COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3205-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RALPH J. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J.[1] Ralph Smith appeals a judgment of conviction for possession of THC, contrary to WIS. STAT. § 961.41(3g)(e).[2] Smith was the

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

passenger in a car where the driver was lawfully arrested for operating with a suspended license. Intending to search the vehicle incident to the driver's arrest, the police officer ordered Smith out of the car and patted him down for weapons. The officer testified at the suppression hearing that he always searches passengers, due to safety concerns, before searching a vehicle. In the course of the search, the officer discovered marijuana in Smith's pocket. Smith contends that the search was unlawful and the circuit court erred by refusing to suppress the resulting evidence. This court agrees, reverses the judgment of conviction and the order denying Smith's suppression motion and remands for a new trial.

BACKGROUND

¶2 On July 13, 1998, at approximately 11:50 p.m., Tigerton police officer Bruce Leiser stopped an automobile driven by Harold Kuik for operating with an excessively loud muffler. After running a standard check, Leiser discovered that Kuik's operating privileges were suspended. This was Kuik's second offense, and Leiser immediately arrested him. Leiser handcuffed Kuik and placed him in the squad car.

¶3 After arresting Kuik, Leiser returned to the vehicle intending to search it incident to Kuik's arrest. To facilitate the search, Leiser ordered the passenger, Smith, to step outside the vehicle. According to his suppression hearing testimony, Leiser then searched Smith because he always performs a "pat down" weapons search for safety reasons before he searches a vehicle. Leiser further testified that he searches every passenger he does not know and he did not

[2] The jury acquitted Smith of possession of drug paraphernalia.

know Smith. He also indicated that he felt the search was necessary because he was alone, it was dark outside and there were two people.

¶4 The search revealed a handkerchief wrapped around two plastic baggies containing marijuana.[3] After being arrested, transported to the police station and read his ***Miranda***[4] rights, Smith signed a written confession in which he admitted possessing the marijuana.

ANALYSIS

¶5 The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. Courts determine whether a search is reasonable by balancing the government's need to conduct the search against the invasion the search entails. *See* ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). Whether evidence should be suppressed because it was obtained in violation of the Fourth Amendment is a question of constitutional fact that this court reviews under a two-step standard of review. *See* ***State v. Phillips***, 218 Wis. 2d 180, 189-90, 577 N.W.2d 794 (1998). First, this court will accept the trial court's findings of evidentiary or historical fact unless they are contrary to the great weight and clear preponderance of the evidence.[5] *See* ***id.*** at 190 (quoting ***State v. Woods***, 117 Wis.

[3] Smith argues that even if Leiser's search was justified by safety concerns, the search exceeded the authorized scope. Because this court concludes that the search itself was not lawful, that argument need not be addressed.

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[5] According to WIS. STAT. § 972.11(1), this court may only overturn a circuit court's findings of fact if the findings are clearly erroneous. The "clearly erroneous" and "great weight and clear preponderance" standards are interchangeable because they are essentially the same test. *See* ***State v. Harris***, 206 Wis. 2d 243, 250 n.6, 557 N.W.2d 245 (1996).

2d 701, 715, 345 N.W.2d 457 (1984)). Second, this court independently applies constitutional principles to the facts as found by the trial court. *See* ***id.***

A. "Pat-down" Frisk for Weapons

¶6 In ***Terry***, the United States Supreme Court struck a balance between the need for law enforcement officers to protect themselves from harm and the individual's right to personal security. *See* ***Terry***, 392 U.S. at 23-25. The Court recognized the dangers faced by the police when conducting close-range investigations of suspects. *See* ***id.*** It concluded that the "more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him" justifies the intrusion on individual rights that the protective frisk entails. ***Id.*** at 23.

¶7 Based on ***Terry***, Wisconsin courts have held that protective frisks are justified when an officer has a reasonable suspicion that a suspect may be armed. *See, e.g.*, ***State v. McGill***, 2000 WI 38, ¶24, 609 N.W.2d 795. The "reasonable suspicion" must be based upon "specific and articulable facts," which, when taken together with any rational inferences, establish that the intrusion was reasonable. ***Id.*** (citation omitted). The test is objective and inquires "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger." ***Terry***, 392 U.S. at 27. This standard is applied in light of the "totality of the circumstances." ***State v. Richardson***, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

¶8 "Nothing in ***Terry*** can be understood to allow a generalized cursory search for weapons …." ***Ybarra v. Illinois***, 444 U.S. 85, 93-94 (1979) (internal quotation marks omitted). Further, the United States Supreme Court recently

acknowledged its earlier holding "that probable cause to search a car [does] not justify a body search of a passenger." ***Wyoming v. Houghton***, 119 S.Ct. 1297, 1302 (1999) (citing ***United States v. Di Re***, 332 U.S. 581 (1948)).[6] Smith argues that there were no "specific or articulable facts" to demonstrate that Leiser reasonably suspected he was armed or dangerous. This court agrees.

¶9 Leiser had initially stopped the vehicle because of an excessively loud muffler—an investigative stop that does not inherently conjure heightened safety concerns. The driver was arrested for operating with a suspended license—a crime that would not naturally raise suspicion or safety concerns related to the vehicle's passenger.

¶10 There were two individuals present, and Leiser testified that he was suspicious of the driver from previous encounters.[7] But, as Leiser himself noted, the driver was already secured in the squad car and he did not know Smith. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." ***Ybarra***, 444 U.S. at 91. There was absolutely no evidence linking Smith to any suspicion, and his mere company with the driver was not sufficient to raise Leiser's suspicion

[6] A person "by mere presence in a suspected car" does not lose "immunities from search of his person to which he would otherwise be entitled." ***United States v. Di Re***, 332 U.S. 581, 587 (1948). In ***Houghton***, the Court held "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." ***Wyoming v. Houghton***, 119 S.Ct. 1297, 1304 (1999). One of the reasons that the Court cited as supporting its conclusion, however, was that the "traumatic consequences" of "[e]ven a limited search of the outer clothing" "are not to be expected when the police examine an item of personal property found in a car." ***Id.*** at 1302.

[7] Leiser recognized Kuik from previous encounters, including an incident where Kuik was suspected of shooting a dog.

regarding Smith beyond merely an "inchoate and unparticularized suspicion or 'hunch.'" ***Terry***, 392 U.S. at 27.

¶11 Leiser was understandably concerned for his safety because he was alone and the encounter occurred in the evening.[8] However, generalized concerns are not sufficient to justify the "severe, though brief, intrusion upon cherished personal security," involved in a pat-down weapon's frisk. ***Terry***, 392 U.S. at 24-25. As our supreme court recently stated: "***Terry*** does not … authorize officers to conduct a protective frisk as a part of every investigative encounter. Rather, Terry limits the protective frisk to situations in which the officer is 'justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.'" ***McGill***, 2000 WI 38, ¶21 (quoting ***Terry***, 392 U.S. at 24). There is no assertion that Smith engaged in any suspicious behavior. There are simply no specific facts that could have led a reasonable police officer to suspect that Smith was armed and dangerous.

B. Smith's Confession

¶12 Smith argues that if this court concludes that Leiser unlawfully searched and seized the marijuana, his confession must also be suppressed as fruit of the poisonous tree. Smith's written confession was as follows: "On Monday

[8] This court is cognizant of the reasonably heightened concern an officer may have while conducting a search in the evening hours alone. *See generally* ***State v. McGill***, 2000 WI 38, ¶ 20, 32, 609 N.W.2d 795. However, these general concerns do not, in themselves, provide any basis to suspect that an individual is armed and dangerous. Per se exceptions to the Fourth Amendment are generally not permissible. *See* ***Richards v. Wisconsin***, 520 U.S. 385, 394-95 (1997). If this court were to conclude that Leiser's search of Smith was lawful just because it was conducted in the evening, that would amount to an impermissible per se rule. This court may not go that far. Further seeking additional officer assistance would have alleviated the general safety concerns Leiser identified of being alone in the evening. In fact Leiser did call for additional assistance after discovering the drugs on Smith.

night I Ralph Smith was arrested with a litel over a ½ os. of personel weed. This happened about 11:30. And would not say were I got it."

¶13 The exclusionary rule requires the suppression of confessions obtained in violation of the Fourth Amendment. *See* ***State v. Anderson***, 165 Wis. 2d 441, 447, 477 N.W.2d 277 (1991). However, the attenuation doctrine allows for the admission of a confession if it was obtained by means sufficiently attenuated so as to be purged of the taint of the prior illegality. *See* ***id.*** at 447-48. The main question is whether the evidence has come at the "exploitation of a prior police illegality …." ***Id.*** ***Miranda*** warnings alone do not break the causal chain. *See* ***Brown v. Illinois***, 422 U.S. 590, 602 (1975).

¶14 The State does not address Smith's argument that the confession must be suppressed. Accordingly, the argument is deemed conceded. *See* ***Charolais Breeding Ranches v. FPC Secs.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Further, this court notes that there is no apparent attenuation between the illegally seized evidence and Smith's confession.[9]

[9] Smith additionally argues that his conviction must be reversed because the jury was not instructed on the elements of marijuana possession. This court does not address this argument because Smith's conviction is already being reversed and a new trial ordered. Further, Smith failed to raise that argument at the trial court or by postconviction motion. This court will generally not consider these issues. *See* ***State v. Monje***, 109 Wis. 2d 138, 153, 325 N.W.2d 695 (1982) (For any issue other than the sufficiency of the evidence to be raised as a matter of right on appeal, it must first be preserved by a postconviction motion.).

By the Court.—Judgment and order reversed and cause remanded.

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