the apparent cocaine in it, and followed by the defendant's running away after the expert [sic] … after he extradited [sic] him [sic] himself from his coat, gave him probable cause to believe that a crime may have been committed, and probable cause to arrest him, and he was arrested, thereafter.

After the court denied Relerford's motion to suppress the evidence, Relerford pleaded guilty to the charge of possession of cocaine with intent to deliver within 1,000 feet of a school. He preserved for appeal his challenge to the admission of the evidence.

DISCUSSION

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and Article I, § 11 of the Wisconsin Constitution guarantees citizens the right to be free from "unreasonable searches." ***State v. Morgan,*** 197 Wis.2d 200, 206, 539 N.W.2d 887, 890 (1995). In construing Article I, § 11 of the Wisconsin Constitution, our supreme court consistently follows the United States Supreme Court's interpretation of the Fourth Amendment. ***Morgan***, 197 Wis.2d at 206, 539 N.W.2d at 890. A pat

down, or "frisk," is a search within the meaning of the Fourth Amendment. ***Id.*** Pat-down searches are justified when an officer has a reasonable suspicion that a suspect may be armed. ***Id.*** at 209, 539 N.W.2d at 891. The scope of such a search must be limited to a pat down reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer. ***Terry v. Ohio***, 392 U.S. 1, 29 (1968).

When the officer conducting a ***Terry*** pat down for weapons feels an object that does not feel like a weapon, the officer exceeds the scope of a ***Terry*** pat down if he or she puts a hand into the suspect's pocket to retrieve that item, unless the feel of the object together with other suspicious circumstances create probable cause that the object is contraband or some other item subject to seizure. ***State v. Guy***, 172 Wis.2d 86, 100, 492 N.W.2d 311, 316 (1992). The rationale for this is that the object is in "plain view" of the officer's lawful touch and thus no search has occurred, only a seizure of evidence of criminal activity plainly sensed by the officer. ***State v. Ford***, 211 Wis.2d 739, 744, 565 N.W.2d 286, 289 (Ct. App. 1997). However, if no contraband is "plainly felt" during a ***Terry*** pat down for weapons, the officer must have probable cause to arrest the suspect before continuing a search of the suspect's person. ***Ford***, 211 Wis.2d at 746, 565 N.W.2d at 290. "Probable cause" exists when the totality of the circumstances within the officer's knowledge at the time is such that a reasonable officer could conclude that guilt is more than a possibility. ***Id.*** at 747, 565 N.W.2d at 290.

When reviewing an order denying a motion to suppress evidence, this court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***Morgan***, 197 Wis.2d at 200, 539 N.W.2d at 887. However, whether a search has occurred, and, if so,

whether the search passes statutory and constitutional muster, are questions of law, which we review de novo. ***Ford***, 211 Wis.2d at 743, 565 N.W.2d at 288.

As noted above, we address only Relerford's contention that Officer Pittman went beyond the scope of a constitutionally permissible pat down for weapons. We will assume, for purposes of this discussion, that the initial stop of Relerford and the initial pat down for weapons was constitutionally permissible. Relerford contends that Officer Pittman went beyond the scope of a permissible pat down for weapons when he reached into Relerford's pocket for the baggie after it fell back into the pocket. Relerford argues that the trial court misstated the sequence of the pat down when the court said:

> Having found something that was hard that could have been a weapon in the pat-down, it was reasonable to examine what this was. And having done so, and observing the toothbrush, as well as the baggie with the apparent cocaine in it....

Relerford contends that the record does not support a finding that Officer Pittman was aware of the content of the baggie when he put his hand back into Relerford's pocket after the baggie fell back in. According to Relerford, Officer Pittman's action in going after the baggie after it dropped back into Relerford's pocket illegally expanded the scope of the pat-down search because Officer Pittman had removed the object he thought was a weapon—the toothbrush—and did not know the contents of the baggie.

The State acknowledges that the baggie fell back into Relerford's pocket before Officer Pittman "could get a good look at it" and does not argue that the officer saw that the baggie contained a yellowish rock substance before it fell back into the pocket. The State also recognizes that Officer Pittman did not offer

probable cause as a reason to reach back into Relerford's coat pocket after the baggie fell back in. However, the State contends that Officer Pittman's action in doing so is nevertheless lawful if the search was objectively justified by probable cause to arrest. According to the State, these are the factors that provided probable cause to believe that Relerford was carrying controlled substances when Officer Pittman reached back into Relerford's pocket after the baggie had fallen back in: (1) the knowledge that Clemons had a prior weapons violation, since the possibility that a suspect is armed provides some reason to believe the suspect is carrying drugs; (2) the "common knowledge" that controlled substances are often packaged in baggies; (3) pulling into the driveway, because this suggests they were attempting to avoid apprehension; (4) Relerford's pushing the officer's hands away as the officer searched; and (5) Relerford's statement that only papers were in his pocket when Officer Pittman felt hard objects—the toothbrush and tapes.

We recently addressed the question of when a police officer may seize nonthreatening contraband during a ***Terry*** pat down in ***State v. Ford***, 211 Wis.2d 739, 565 N.W.2d 286 (Ct. App. 1997). There the police received an anonymous tip that four or five black males were selling drugs at a certain intersection, ***id*** at 741, 565 N.W.2d at 287, and two officers arrived at that location about thirty minutes later. A police officer approached Ford, a black male seated on the hood of a car with three other black males near the intersection. As the officer did so, he smelled marijuana. ***Id.*** The officer ordered Ford to place his hands on the hood and began conducting a pat down for weapons. ***Id***. at 741, 565 N.W.2d at 288. During the pat down, the officer felt a large square wad of soft material in the front of Ford's pants and when he asked Ford what this was, Ford said that it was money. Ford became "jumpy" whenever the officer's hands approached the front of Ford's waist, and even grabbed the officer's hand as he

approached that area. ***Id.*** The police officer handcuffed Ford since he was uncooperative and gave the impression that he intended to run. ***Id.*** at 742, 565 N.W.2d at 288. When the officer resumed the pat down, Ford was still "jumpy" whenever the officer's hand approached the waistband of his boxer shorts, which was visible above his jeans. ***Id.*** The officer asked Ford if he could look inside his shorts and Ford stepped back. The officer then pulled out the waistband and found two plastic bags of marijuana.

In ***Ford***, the State conceded that the officer's actions in pulling out the waistband and looking into Ford's shorts exceeded the scope of a ***Terry*** weapons pat down but contended that it was supported by probable cause. ***Ford***, 211 Wis.2d at 742, 565 N.W.2d at 288. We concluded that it was not. We reasoned that because the pat down had not yielded anything that felt like a weapon or contraband, there had to be probable cause to arrest Ford before searching further. ***Id.*** at 746, 565 N.W.2d at 290. We rejected the State's argument that the anonymous tip, the smell of marijuana, the wad of money, and Ford's jumpiness and lack of cooperation while the police officer was conducting the pat down constituted probable cause to arrest Ford. We noted that the marijuana smell was not specifically associated with Ford and that Ford's jumpiness and evasive movements were "at best equivocal." We declined to equate his movements "with an observed movement to conceal an object from an officer's view." ***Id.*** at 747, 565 N.W.2d at 290.

Although the determination of probable cause is very fact specific, the similarities and differences between ***Ford*** and this case are instructive. In this case, unlike ***Ford***, the officer felt something that could be a weapon, and so properly removed it from Relerford's pocket. However, as in ***Ford***, the officer here did not testify that he felt anything during the pat down that felt like

contraband. And, as we have noted above, the parties agree that Officer Pittman did not see what was in the baggie before it fell back into Relerford's pocket. Therefore, the absence of contraband in "plain view" (through sight or touch) during the weapons pat down is similar in both cases. The evasive actions during the pat downs are similar in that they are not "observed movement[s] to conceal an object from an officer's view." On the other hand, in contrast to the facts in ***Ford***, Officer Pittman did not have any information linking Relerford to drugs when he stopped Relerford, and he observed no indication of drugs before the pat down. Both the similarities and differences between ***Ford*** and this case indicate that probable cause is absent here.

The factors the State relies on do not persuade us otherwise. We do not agree with the State that reasonable suspicion that a detained suspect is armed supports a search for drugs. The factors justifying a ***Terry*** pat down for weapons need have nothing to do with drug-related activity. *See e.g.,* ***State v. Morgan***, 197 Wis.2d 200, 214, 539 N.W.2d 887, (reasonable suspicion to conduct ***Terry*** pat down on driver of car with expired license plate, driving in and out of alleys at 4:00 a.m. in a high crime area, when driver is more than typically nervous when looking for driver's license). Moreover, when Officer Pittman reached back into Relerford's pocket for the baggie, Officer Pittman had already removed the one item he thought, from touch, might be a weapon and had discovered that it was not a weapon. We do not see how Clemons' prior weapons violation is a factor contributing to probable cause that Relerford was carrying drugs.

We also reject the State's argument that "common knowledge" that controlled substances are often packaged in bags contributes to probable cause in this case. There is nothing on this record indicating that, based on Officer Pittman's training and experience, he knew that drugs were packaged in baggies.

The State cites ***State v. Pozo***, 198 Wis.2d 705, 712, 544 N.W.2d 228, 231 (1995), in support of this argument. However, in ***Pozo*** the officer testified that based on his past training and experience, the sandwich bag and shiny blue paper packet "were consistent [with] how drugs are packaged." He also testified that while he could not see through the sandwich bag, from his experience in assessing people for drug offenses, the manner in which the sandwich bag was rolled up "was a way in which marijuana is commonly transported or carried." ***Pozo***, 198 Wis.2d at 713, 544 N.W.2d at 231. Courts take into account testimony of an officer's training and experience because courts recognize that training and experience enable law enforcement officers to perceive and articulate meaning that would not arouse suspicion to the untrained observer. *See* ***Brown v. Texas***, 443 U.S. 47, 52 n.2 (1979). However, we know of no authority for treating an officer's testimony in one case on his training and experience as "common knowledge" that supports another officer's actions in another case where there is no such testimony.

We are left with what the State describes as evasive actions: parking the car in a driveway, pushing the officer's hands away from the pocket, and falsely stating there were only papers in the pocket. We conclude these are an insufficient basis from which a reasonable officer could conclude it was more than a possibility that Relerford was carrying drugs. The State argues that pulling into a driveway "after crossing a street in which a squad car was approaching suggests they were attempting to avoid apprehension by the authorities because they feared a traffic stop would lead to disclosure of a more serious offense." However, there is nothing in the record from which one could reasonably infer that the occupants of the gray vehicle even saw Officer Pittman's squad car. Officer Pittman did not testify that he considered the car to be evading him and the court made no finding on this.

Relerford's actions in "bringing his hands up" while he was being patted down may reasonably be interpreted as suspicious behavior, as may his statement that he had only papers in his pocket when the pat down revealed, to the officer's touch, a long thin object and cassettes. However, while evasive behavior may constitute reasonable suspicion justifying a ***Terry*** stop, *see* ***State v. Anderson***, 155 Wis.2d 77, 82, 454 N.W.2d 763, 765 (1990)—or, in this case, further detention and inquiry—Relerford's behavior does not establish the probable cause necessary to search for drugs after the purpose of a weapons pat down has been satisfied.

State v. Richardson, 156 Wis.2d 128, 456 N.W.2d 830 (1990), relied on by the State, does not support a determination of probable cause here. In ***Richardson***, the police received an anonymous tip that the defendant was a drug trafficker, set up a surveillance and stopped his vehicle. The court concluded that when the officer patted down Richardson for weapons and felt an object which was not a weapon, that fact, coupled with Richardson's agitation and the officer's knowledge that the defendant was a suspected drug trafficker, constituted probable cause to believe that the object was illegal drugs and justified a search of Richardson's pockets. ***Richardson,*** 156 Wis.2d at 146, 456 N.W.2d at 837. As we have already pointed out, Officer Pittman had no information linking Relerford to drugs.

Because the search of Relerford's pocket for the baggie after it dropped back into the pocket exceeded the scope of the ***Terry*** pat down, and because Officer Pittman did not have probable cause to arrest Relerford prior to that search, the cocaine in that bag must be suppressed. That leads to the suppression of the contraband subsequently recovered, since the State makes no argument that any evidence is untainted by the unlawful search.

By the Court.—Judgment reversed.

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