

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 5, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 97-3167-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GEOFFREY K. TURK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Grant County:  
GEORGE S. CURRY, Judge. *Reversed and cause remanded with directions.*

DYKMAN, P.J.<sup>1</sup> Geoffrey Turk appeals from a judgment convicting him of possession of THC, contrary to § 161.41(3r), STATS., and possession of drug paraphernalia, contrary to § 161.573(1), STATS. He asserts that he was arrested without probable cause, and therefore, the fruits of that arrest

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

should be suppressed. We agree with the trial court that when two police officers, one with a drawn gun, forced Turk and his companion to lie face down on the ground and handcuffed them, Turk had been arrested. We further conclude that Turk's arrest was without probable cause. Having so concluded, we need not consider whether the officers could have performed a *Terry* stop.<sup>2</sup> Accordingly, Turk's motion to suppress the evidence discovered during the search should have been granted. We therefore reverse and remand with instructions for the trial court to do so.

On October 27, 1995, Officer William Fowler of the Platteville police department received a University of Wisconsin-Platteville police officer's radio report of loud voices, yelling and gunshots coming from an area southwest of the University's driving range. He asked another officer, Kristin Walker, to check a nearby road, and he drove to a quarry close to and southwest of the driving range. He was not sure whether the quarry was on University property or not. Because it was getting dark, he brought a flashlight. When Fowler was walking toward the quarry, he saw Turk and a companion standing near a vehicle. He drew his gun and ordered the men to put their hands above their heads, walk away from the car and lie face down on the ground. They did so. He directed them to place their arms and legs away from their bodies, and the palms of their hands toward the sky. Officer Walker and a deputy sheriff arrived about then. Officer Fowler directed Officer Walker to handcuff Turk. Officer Walker did so, and then searched him for weapons, removing some items in the process of the search. After they had the situation under control, Officers Fowler and Walker looked through the items removed from Turk's pockets. A small black case

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<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

looked suspicious, and upon opening it, the officers saw a marijuana pipe. Turk then told the officers that he had marijuana in one of his pockets. Turk was arrested for possession of marijuana and the pipe.

Turk moved to suppress the items seized during the officers' search of him. Officer Fowler testified that he asked Officer Walker to handcuff Turk for two reasons. The first was that the quarry might be in the campus area and he knew that weapons are not allowed on campus. Secondly, he had Turk handcuffed for officer safety. He had heard a report of shots fired and loud voices. He did not know whether he or the officers were at risk.

Turk does not take issue with these facts. We will not overturn a trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. Whether these facts rise to the level of a seizure invoking Fourth Amendment protections is a question of constitutional fact that we determine *de novo*. ***State v. Kramar***, 149 Wis.2d 767, 781, 440 N.W.2d 317, 322 (1989).

A seizure of the person, for Fourth Amendment purposes, occurs when an officer, by means of physical force or a show of authority, restrains a person's liberty. ***State v. Harris***, 206 Wis.2d 243, 253, 557 N.W.2d 245, 249 (1996). Whether a person has been seized for Fourth Amendment purposes is determined by an objective test. ***Kramar***, 149 Wis.2d at 781, 440 N.W.2d at 322. A person is seized within the meaning of the Fourth Amendment only if, in view of all the circumstances, a reasonable person would have believed he or she was not free to leave. ***Id.*** Would a reasonable person, having been ordered to lie on the ground by an officer displaying a gun, and whose arms and legs have been positioned away from his or her body with palms facing upward, and who is subsequently handcuffed, believe that he or she was free to leave? We think not.

We therefore agree with the trial court that at least by the time Turk was handcuffed, he was arrested.

The next question is whether Turk was lawfully arrested. “Probable cause to arrest is a requirement of the Fourth Amendment of the United States Constitution.” *State v. Koch*, 175 Wis.2d 684, 700, 499 N.W.2d 152, 161 (1993). Probable cause exists when the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant has probably committed a crime. *Koch*, 175 Wis.2d at 701, 499 N.W.2d at 161. A lawful arrest may also be made when the officer believes that a defendant has probably violated an ordinance punishable only by a civil forfeiture. *City of Milwaukee v. Nelson*, 149 Wis.2d 434, 456-57, 439 N.W.2d 562, 570 (1989). However, the officer may make a warrantless arrest for an ordinance violation only if the violation was committed in the officer’s presence. *Id.* at 457-58, 439 N.W.2d at 571.

What did the officers know at the moment they arrested Turk? We can assume that they knew that WIS. ADM. CODE §§ UWS 18.06(10) and 18.07 prohibit firing or carrying weapons on University lands, and that doing so is punishable by a forfeiture. But they did not see Turk carrying or firing weapons on University property.<sup>3</sup> Indeed, they did not know whether the land on which Turk was standing was owned by the University. Officer Fowler testified that he “was not sure whether or not ... the quarry was on campus property or not.” This testimony is not grounds for concluding that the quarry was probably owned by

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<sup>3</sup> We can assume that the officer who arrested Turk had the information known by the University police officer. See *State v. Cheers*, 102 Wis.2d 367, 388-89, 306 N.W.2d 676, 685-86 (1981). But even that evidence would only show that either Turk or his companion or both were probably firing a firearm in the quarry.

the University. While the officers' knowledge of the shots, the loud voices, and the quarry as a likely target area was sufficient for probable cause to believe that Turk was firing a firearm in the quarry, there was no evidence that doing so was probably a crime or an ordinance violation. Without probable cause to arrest for something, the officers could not make a lawful arrest.

The State, perhaps recognizing the difficulty of defending the validity of Turk's arrest, argues only that when Turk was made to lie on the ground and handcuffed, he was subjected to a *Terry* stop. In *Terry*, the Supreme Court concluded that the Fourth Amendment was not violated when police stopped a suspect whom they reasonably suspected was involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *see also Florida v. Royer*, 460 U.S. 491, 498 (1983).

We are not persuaded that a police detention which constitutes an arrest can at the same time be considered a *Terry* stop. *Terry* authorized a limited intrusion into a person's liberty when the circumstances gave the police only a reasonable suspicion, but not probable cause, to believe that criminality was occurring or had taken place. It is anomalous to analyze the circumstances surrounding an arrest to see whether they could also permit a *Terry* stop. The lesser quantum will always be present when the greater quantum is present. *Terry* authorized only a limited interference with a person's liberty, because to do more with only a reasonable suspicion of criminal activity would violate the Fourth Amendment. *Terry* does not authorize arrests. It permits only a stop of a person to investigate the circumstances. Once an arrest is made, inquiry into whether the police might have validly stopped a person is either irrelevant or moot. We therefore do not consider the result had the police merely stopped Turk for questioning rather than arresting him.

Having concluded that the officers who arrested Turk lacked probable cause to do so, the evidence the officers discovered as a result of the arrest must be suppressed. *See State v. Smith*, 131 Wis.2d 220, 240, 388 N.W.2d 601, 610 (1986). We therefore reverse and remand with directions that the trial court do so, and for further proceedings.

*By the Court.*—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

