COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0862-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL HANSON,

DEFENDANT-APPELLANT.

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

¶1 HOOVER, P.J.[1] Paul Hanson appeals a judgment of conviction for possession of marijuana. Hanson was the passenger in a truck where the driver

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

was arrested for operating while under the influence of an intoxicant. A consent search of the truck revealed a bag of marijuana under the driver's seat. Thereafter, Hanson was frisked and marijuana was found in his pocket. He contends that the search was unlawful and that the circuit court erred by refusing to suppress the resulting evidence. Specifically, Hanson argues that the search was not justified under ***Terry v. Ohio***, 392 U.S. 1 (1968). He also asserts that the trial court erred by concluding that the search of his person was incident to a lawful arrest. This court agrees with both contentions, reverses the judgment of conviction and the order denying Hanson's suppression motion and remands for a new trial.

FACTS

¶2 Hanson was charged with possession of marijuana as a party to a crime, contrary to WIS. STAT. §§ 961.41(3g)(e)2 and 939.05. He filed a motion to suppress evidence.[2] The following facts emerged from the motion hearing.

¶3 Officer Lewis Moses III of the Menominee Tribal Police Department was on patrol shortly after midnight when he came across a pickup truck that was "halfway in the ditch" blocking a part of the lane of travel. Hanson was a passenger in the truck, which was owned and operated by Eric Walton. When Moses arrived at the scene, Walton was trying to free the truck and Hanson was attempting to direct traffic around the scene. When Moses approached Walton, he determined that Walton appeared to have been drinking intoxicants. Moses asked Walton for a driver's license. While Walton was retrieving his wallet from the

[2] Hanson also filed a motion to suppress a statement that he made concerning contraband found during a pat-down search of Hanson and before receiving warnings under ***Miranda v. Arizona***, 384 U.S. 436 (1966). The trial court granted the motion, concluding that Hanson was in custody at the time he made his incriminating statement. The State has not appealed this order.

truck's center console and with the driver's door open, Moses observed "a small bag with a green leafy material lying halfway under the front driver's side seat."[3]

¶4 Moses only has jurisdiction over Native Americans. Once he determined that Walton was not Native American, Moses contacted the Menominee County Sheriff's Department to send a deputy.

¶5 At some point, Hanson approached Moses, who asked Hanson to step back into the vehicle for safety. Moses asked Hanson to produce some form of identification that he then used to determine that there were no warrants for Hanson's arrest.

¶6 When deputy Brett Reiter arrived at the scene, Moses informed him of what he had seen.[4] Reiter first had Walton perform field sobriety tests and then solicited and received Walton's consent to search his truck. Before searching the vehicle, Reiter told Hanson to exit the truck and stand near the squad car with Moses and Walton. Hanson complied. Reiter began to search the car and found in the console between the seats a closed tin box that contained a bottle of vitamins and a small marijuana pipe.[5] After finding the paraphernalia, Reiter decided that both Walton and Hanson would be arrested, but he did not communicate this

[3] Later, under cross-examination, Moses testified that the green leafy substance was "under the driver's side front seat." The arresting deputy, Brett Reiter, remembers the circumstances somewhat differently. He testified that when he arrived at the scene, Moses told him that there was what Moses believed to be a "baggie of marijuana … under the driver's side mat …." He later testified that when searching the truck, he "opened the driver's side door and immediately noticed that the mat on the driver's side, mat that was on the floor appeared to have something underneath it, and I lifted it up and saw a green bag of what turned out to be marijuana."

[4] By the time of his arrival, Reiter was the third law enforcement officer at the scene.

[5] Reiter testified that "there was the smell of burnt marijuana in the box …." He did not testify whether the odor was present before opening the tin box.

decision to anyone at that time. When Reiter walked around the truck to start the search of the driver's side, Walton called out to him that a lot of people drive his vehicle, and he was not responsible for anything in it. Moses also told Reiter that Walton had told him that there might be some "residuals" in the truck. Reiter then opened the driver's side door and immediately noticed that something was underneath the driver's side floor mat. Lifting the mat, Reiter found a bag of what was later determined to be marijuana.

¶7 Reiter then approached the squad car where Hanson, Walton and Moses were standing and told Moses what he had found in the vehicle. Reiter also told Moses that both of the parties were going to be arrested. He then addressed Walton, told him he was under arrest, placed him in hand restraints, and started a "pat down" search. Walton stated that the jacket he was wearing was not his. Shortly thereafter, Reiter found another tin box containing another pipe and a small amount of marijuana in the jacket.

¶8 While Reiter was searching and arresting Walton, Moses instructed Hanson to place his hands on the squad car and told him he was also going to be subjected to a "pat-down" search. Moses then testified as follows concerning the frisk:

> Q. Okay, and so as the other officer searched the vehicle then you went over to my client to talk to him further?
>
> A. Yes, I did.
>
> Q. And it was at that point that you, I guess, patted him down?
>
> A. I don't know if it was at that point, but I believe Deputy Reiter came to me and told me that he did find green leafy material and some narcotics. At this time he did tell Mr. Walton he was under arrest. At that point, for my safety and the safety of the officer, I patted him down, too.
>
> Q. So my client was in the car at that point?

A. No, he was out of the car.

Q. And for your safety you patted him down?

A. Yes.

Q. Had he, you didn't have any particular reason to think he might be armed, did you?

A. I'm not an expert in that. I just do it for my safety.

Q. I understand that, but you didn't have any particular reason to think that this guy who happened to be there would have a weapon on him?

A. I'm not there to make that judgment. I do that on every stop I have on something like that.

Q. I'm sorry, I didn't hear you.

A. I do it every time I have a certain type of stop where there is a crime committed or I believe there is a crime going to be committed, I do a pat-down.

Q. Okay, so you do a pat-down in every case, basically?

A. Yes.

Moses's search of Hanson yielded a baggie of green leafy substance and a wooden pipe. Shortly after the frisk, Reiter arrested Hanson.

STANDARD OF REVIEW

¶9 The Fourth Amendment to 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***, 392 U.S. at 21. This court determines whether evidence was obtained in violation of the Fourth Amendment, a question of constitutional fact, 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 accepts the trial court's findings of historical fact unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***id.*** at 190. Second, this court

independently applies constitutional principles to the trial court's evidentiary findings. *See* ***id.***

¶10 Similarly, whether certain facts constitute probable cause to arrest is a question of constitutional fact involving the application of federal constitutional principles that this court reviews independently of the circuit court's conclusions. The issue is thus subject to independent review and requires an independent application of the constitutional principles involved to the circuit court's fact findings. *See* ***State v. Secrist***, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999).

ANALYSIS

A. "***Terry***" Pat-Down Frisk for Weapons

¶11 Hanson argues that the pat-down search was illegal because it was not predicated upon a reasonable suspicion that he was armed with a dangerous weapon.[6] This court agrees.

¶12 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* ***id.*** 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"

[6] Hanson raises several other arguments that this court will not address. *See* ***Norwest Bank Wisconsin Eau Claire, N.A. v. Plourde***, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994) (only dispositive issues need be addressed).

justifies the intrusion on individual rights that the protective frisk entails. *See* ***id.*** at 23.

¶13 Consistent with ***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, 224 Wis. 2d 560, 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. *See* ***id.*** at ¶22. The test is objective and inquires "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or 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, 140, 456 N.W.2d 830 (1990).

¶14 Our supreme court has recently stated that, while "[t]he need for officers to frisk for weapons is even more compelling today than it was at the time of ***Terry***,"[7] ***McGill***, 2000 WI 38 at ¶20, officers nevertheless may not conduct a protective frisk as a part of every investigative encounter. *See* ***id.*** at ¶21. "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 ….'" ***Id.*** (quoting ***Terry***, 392 U.S. at 24); *see also* ***Ybarra v. Illinois***, 444 U.S. 85, 93-94 (1979) ("Nothing in ***Terry*** can be understood to allow a generalized cursory search for weapons ....") (internal quotation marks omitted).

[7] The court noted that the number of assaults on officers has doubled since 1966. *See* ***State v. McGill***, 2000 WI 38, ¶20, 609 N.W.2d 795.

¶15 Finally, 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***, 526 U.S. 295, 303 (1999) (citing ***United States v. Di Re***, 332 U.S. 581 (1948)).

¶16 Hanson argues that there were no "specific or articulable facts" to demonstrate that Moses reasonably suspected Hanson was armed or dangerous. This court agrees. Neither Moses nor Reiter articulated a single reason for suspecting that Hanson was armed with a dangerous weapon. Neither officer testified as to any suspicious or unusual behavior.[8] Indeed, Moses based his decision to frisk Hanson solely on the misapprehension that he is authorized to "do a pat-down in every case, basically." Moses possessed at best merely the "inchoate and unparticularized suspicion," that the ***Terry*** Court held was insufficient to authorize a frisk for weapons. *See* ***id.*** at 27.

¶17 Moreover, under an objective view of the total circumstances, nothing would justify Moses's apprehension that Hanson was armed and posed a threat to Moses or others.[9] Just the opposite is true. There were no outstanding warrants for Hanson. He cooperated in every respect with the officers. When Moses arrived at the scene, Hanson responded to his questions and provided Moses with identification that the officers retained. Before that, according to

[8] *Compare, e.g.,* ***McGill,*** 2000 WI 38 at ¶24. The arresting officer decided to conduct the frisk based upon a number of factors, including McGill's failure to stop for the squad's emergency lights, his unusually nervous appearance, and his attempt to walk away from the encounter. *See* ***id.*** at ¶8. In addition, McGill kept placing his hands in his pockets, was "twitchy" and smelled of both drugs and alcohol. *See* ***id.*** "[The officer's] concerns were raised because he viewed McGill's actions as out of the ordinary." ***Id.***

[9] With respect to reasonableness of any perceived but unarticulated threat, it is relevant that Moses, after telling Walton and Hanson to wait in the truck, directed traffic until Reiter arrived. Further, Reiter was the third law enforcement officer at the scene.

Moses, Hanson was "being helpful" by directing traffic around the scene. When Moses instructed Hanson to have a seat in Walton's truck, Hanson cooperated. When Reiter asked Hanson to exit the truck so that he could perform the search, Hanson again complied. Because there are simply no specific facts that could have led a reasonable police officer to suspect that Hanson was armed and dangerous, this court concludes that the frisk was not justified under ***Terry***.

B. Search Incident To Arrest

¶18 The trial court did not consider Hanson's motion under a ***Terry*** analysis. Rather, it concluded that Hanson was searched "incident to a lawful arrest." While the court acknowledged that the marijuana was found "closer to the driver," it reasoned that both occupants were suspects because Walton made an ambiguous disclaimer that "many people drive his truck" and that he did not own the jacket he was wearing when Reiter found the contraband. This court concludes, however, that the trial court erroneously concluded that the evidence was sufficient to demonstrate probable cause that Hanson knowingly possessed marijuana.[10]

¶19 To be found guilty of possessing a controlled substance, physical possession is not necessary. It is sufficient that the defendant has constructive possession of the controlled substance or is within such juxtaposition to the

[10] In addition to arguing that Moses had probable cause to arrest Hanson, the State contends that if the frisk was premature, the evidence seized would have inevitably been discovered by lawful means and therefore should not be suppressed. *See* ***State v. Washington***, 120 Wis. 2d 654, 664-65, 358 N.W.2d 304 (Ct. App. 1984), adopting the "inevitable discovery" rule. The State's argument, however, rests upon the tacit contention that Reiter's "lawful" basis for searching Hanson was probable cause that he possessed the marijuana found in the truck. Because this court rejects the State's underlying premise, its argument need not be further considered.

substance that he might be said to possess it. *See* ***Ritacca v. Kenosha County Court***, 91 Wis. 2d 72, 82, 280 N.W.2d 751 (1979). Possession is "imputed when the contraband is found in a place immediately accessible to the accused and subject to his or her exclusive or joint dominion and control, *provided that* the accused has knowledge of the presence of the drug." ***Id.*** (emphasis added). A fact that can buttress an inference of knowing possession from the joint occupancy of an area in which drugs are found is whether the drugs are in "plain view." *See* ***State v. Allbaugh***, 148 Wis. 2d 807, 813, 436 N.W.2d 898 (Ct. App. 1989). Knowledge of possession may also be shown circumstantially by conduct, directly by admission, or indirectly by contradictory statements from which guilt may be inferred. *See* ***State v. Trimbell***, 64 Wis. 2d 379, 384-85, 219 N.W.2d 369 (1974). More than mere proximity to drugs, however, must be shown to support a finding of possession. *See* ***Allbaugh***, 148 Wis. 2d at 812.

¶20 Applying these principles, this court concludes that there is no evidence to support the inference that Hanson knew there was marijuana in the truck. There was no testimony suggesting that the bag that was in Moses's plain view from his vantage point was similarly visible to Hanson. Given the unresolved discrepancy between the officers' testimony, it is even uncertain whether the bag was exposed or under the mat when Moses began his investigation. The trial court's ruling, relying as it did on Walton's disavowals, did not necessarily imply that it found the former. Moreover, the testimony did not establish whether the console in which the pipe was found was exposed or covered but, in any event, the tin containing the pipe was closed. Finally, while as indicated the trial court relied on Walton's vague disclaimers to conclude that Hanson was probably a party to possession, there was no evidence to support an inference that Hanson had driven the truck or owned the jacket.

¶21 The only evidence connecting Hanson to the contraband found in Walton's truck was proximity. Without more, this is insufficient to establish probable cause that Hanson knowingly possessed the bag of marijuana or the pipe. *See* ***id.*** Therefore the trial court erroneously concluded that Moses's search of Hanson was permissible as incident to a lawful arrest.

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

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