COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2657

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

IN THE INTEREST OF ENCARNACION F.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ENCARNACION F.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

BROWN, J. Encarnacion F. appeals from an order finding him delinquent after he was found in possession of marijuana. Encarnacion asserts that his rights against unreasonable search and seizure were violated when police stopped and searched him while he was waiting for his father in front of the Masonic Temple. Because we conclude that the police officers' stop and

subsequent weapon frisk were reasonable given the fact that the police were responding to a "shots fired" call, we affirm.

The facts are as follows. Police received a shots fired call from a Racine resident at about 9:00 p.m. on May 6, 1997. The caller, Tom Johnson, told the police that a Hispanic male dressed in a dark shirt and light pants, who later turned out to be Encarnacion, had stopped at his house and asked to use the phone. Encarnacion told him he had been walking home from his sister's house at about 8:15 p.m. when he was shot at. He went to Johnson's house, called his father and asked to be picked up. Encarnacion told his father to meet him at the Masonic Temple. He then left Johnson's house and went to wait outside the temple. Johnson called the police and told them about the incident. The police went to Johnson's house and then to the Masonic Temple.

When they arrived at the Masonic Temple, the police saw an individual fitting Johnson's description of the person who had used his phone; it was Encarnacion. There is conflict in the testimony about this initial encounter. Encarnacion testified that he walked toward the officers of his own accord and that they did not ask him his name. The officer testified that he and his partner told the individual to approach them and that he believed that they had asked him to identify himself. The officer could not recall whether he and his partner asked Encarnacion what he was doing there; there is no statement in the police report that the question was asked. Next, the officer patted Encarnacion down for weapons because he and his partner were concerned for their safety. In Encarnacion's front pants pocket the officer felt a palm-size, semi-firm bulge. He asked Encarnacion what the bulge was, and Encarnacion declined to answer. The officer then handcuffed Encarnacion and continued the pat-down search. Because

he was concerned that a weapon might be concealed behind the object in Encarnacion's pocket, he removed it. It was a bag of marijuana.

Encarnacion was charged with possession of marijuana. He moved to suppress the evidence on the grounds that the stop and search were in violation of the United States and Wisconsin Constitutions. The trial court denied the motion, and Encarnacion subsequently admitted to the possession offense. He was found to be delinquent.

Encarnacion argues that the evidence should have been suppressed on three grounds. First, he claims he was stopped "without any articulable and reasonable suspicion that he had been, was or was about to engage in criminal activity." Second, the weapon search was impermissible because there were no facts that would have led a reasonable person to conclude that Encarnacion was armed and presently dangerous. Third, even if the weapon search was justified, "the police exceeded the scope of a permissible search by removing an item they did not reasonably believe was a weapon." The State responds that the stop and search were justified, as the officers reasonably feared for their safety due to the nature of a shots fired call. We agree with the State.

The right at issue in this case, to be free from unreasonable searches and seizures, flows from the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11; ***State v. Morgan***, 197 Wis.2d 200, 207, 539 N.W.2d 887, 890 (1995). In Wisconsin, our interpretation of the protection afforded individuals under the state constitution follows the United States Supreme Court's interpretation of the federal constitution. *See* ***Morgan***, 197 Wis.2d at 207-08, 539 N.W.2d at 890-91. In our review of a trial court's refusal to suppress evidence the

accused claims was obtained in violation of his or her constitutional rights, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***id.*** at 208, 539 N.W.2d at 891. However, whether a stop or search was reasonable, given those facts, is a question of law we review de novo. *See* ***id.***

A police officer may stop an individual for inquiry when there are specific and articulable facts that warrant a reasonable belief that a crime has been, is being or is about to be committed. *See* ***State v. Waldner***, 206 Wis.2d 51, 55, 556 N.W.2d 681, 684 (1996). This standard derives from the United States Supreme Court's decision in ***Terry v. Ohio***, 392 U.S. 1 (1968), which has been codified in Wisconsin as § 968.24, STATS. The test is objective and the focus is on reasonableness. *See* ***Waldner***, 206 Wis.2d at 56, 556 N.W.2d at 684. For the stop to be permissible, the officer must have more than a hunch that criminal activity is afoot; he or she must have a reasonable suspicion that such is the case. *See* ***id.*** at 57, 556 N.W.2d at 685. When deciding whether a stop was reasonable, we look to the totality of the circumstances. *See* ***id.*** at 58, 556 N.W.2d at 685. Our approach is commonsense and strikes a balance between the individual's privacy interest and the societal interest in allowing police to do their job. *See* ***id.*** at 56, 556 N.W.2d at 684.

Here, the police were called because at least one shot had been fired. The responding officers did not know how many shots had been fired or whether there had been retaliation. The alleged victim of the shooting did not call the police. Instead, he called for a ride away from the area. At the Masonic Temple, Encarnacion did not appear eager to meet with police. He had to be asked to approach and identify himself. In such a situation, it was reasonable for the police to believe that the victim himself may also have been carrying a weapon. Thus,

the officers' initial stop of Encarnacion was justified by a reasonable suspicion that he had committed or was committing a crime.

We next address the pat-down search the officers conducted. Such a search is justified when the officer has a reasonable suspicion that the person *may* be armed. *See* ***Morgan***, 197 Wis.2d at 209, 539 N.W.2d at 891. As with the initial suspicion leading to the stop, the suspicion that an individual is armed must be based on specific and articulable facts. *See* ***id.*** The test is objective and the determination of whether a pat-down search is reasonable must be made in light of the totality of the circumstances. *See* ***id.*** The point of a pat-down search is to allow the officer to protect himself or herself from a potentially armed individual, and thus "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." ***State v. Guy***, 172 Wis.2d 86, 94, 492 N.W.2d 311, 314 (1992) (quoting ***Terry***, 392 U.S. at 27). The scope of a pat-down search is limited to "that which is necessary for the discovery of weapons which might be used to harm the officer." ***Terry***, 392 U.S. at 26.

Here, as noted above, the officers were responding to a shots fired call. As the trial court noted:

> It was a call in which the officers knew that within this area there had been a weapon apparently fired and that they were dealing quite possibly with the victim of a shooting but had no information as to ... how many shots had been fired, whether there were shots fired by one person or two people, and I believe that under what is a relatively low threshold on a Terry pat down, that [the officer] did have the right to do a pat-down search of [Encarnacion] having identified him as someone who had been the probable victim of a shooting, and I think that he was justified in being concerned for his safety in trying to determine whether [Encarnacion] himself might be armed.

We agree with the trial court's rationale: it was not unreasonable for the officers to suspect that the supposed victim of a shooting, who did not himself call the police, *may* have been armed.

As to the scope of the search, the officer feared that the bulge he felt in Encarnacion's pocket may have been concealing a weapon. This is not unreasonable. The officer testified that there are guns that "are certainly palm-size and could be hidden in a pocket." The trial court found that the bag of marijuana that had made the bulge was not "soft stuff." "[I]t provides a relatively bulky mass, portions of which are hard, and under those circumstances, I do believe that the officer was justified in getting it out of the pocket to determine whether it was concealing or hiding a weapon." As did the trial court, we conclude that the officer had reason to continue his search to determine if the unidentified object was hiding a weapon. Furthermore, the officer safety justification of the search is not diminished by the fact that the officer handcuffed Encarnacion prior to continuing the search. *See, e.g.,* ***Guy***, 172 Wis.2d at 96, 492 N.W.2d at 315 (upholding frisk while defendant was handcuffed where officer was executing warrant to search home for cocaine); ***United States v. Taylor***, 716 F.2d 701, 709 (9th Cir. 1983) ("[T]he use of handcuffs … do[es] not necessarily convert a *Terry* stop into an arrest necessitating probable cause."). Once Encarnacion had declined to answer when the officer asked him what was in his pocket, the officer had reason to believe that his safety was in jeopardy should he continue the search with Encarnacion unrestrained. Thus, the marijuana was not discovered pursuant to an unconstitutional stop and search, and the suppression motion was properly denied.

By the Court.—Order affirmed.

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