COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2351-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAMIEN L. HENNING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

SCHUDSON, J. Damien L. Henning appeals from the judgment of conviction, following his guilty plea, for carrying a concealed weapon. He argues that the police did not have reasonable suspicion that he might have been armed when an officer frisked him pursuant to § 968.25, STATS., and, therefore, that the trial court erred in denying his suppression motion. This court affirms.

The facts are undisputed. According to the testimony at the hearing on Henning's suppression motion, on November 10, 1996 at about 7:00 a.m., City of Milwaukee Police Officer Gilberto Gonzalez, Jr., and his partner were dispatched to "trouble with suspects sleeping in the hallway of an apartment building" or "vagrants in the hallway sleeping." Officer Gonzalez described the circumstances of their arrival at the building and contact with Henning and the person they found with him:

> Well when we arrived, like I said, there was a locked lobby. We pounded on the door. No answer. Rang the buzzers. Still no answer. Walked around the building, trying and [sic] the complainant, couldn't do that. We found a window just to the side of the door which was unlocked, slid it open. We entered that – well actually I entered that way, opened the door for my partner. We came in. We got up to the top of the stairs, found these two individuals lying there sleeping, had no idea why they were there. Obviously someone called. They were concerned, and that's why we patted them down.

Additionally, Officer Gonzalez described the circumstances of the frisks, the first involving the person with Henning, and the second, of Henning:

> We woke the first individual, patted him down. We patted him down for our officers' safety, asked him what he was doing, why he was up there. He appeared to be nervous and really had no excuse as to why he was up there.
>
> ….
>
> Woke [Henning] up. He was lying on the floor, asked him what he was doing there. He appeared to be nervous and surprised that we were there. He really had no explanation as to why he was there…. [H]e said he was waiting for a friend. The only name he could give was B, some kind of nickname, I assume…. [H]e was nervous, really kind of jumpy, didn't really – it appeared he really didn't belong there.

Officer Gonzalez also testified that he frisked Henning "[f]or officers' safety. We had no – it was a locked lobby, and when we first arrived there was an open window. We had – we really didn't know who these guys were and why they were there. It was basically for officers' safety." Officer Gonzalez discovered a .25 caliber pistol in Henning's coat pocket.

Henning does not challenge the propriety of the officers' initial contact with him. He argues, however, that "[u]nder the totality of the circumstances known to Officer Gonzalez, he did not have a reasonable suspicion that Mr. Henning may have been armed when he conducted the pat-down search." This court disagrees.

Section 968.25, STATS., in part, provides:

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

The Wisconsin Supreme Court has elaborated the standards for evaluating whether a frisk is reasonable:

> A frisk is a search. The fourth amendment does not proscribe all searches, only unreasonable searches. In order to determine whether a search is reasonable, we balance the need for the search against the invasion the search entails.
>
> In *Terry* [*v. Ohio*, 392 U.S. 1 (1968)], the Court applied this balancing test to determine the legality of an on-the-street frisk of a person suspected of casing a robbery location. The Court first considered the need for the search, *emphasizing the need for police to protect themselves from violence*:
>
> > [T]here is the more immediate interest of the police officer in taking steps *to assure*

> *himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him*. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

The Court then balanced the need for police protection against the intrusion on individual rights which a frisk entails. Although the Court viewed a frisk as "a severe, though brief, intrusion upon cherished personal security" and an "annoying, frightening, and perhaps humiliating experience[,]" the Court held that when an officer has a reasonable suspicion that a suspect may be armed, the officer can frisk the suspect for weapons.

The facts of each case determine the reasonableness of the frisk, and we judge those facts against an objective standard.

> *The officer need not be absolutely certain that the individual is armed*; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.... And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

In the years since the Court decided *Terry*, the Court has applied the *Terry* standard to different facts. *The constant refrain in these cases has been that the need for police to protect themselves can justify a limited frisk for weapons.*

State v. Guy, 172 Wis.2d 86, 93-95, 492 N.W.2d 311, 313-14 (1992) (citations omitted; emphasis added), *cert. denied*, 509 U.S. 914 (1993). *See also* § 968.25, STATS.

In assessing whether police *reasonably* suspected that a person might be armed, this court must determine, from an objective viewpoint, whether the facts, reasonable inferences from the facts, and surrounding circumstances confronting the police justified the frisk. ***State v. Richardson***, 156 Wis.2d 128, 143-44, 456 N.W.2d 830, 836 (1990). Here, where the essential facts are undisputed, this court reviews the trial court's legal conclusion *de novo*. ***State v. Goodrum***, 152 Wis.2d 540, 546, 449 N.W.2d 41, 44 (Ct. App. 1989).

This court concludes that Officer Gonzalez reasonably suspected that Henning might be armed. He and his partner had been dispatched as a result of a complaint about Henning being in an apartment building where, apparently, he did not reside. The suspicious circumstances increased when no one responded to the police attempts to gain entry by pounding on the door and buzzing the apartments, and when an unlocked window was discovered. Suspicions were anything but allayed when Henning's companion seemed nervous and offered no legitimate explanation for his presence at the top of the stairs. Then, Henning's jumpiness and vague explanation further contributed to Officer Gonzalez's reasonable suspicion that Henning might be armed.

Therefore, this court concludes that Officer Gonzalez reasonably suspected that he and his partner were in danger when he frisked Henning because, based on the totality of the circumstances, he had a substantial basis for suspecting that Henning might be armed.

By the Court.—Judgment affirmed.

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