COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2510-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

PATRICK MARTIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

¶1 SNYDER, J.[1] The State appeals from an order granting Patrick Martin's motion to suppress evidence discovered during a frisk of his person. Because the evidence was suppressed, the trial court order also dismissed the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

criminal complaint charging Martin with possession of drug paraphernalia in violation of WIS. STAT. § 961.573(1), and possession of marijuana in violation of WIS. STAT. § 961.41(3g)(e). We agree that the search violated the Fourth Amendment prohibition against unreasonable searches and seizures and affirm the trial court order.

¶2 The relevant facts concerning the stop and search were presented at the suppression hearing by the testimony of City of Waukesha Police Officers Terry Thieme and Dan Mailloux, and by Martin. Thieme's written police report was also received into evidence.[2] On March 27, 1999, at approximately 9:54 p.m., Thieme and Mailloux were in their squad car traveling east through the Westbrook Center parking lot when they observed two individuals walking in the middle of the roadway. One of the individuals was a female who looked to be about fifteen years old and the other was a male who looked "seventeen or so."

¶3 According to Thieme, the individuals were kicking something down the roadway, turned around, observed the squad car and "kind of ran off" toward St. Francis Bank where they appeared to be putting something in the bushes. Thieme and Mailloux both testified that the female possessed and was smoking a cigarette. The officers stopped the squad car and Mailloux proceeded to obtain identification information from the female in order to issue her a citation for smoking.

[2] The exhibit list indicates that the police report, marked as defense exhibit 1, was never offered or received into evidence. While that indication is contrary to the record and should be duly noted by the parties responsible for the integrity of the appellate record, the transcript sufficiently addresses the evidentiary essence of the report, and we need not order that it be produced for purposes of this appeal.

¶4 Thieme observed that the male individual was acting kind of nervous, that "[h]e wouldn't make eye contact with me and he kept on fidgeting around and putting his hands in his pocket after I asked him not to put his hands in his pocket." Thieme expressed an "officer safety" concern about individuals who displayed these particular sorts of mannerisms and testified, "Generally it's a fact that they're trying to conceal something or they have something hidden that they're trying to dispose of, or there is a weapon in their pockets." Thieme then patted down Martin and discovered the suppressed evidence.

¶5 The State contends that the stop and frisk of Martin was authorized under ***Terry v. Ohio***, 392 U.S. 1 (1968). The ***Terry*** holding has been statutorily expressed in WIS. STAT. §§ 968.24 and 968.25. *See* ***State v. Williamson***, 113 Wis. 2d 389, 399-400, 335 N.W.2d 814 (1983). In reviewing a suppression motion order, this court will uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). However, whether these facts satisfy the constitutional requirement of reasonableness presents a question of law which we determine independently. *See* ***id.***

¶6 A two-part analysis is used to assess the constitutionality of a stop and frisk to determine if the officer acted within permissible constitutional grounds in initiating a search: (1) whether the officer was rightfully in the presence of the party frisked; and (2) whether the officer suspected that the party was armed and dangerous. *See* ***State v. Buchanan***, 178 Wis. 2d 441, 445, 504 N.W.2d 400 (Ct. App. 1993). The trial court found that the officers were

rightfully in the presence of Martin and that finding is not erroneous.[3] The issue here addresses the second ***Buchanan*** concern, whether Thieme had a reasonable suspicion that Martin was armed and dangerous. The trial court held that he did not.

¶7 Under ***Terry***, "an officer must have a reasonable suspicion—less than probable cause, but more than a hunch—that someone is armed before frisking that person for weapons." ***State v. Guy***, 172 Wis. 2d 86, 95, 492 N.W.2d 311 (1992). An officer need not be absolutely certain that the individual is armed. The question is whether a reasonably prudent officer under the circumstances would be warranted in believing that his or her safety or that of others was endangered. *See* ***id.*** at 99. 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. *See* ***State v. Richardson***, 156 Wis. 2d 128, 143-44, 456 N.W.2d 830 (1990). In determining whether the officer acted reasonably under the circumstances, due weight must be given to the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *See* ***Buchanan***, 178 Wis. 2d at 448.

¶8 The trial court concluded that there was no objective basis for Thieme to suspect that Martin was armed or dangerous, finding that the lack of eye contact was objectively insufficient to support a reasonable suspicion and that the testimony as to Martin's hands did not establish the requisite suspicion for a frisk. In sum, the trial court found that Martin was "a citizen on the street, went to

[3] The trial court found that "[the officers] observed the female apparently underage smoking a cigarette. That's illegal. It's not a crime however."

the side of a street with a juvenile who was smoking and was nervous when the police talked to him." Based upon the evidence presented, those findings are not erroneous.

¶9 In independently determining whether the trial court's factual determinations support its constitutional conclusions, we first note that there is a conflict in the testimony concerning Martin's hand placements as relied upon by the State. Thieme testified that Martin "kept on ... putting his hands in his pocket after I asked him not to put his hands in his pocket." Martin, however, testified that Thieme "asked me for my I.D. and I gave him my I.D. ... and he told me to remove my hands out of my pockets and I took my hands out of my pockets and I never put them back in my pocket and just stood there and he ... patted me down." Thieme conceded on cross-examination that his written police report failed to indicate that Martin refused to remove his hands from his pockets after being asked to do so.

¶10 When the testimony presented at a hearing conflicts, the trial court is the ultimate arbiter of the credibility of witnesses. *See* ***State v. Angiolo***, 186 Wis. 2d 488, 495, 520 N.W.2d 923 (Ct. App. 1994). "Any conflicts in testimony will be resolved in favor of the trial court's finding." ***State v. Flynn***, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979). If a trial court fails to make a finding of fact that appears from the record to exist, an appellate court may assume that the fact was determined in support of the decision. *See* ***Angiolo***, 186 Wis. 2d at 495-96. While the trial court made no specific findings resolving this conflict, we apply these facts to the constitutional questions at issue and conclude that the facts support the trial court's suppression order.

¶11 We next note that ***Terry*** and WIS. STAT. § 968.25 limit an officer's frisk authority to circumstances where the officer "reasonably suspects that he or she or another is in danger of physical injury." ***Id.***; *see* ***Terry***, 392 U.S. at 29. Here, Thieme testified that based upon his training and his seventeen years of experience in law enforcement, Martin's suspicious mannerisms suggested that he was "trying to conceal something" or had "something hidden that [Martin was] trying to dispose of," suggesting the existence of other reasons for the frisk of Martin besides officer safety.

¶12 The purpose of a frisk after the stop is to allow the officer to pursue his or her investigation without fear of violence, not to discover crime evidence. *See* ***Adams v. Williams***, 407 U.S. 143, 146 (1972). If the frisk goes beyond what is necessary to determine if the suspect is armed, its fruits will be suppressed. *See* ***Minnesota v. Dickerson***, 508 U.S. 366, 373 (1993). Under the circumstances presented here, we are satisfied that the trial court's order, concluding that "Officer Thieme lacked the requisite reasonable suspicion that [Martin] was armed to conduct a pat down for weapons," correctly reflects a proper constitutional analysis based upon findings that are not erroneous.

By the Court.—Order affirmed.

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