COURT OF APPEALS
DECISION
DATED AND FILED

MARCH 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2757-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KERRY A. JORDAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Kerry A. Jordan complains that a sheriff's deputy lacked reasonable suspicion to justify a frisk search that turned up drug paraphernalia in his jacket and led to the discovery of marijuana in the van in

[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.

which he was a passenger. When we apply a commonsense test to the facts known by the deputy, we conclude that there was reasonable suspicion to justify a pat-down search of Jordan.

¶2 Jordan was originally charged with being a party to the crime of possession of marijuana with intent to deliver in violation of WIS. STAT. §§ 961.41(1m)(h)1 and 939.05, and one count of possession of drug paraphernalia in violation of WIS. STAT. § 961.573(1). The charges arose out of an encounter with Manitowoc county sheriff's deputies who stopped to assist Jordan and several friends with a disabled vehicle. After the circuit court denied Jordan's motion seeking to suppress physical evidence, he entered a plea to reduced charges of being a party to the crime of being the keeper of a drug vehicle in violation of WIS. STAT. §§ 961.42, 961.14(4)(t) and 939.05, and possession of marijuana in violation of §§ 961.41(3g)(e), 961.14(4)(t) and 939.05.

¶3 On appeal, Jordan challenges the circuit court's determination that a deputy's frisk for weapons was supported by a reasonable suspicion that Jordan was armed and dangerous. Jordan objects to the circuit court's conclusion that the deputy had specific and articulable facts to justify the search. He contends that the circuit court erred in disregarding competent evidence which would have warranted a granting of his suppression motion.

¶4 When reviewing a circuit court's denial of a suppression motion, an appellate court "will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether a search or seizure passes statutory and constitutional standards, however, is a question of law which this court reviews de novo. *See* ***id***. at 137-38. We have often recognized,

however, that we may, and often do, benefit from the circuit court's analysis of the issues. *See* ***Lomax v. Fiedler***, 204 Wis. 2d 196, 206, 554 N.W.2d 841 (Ct. App. 1996). This is such a case. We have found the circuit court's thoughtful, well-reasoned decision quite helpful to our own analysis of the issues.

¶5 In order to justify a pat-down search, the officer "must be able to point to specific and articulable facts which, taken with rational inferences from those facts, reasonably warrant that intrusion." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). Once the officer has articulated the facts which caused him or her to act, those facts are assessed against an objective standard: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate?" ***Id.*** at 21-22. There is no set standard for what constitutes a reasonable police reaction in all situations.[2] Rather, the reasonableness of the reaction depends upon the circumstances facing the officer. *See* ***Bies v. State***, 76 Wis. 2d 457, 468 & n.7, 251 N.W.2d 461 (1977). The court must examine the totality of the circumstances to determine whether the stop and frisk was justified. *See* ***Penister v. State***, 74 Wis. 2d 94, 100, 246 N.W.2d 115 (1976).

¶6 In an exhaustive written memorandum the circuit court discussed the historical facts of the encounter between Jordan and members of the Manitowoc county sheriff's department. The facts, as found by the court, establish:

> Officer Joseph Keil has been a patrol officer for Manitowoc County for seven and a half years. He has received training in interdiction which he defined as patrolling highways and looking for controlled substances

[2] In ***State v. Morgan***, 197 Wis. 2d 200, 209, 539 N.W.2d 887 (1995), the supreme court held that "an officer making a ***Terry*** stop need not reasonably believe that an individual is armed; rather, the test is whether the officer 'has a reasonable suspicion that a suspect may be armed.'"

and other illegal items. He also is an instructor for other officers on the subject of interdiction. He has worked the night shift for seven years and during that time he has made more than 100 arrests of persons for possession of illegal items after he has stopped the person for a general traffic stop.

On April 12, 1998 at about 3 a.m. Keil was called to the scene of a disabled van by Officer Richard Sieracki. When he arrived Sieracki advised him that Sieracki had spoken to individuals who had been in the van. Some of the individuals were at a pay phone at a gas station. Sieracki observed that the individuals appeared to be nervous, were not concerned about getting his help, and were more concerned about wanting him to leave. Keil's experience has been that when people break down on the road they are usually glad for the officer's help. Under similar circumstances Keil never had people tell him that they did not need his help and that he should leave. Keil made contact with the one person who was still with the van, Kerry Jordan. Keil found the van with its emergency flashers activated, on the white fog line of the left hand shoulder. Since it was dark, Keil was concerned that the van's flashers would not last until daylight. Even with the flashers, because of its location, Keil thought the van was a traffic hazard and that an officer needed to stay with the van until a wrecker arrived.

When Officer Keil made contact with Kerry Jordan, Jordan was seated in the driver's seat of the vehicle with the driver's door open. When the Deputy started questioning Jordan, Keil observed that Jordan was nervous, his leg was bouncing up and down and his hand was twitching and shaking. Based on his experience, Keil found this to be unusual behavior for a motorist with a vehicular breakdown. Keil noted that this was not unusual behavior for people when there were guns, knives or illegal substances involved.

Jordan told Keil that the group in the van was coming from Milwaukee after being there for an hour and a half. Jordan said they had visited a friend named Scott, but Jordan did not know his last name. Jordan told Keil that the people in the van had put him in contact with Scott about a month ago. The group came from Sturgeon Bay and was on the way back to Sturgeon Bay. Keil did not believe that this explanation made sense. During the rest of the conversation Jordan looked at Keil, but when Keil asked Jordan about the van or the contents of the van Jordan looked away from him. When Keil combined Jordan's observable nervousness, his story about the trip

> and his evasiveness regarding the van, Keil believed there might be something illegal in the van. Keil had been trained that when people are transporting illegal items, those people have a higher propensity to carry weapons. Keil was also concerned that Jordan was only three or four feet away from him and was seated in the van which placed Jordan at a higher level than Keil. Keil received training that 21 feet was a necessary safe distance to react to a knife. Keil observed that Interstate 43 at that time of the morning was a high crime area. This was based on his experience that most of the time he had stopped people with guns or illegal drugs was late at night or early in the morning. Based on Keil's training and experience Interstate 43 is a conduit between Milwaukee and northern Wisconsin and northern Michigan for drug trafficking. As a result of all this information, Keil patted down Jordan.
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> When Keil patted down Jordan, he felt something in his jacket pocket. Keil thought that it was a one-hitter box, marijuana pipe. Keil then asked Jordan if he could go inside his pocket and Jordan said go ahead. Keil then found the one-hitter box that had an odor of marijuana. Keil then placed Jordan under arrest.

¶7 Jordan chides the circuit court for ignoring what he characterizes as "competent evidence which would have warranted suppression of all evidence obtained as a result of the pat-down search." For example, Jordan contends that the officers' testimony that he would have been nervous under similar circumstances along with evidence that the propane tank in the van could have exploded offer a sterile explanation for his nervousness. Jordan urges us to accept the competing inferences from the testimony that would not support a finding of reasonable suspicion. However, where there are two competing inferences the circuit court and the appellate court are entitled to rely upon the inference supporting a reasonable suspicion to conduct the pat down. *See* ***State v. Tompkins***, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988).

¶8 Jordan attempts to discount his nervousness as one of the factors giving rise to the deputy's reasonable suspicion that he was armed and dangerous. He attributes his nervousness as being justified "by the fact that a wheel fell off of

the vehicle as well as the fact that a propane tank may have exploded within the vehicle itself." He also makes an effort to discount the lateness of the hour and the deputy's testimony that it was his experience that late at night Interstate 43 is a conduit for drug trafficking.

¶9 Jordan's arguments run afoul of a basic principle: whether an officer had a requisite reasonable suspicion to conduct a pat down must be based on the totality of the circumstances. "[A]ll of the circumstances … are to be considered in determining what was reasonable police procedure in the particular situation." ***State v. Williamson***, 58 Wis. 2d 514, 520, 206 N.W.2d 613 (1973) (quoting ***State v. Chambers***, 55 Wis. 2d 289, 297, 198 N.W.2d 377 (1972)).

> Any one of [the] facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

State v. Waldner, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

¶10 Keil provided specific, articulable facts that when added together equal a reasonable suspicion to justify the pat-down search of Jordan. First, Jordan's refusal of assistance after a vehicular breakdown was an unusual response. Second, Jordan's nervousness that translated into twitching, shaking and bouncing was atypical of a motorist who had suffered a breakdown on the side of the road. Third, Jordan's evasiveness when questioned about what might be in the van served to heighten Keil's concerns. Fourth, Jordan's explanation of why he and his friends were on the highway did not sound right to Keil. Fifth, relying on his seven and one-half years of experience as a patrol officer trained in drug interdiction, Keil knew that Interstate 43 was a conduit for drugs from Milwaukee.

Sixth, Keil's personal experience was that individuals who are stopped late at night or early in the morning might have weapons. Seventh, Jordan had a height advantage on Keil because he was sitting in the van. Finally, Keil was trained to know that he had to have a separation of twenty-one feet between Jordan and himself to be able to react to a knife.

¶11 We agree with the circuit court that these facts along with reasonable inferences drawn from these facts, when looked at together, formed a reasonable basis for Keil's suspicion that Jordan might be armed and dangerous. When a sheriff's deputy observes unusual conduct which leads the deputy to reasonably conclude in light of his or her experience and training that the persons with whom the deputy is dealing may be armed and presently dangerous, a pat-down search is justified. *See* ***State v. Taylor***, 226 Wis. 2d 490, 496, 595 N.W.2d 56 (Ct. App.) *review denied*, ___ Wis. 2d ___, 602 N.W.2d 759, 760 (Wis. July 23, 1999) (Nos. 98-0962-CR, 98-0963-CR).

By the Court.— Judgment and order affirmed.

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