

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 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. 97-3242-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRAIG SHELTON HAYES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN P. BUCKLEY, Reserve Judge. *Reversed.*

SCHUDSON, J.¹ Craig Shelton Hayes appeals from a judgment of conviction, following his guilty plea, for possession of a controlled substance—cocaine, contrary to §§ 961.16(2)(b)(1) and 961.41(3g)(c), STATS. Hayes claims that the trial court erred in denying his motion to suppress. He argues that City of

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

Milwaukee Police Officer Daniel Clark "had no reasonable, articulable suspicion to justify the pat-down search." This court agrees and therefore reverses.

The facts of record are undisputed. At approximately 9:30 p.m. on Thursday, September 23, 1993, City of Milwaukee Police Officer Daniel Clark and his partner were patrolling in the area of the 5600 block of Silver Spring Drive in the City of Milwaukee, an area Officer Clark described as "an extremely high crime area." They observed Hayes "[d]isregarding [an] official sign, stop sign," stopped him for the traffic violation, and Officer Clark asked Hayes for his driver's license. Hayes told him that he did not have his driver's license or any other identification on him. Officer Clark then asked Hayes to step out of the car and conducted a pat-down search. Officer Clark testified that "[d]uring the pat down search for weapons, I found drugs in his pocket." Denying Hayes's motion, the trial court concluded that the high-crime area and Hayes's lack of identification justified the frisk.

In reviewing the denial of a defendant's motion to suppress evidence, this court will uphold the trial court's findings of fact unless they are clearly erroneous. See *State v. Morgan*, 197 Wis.2d 200, 208, 539 N.W.2d 887, 891 (1995). The issues of "whether a ... search has occurred, and, if so, whether it passes statutory and constitutional muster are questions of law subject to *de novo* review." *State v. Richardson*, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990). As the supreme court has reiterated:

A pat down, or "frisk," is a search. The Fourth Amendment prohibits only unreasonable searches; in determining whether a search is reasonable, this court balances the need for the search against the invasion of the suspect's privacy entailed in the search. Pat-down searches are justified when an officer has a reasonable suspicion that a suspect may be armed. The officer's reasonable suspicion

must be based on "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The test is objective:

[T]he 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 officers acted reasonably in such circumstances, due weight must be given ... to the specific reasonable inferences which he is entitled to draw from his experience.

Finally, the determination of reasonableness is made in light of the totality of the circumstance known to the searching officer.

Morgan, 197 Wis.2d at 208-209, 539 N.W.2d at 891 (citations omitted).

Hayes argues that Officer Clark did not have reasonable suspicion that he was armed and, therefore, contends that the trial court erred in denying his motion to suppress. In particular, he complains that "the trial court placed great weight on the fact that Officer Clark considered the 5600 block of West Silver Spring to be a 'high crime area,'" and contends that "[t]he location and time of day of a traffic stop for a minor violation do not justify a warrantless patdown where an officer does not observe anything unusual about the driver or passenger." In response, the State, citing *Morgan*, argues that the time of day and location were just two of the factors justifying Officer Clark's pat-down. The State claims that Hayes's lack of "identification on his person further heightened the officer's suspicions and concerns," and therefore, under the totality of the circumstances known to the officer, justified a limited pat-down for weapons. This court cannot agree.

Unlike *Morgan*, in which police stopped a car at 4:00 a.m. after observing it going in and out of alleys, this traffic stop occurred on a busy

roadway at 9:30 p.m. Unlike the officer in *Morgan*, who testified that the defendant appeared nervous when he was asked to produce a license, Officer Clark did not say that Hayes appeared nervous or made any furtive movements. In fact, Officer Clark specifically stated that he did not suspect any other type of criminal activity, and he further conceded that he did not remember observing “anything specifically ... that led [him] to believe that [he] or someone else might be in danger of physical injury.” Indeed, Officer Clark acknowledged that in 90 - 95 percent of his traffic stops in which drivers do not have identification, he orders them out of the vehicle and, in those cases, frisks them. Thus, clearly, Officer Clark’s frisk of Hayes was based on what he conceded to be his “normal practice,” not an individualized, reasonable suspicion.

Therefore, Officer Clark's testimony is devoid of any "reasonable, individualized suspicion" that would support a search for weapons. See *Maryland v. Buie*, 494 U.S. 325, 334-35 n.2 (1990), see also § 968.25, STATS. Consequently, this court concludes that the trial court erred in denying Hayes’s motion to suppress.

By the Court.—Judgment reversed.

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

