COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP102-CR **Cir. Ct. No. 2004CF4085**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL L. SUMNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. Nathaniel Sumner appeals from a judgment of conviction for possession of heroin, contrary to WIS. STAT. §§ 961.14(3)(k) and 961.41(3g)(am) (2003-04).[1] Sumner asserts that the circuit court erred in denying his motion to suppress evidence obtained during a protective frisk, arguing that the police officer did not have the requisite reasonable suspicion that he was armed and dangerous. We conclude that the totality of the circumstances does not support a conclusion that the officer had reasonable suspicion of danger to justify a protective frisk. Accordingly, we reverse.[2]

Background

¶2 The following facts are taken from the suppression hearing. At around 9:00 p.m. on July 29, 2004, Deputies Timothy and Kevin Johnson[3] were on patrol in a marked squad car on Locust Street in Milwaukee. They were stopped, waiting for the cars in front of them to turn right, when a red BMW passed the squad car on its left, crossing into the oncoming lane of traffic and forcing the cars in that lane to pull over. Johnson stopped the BMW, and as it was pulling over he observed the driver, Nathaniel Sumner, making reaching gestures toward the passenger side of the vehicle.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Because we conclude that there was not reasonable suspicion to justify a protective frisk, we need not address the parties' arguments over whether the officers otherwise violated Sumner's constitutional rights during the traffic stop.

[3] For clarity, we will refer to Deputy Timothy Johnson and Deputy Kevin Johnson (who are both partners and brothers, and therefore share a title as well as a surname) as "Johnson" and "Kevin Johnson," respectively.

¶3 Johnson approached the vehicle and asked Sumner for his driver's license or identification. Sumner stated he did not have any identification on him, but gave his name. Johnson observed that Sumner's vehicle was filled with objects, including office equipment, clothing, and bags. Johnson asked Sumner if he could search his vehicle and Sumner answered no. Johnson requested permission a second time and Sumner again answered no. Johnson then went back to the squad car.

¶4 Kevin Johnson ran Sumner's name through the squad car's computer while Johnson monitored Sumner's activity. Through the computer check, the deputies learned that Sumner's driver's license was suspended. The deputies called for a tow truck, and Kevin Johnson wrote Sumner a citation for driving with a suspended license while Johnson continued to monitor Sumner. Johnson did not observe Sumner engage in any suspicious activity while he monitored him. After about fifteen minutes in their squad car, both deputies exited their vehicle and approached Sumner's vehicle. They asked Sumner to exit his vehicle so that they could fingerprint him for identification purposes.

¶5 After Sumner exited his vehicle, the deputies fingerprinted Sumner and explained that his vehicle was going to be towed because his license was suspended. Kevin Johnson began searching Sumner's vehicle. Johnson observed that Sumner was sweating and kept putting his hands in his pockets. Sumner was wearing a t-shirt and either "sweat pants" or "running pants." Johnson observed no unusual bulges in Sumner's clothing. Johnson testified:

> I told him to keep his hands out of his pockets. His demeanor was—He appeared very nervous by him continuously going in his pockets and me telling him to keep his hands out of his pockets. At that point I believe it was the second or third time I told him to keep his hands

> out, that's when I said, okay, I'm going to do a pat down for my safety.

¶6 Johnson then performed a protective frisk of Sumner, during which he discovered several packets of heroin. The search of Sumner's car uncovered multiple syringes, cooking caps, and a rubber tourniquet. Sumner was arrested and charged with possession of heroin. He moved to suppress the evidence obtained during the traffic stop as unlawfully obtained. After a hearing, the court denied the motion to suppress. Sumner then pled guilty to possession of heroin. Sumner appeals from the judgment of conviction, challenging the circuit court's denial of his suppression motion.

Standard of Review

¶7 A warrantless search implicates constitutional protections under the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. ***State v. Johnson***, 2006 WI App 15, ¶10, 288 Wis. 2d 718, 709 N.W.2d 491 (2005) (citation omitted). Determining whether reasonable suspicion existed to support a warrantless protective frisk is a question of constitutional fact. ***Id***. (citation omitted).

¶8 In reviewing a circuit court's ruling on a motion to suppress, we uphold the court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Kyles***, 2004 WI 15, ¶6, 269 Wis. 2d 1, 675 N.W.2d 449 (citation omitted).[4] However, "[w]hether the facts satisfy the

[4] We now use the WIS. STAT. § 805.17(2) "clearly erroneous" standard of review for a trial court's findings of fact. That test is essentially the same as the previous against the "great weight and clear preponderance" of the evidence test. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

constitutional requirement for performing a protective search for weapons—that an officer must have reasonable suspicion that a person may be armed and dangerous to the officer or others—is a question of constitutional law" that we decide de novo. ***Id.***, ¶7 (citation omitted).

Discussion

¶9 Under ***Terry v. Ohio***, 392 U.S. 1, 30 (1968), a police officer may perform a protective frisk of a person when there are "reasonable grounds to believe that [the suspect is] armed and dangerous, and it [is] necessary for the protection of [the officer] and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized." The reasonableness of a protective frisk is determined by an objective standard, looking to "whether a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety and that of others was in danger because the individual may be armed with a weapon and dangerous." ***Johnson***, 288 Wis. 2d 718, ¶12 (citation omitted). The officer must articulate specific facts and reasonable inferences therefrom rather than rely on an "inchoate and unparticularized suspicion or 'hunch'" to support a reasonable suspicion of danger. ***Terry***, 392 U.S. at 27.

¶10 Sumner contends that the circuit court erred in finding Johnson had the requisite reasonable suspicion of danger to perform a protective frisk. He argues that the facts relied on by the State—that Sumner had made a furtive gesture toward the passenger side of his vehicle when pulled over, was sweating and appeared nervous, and repeatedly placed his hands in his pockets—together with the totality of the circumstances, do not amount to objectively reasonable suspicion. We agree.

¶11 We examine each of the key factors emphasized by the State separately and then in their entirety. We conclude, based on the totality of the circumstances, that Johnson lacked reasonable suspicion to perform a protective frisk of Sumner and therefore the evidence obtained during the frisk must be suppressed.[5]

1. Furtive Gesture

¶12 The State contends that Sumner's reaching gesture toward the passenger side of his vehicle contributed to Johnson's reasonable suspicion of danger. We agree that Sumner's furtive movement is an important factor in

[5] Sumner also argues that any evidence obtained from the search of his vehicle must be suppressed as unlawfully obtained because the officers lacked reasonable suspicion to perform a protective frisk and the State asserted no other valid exception to the warrant requirement. *See* ***State v. Johnson***, 2006 WI App 15, ¶14, 288 Wis. 2d 718, 709 N.W.2d 491 (2005) (explaining that "the scope of a search for weapons … is not limited to the search of the person but may … encompass the search of the passenger compartment of the person's vehicle where the officer reasonably suspects that he or she or another is in danger of physical injury") (citation omitted). Because we conclude that the officers lacked reasonable suspicion to perform a protective frisk of Sumner, we accordingly conclude they lacked reasonable suspicion to perform a protective frisk of his vehicle.

The State also argues, however, and the circuit court found, that the search of Sumner's vehicle was reasonable as standard police procedure when towing a vehicle. *See* ***State v. Weide***, 155 Wis. 2d 537, 550-51, 455 N.W.2d 899 (1990) (concluding that police inventory of defendant's purse, which was left in police squad car, was reasonable because it was standard police procedure and was not investigatory in nature). We decline to address the State's argument on two grounds. First, our conclusion that Johnson lacked reasonable suspicion to perform a protective frisk is dispositive because Sumner was only charged with possession of heroin, and all of the heroin was found on his person, not in his vehicle. Further, the search of Sumner's vehicle and the protective frisk of his person occurred contemporaneously, and the State has not argued that the discovery of paraphernalia in Sumner's vehicle contributed to the reasonableness of the frisk of his person. Second, the State merely cites to ***Weide*** for the proposition that the search of Sumner's vehicle was reasonable, but does not explain how the elements of ***Weide*** were met: namely, that the search was pursuant to a departmental policy *and* that the search was for inventorial, rather than investigatory, purposes. *See* ***id***. Because the State has not adequately developed this argument, we need not address it. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct.App.1987) (citing ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980)).

determining whether Johnson had reasonable suspicion of danger to justify a protective frisk.[6] *See* ***Johnson***, 288 Wis. 2d 718, ¶16.

¶13 In ***Johnson***, the officers noticed Johnson lean forward and make furtive movements as they pulled him over for an emissions suspension and failure to signal a turn. ***Id***., ¶2. The officers approached the vehicle and informed Johnson why he had been stopped and checked Johnson's emissions papers. ***Id***., ¶4. They instructed Johnson to exit the vehicle for their safety, based on the furtive movements he had made when the officers stopped him. ***Id***.

¶14 After Johnson exited his vehicle, one officer began to pat him down for weapons. ***Id***., ¶5. Johnson fell to the ground, complaining of leg pain. ***Id***. After the officers helped him up and resumed the pat-down, he fell again. ***Id***. The officers then helped him to the curb and instructed the passenger in Johnson's vehicle to exit. ***Id***. They frisked the passenger for weapons. ***Id***. The officers then searched Johnson's vehicle and discovered marijuana. ***Id***., ¶6.

¶15 We reversed the circuit court's denial of Johnson's motion to suppress, explaining that Johnson's furtive movements and his falling down during the frisk, when examined in the totality of the circumstances, did not support a reasonable suspicion of danger. ***Id***., ¶18. We said:

> Suspicious gestures are certainly important factors to consider in determining whether a protective search of a vehicle was reasonable. We are also to give due weight to the "specific reasonable inferences which an officer is entitled to draw from the facts in light of his or her

[6] The State relies on several cases from other jurisdictions describing furtive gestures as a factor in determining reasonable suspicion. Because those cases are not controlling, we will not discuss them. We rely on Wisconsin case law on furtive gestures as a factor in determining reasonable suspicion.

> experience." Further, in some cases, "furtive" movements or gestures by a motorist may ripen into an objectively reasonable suspicion that the person may be armed and dangerous….
>
> However, "furtive" or suspicious movements do not automatically give rise to an objectively reasonable suspicion that the occupant of the vehicle is armed and dangerous. We must consider such movements in light of the totality of the circumstances.

Id., ¶¶16-17 (citations omitted).

¶16 We observed that the officers pulled Johnson over for a traffic violation rather than suspected criminal activity; that the officers had no prior contact with Johnson to indicate he would be armed or dangerous; that it was only late afternoon, dark out but well lit by streetlights, and not in a high crime area; and that Johnson had made no further suspicious movements in the car and, though "upset," was cooperative with the officers. ***Id.***, ¶18. Thus, we concluded the officers did not have an objectively reasonable suspicion of danger to justify a protective frisk of Johnson's vehicle. ***Id.***, ¶19.

¶17 Following ***Johnson***, we will consider the fact that Sumner made furtive gestures in his vehicle at the initiation of the traffic stop. That fact is not controlling, but must be evaluated under the totality of the circumstances.

2. Sweating and Nervousness

¶18 The State also relies on the fact that Sumner was sweating and nervous during the search of his vehicle. We agree that "unusual nervousness is a legitimate factor to consider in evaluating the totality of the circumstances." ***Kyles***, 269 Wis. 2d 1, ¶54 (citations omitted).

¶19 Johnson testified that he assessed Sumner as nervous based on his sweating and his repeatedly placing his hands in his pockets. The circuit court found that Sumner was "very" and "particularly" nervous. We consider Sumner's "very" and "particularly" nervous demeanor in the totality of the circumstances.

3. Hands in Pockets

¶20 The State contends that Sumner's placement of his hands in his pockets supports Johnson's objectively reasonable suspicion.[7] We agree "that an individual's failure to obey the direction of an officer to keep his hands in the officer's sight is a significant factor to consider in determining the reasonableness of an officer's suspicion that an individual might be armed and dangerous." ***Kyles***, 269 Wis. 2d 1, ¶40. However, "a circuit court must consider under the totality of the circumstances whether an individual's refusal to comply with an officer's direction to the individual to remove his hands from his pockets is sufficient to trigger reasonable suspicion to conduct a protective search."[8] ***Id.***, ¶49.

¶21 In ***State v. Mohr***, 2000 WI App 111, ¶¶6-7, 15, 235 Wis. 2d 220, 613 N.W.2d 186, we concluded that the officer lacked reasonable suspicion of danger to justify the frisk despite testimony that Mohr refused to take his hands

[7] The State discusses numerous cases from other jurisdictions focusing on defendants' placement of their hands in their pockets as supporting officers' reasonable suspicion. Because those cases are not controlling, we will not discuss them, and instead rely on Wisconsin case law.

[8] We agree with the State that "[c]ircuit courts are aptly positioned to decide on a case-by-case basis, evaluating the totality of the circumstances, whether an officer had reasonable suspicion to effectuate a protective search for weapons in a particular case." ***State v. Kyles***, 2004 WI 15, ¶49, 269 Wis. 2d 1, 675 N.W.2d 449. However, we are not bound by the circuit court's decision. *See* ***State v. Mohr***, 2000 WI App 111, ¶11, 235 Wis. 2d 220, 613 N.W.2d 186. We conduct an independent review of the record to determine if reasonable suspicion was met by the facts of this case. *See* ***id.***

out of his pockets upon repeated requests to do so by the officer. Testimony also established that the officer decided to do the frisk because he did not know what was in Mohr's pockets, and Mohr's behavior was "nervous" and "resistive." ***Id***., ¶7. However, we also considered significant that the officer had been on the scene and allowed Mohr to remain in the vehicle for twenty minutes while he dealt with the driver and another passenger. ***Id***., ¶16. We concluded that a reasonable officer would not have thought Mohr was armed and dangerous after twenty minutes had elapsed on the scene without incident. ***Id***., ¶¶15-16. Thus, "[a]lthough Mohr appeared nervous, was resistive and refused to remove his hands from his pockets, these circumstances did not give the officer a reasonable suspicion that Mohr was dangerous, especially when the officer had spent the previous twenty minutes at the scene without any suspicious incidents." ***Id***., ¶16.

¶22 The State argues that ***Mohr*** is distinguishable on the facts because here, Johnson demonstrated concern for his safety by repeatedly requesting permission to search Sumner's vehicle and monitoring Sumner while his partner ran the computer check and wrote the citation. We reject the State's contention on both grounds. First, we recognize that police officers routinely request permission to search vehicles during traffic stops, and thus a request to search is not necessarily indicative of an officer's concern for safety.[9] A reasonable officer would have ordered Sumner out of the vehicle and performed a frisk if there was a serious safety concern, whether or not Sumner gave permission for the officer to

[9] *See, e.g.*, ***State v. Williams***, 2002 WI 94, ¶7, 255 Wis. 2d 1, 646 N.W.2d 834; ***State v. Jones***, 2005 WI App 26, ¶4, 278 Wis. 2d 774, 693 N.W.2d 104; ***Mohr***, 235 Wis. 2d 220, ¶17 ("[W]e observe, as have other appellate courts, that an increasing number of appeals present situations in which police officers routinely ask permission to do drug and weapon searches of motor vehicles following stops for minor traffic infractions.").

do so.[10] Second, we are not convinced that monitoring a driver during the course of a traffic stop is uncommon police procedure. We do not consider routine police practices of requesting to search the vehicle and monitoring the driver as indicating the officer's reasonable suspicion of danger.

¶23 In ***Kyles***, the supreme court reiterated ***Mohr***, refusing to establish a *per se* rule that reasonable suspicion is met whenever a defendant refuses to remove his hands from his pockets. ***Kyles***, 269 Wis. 2d 1, ¶50. The court concluded that the officer did not have reasonable suspicion to perform a frisk even though Kyles was wearing a large, fluffy coat and repeatedly put his hands in his pockets after the officer instructed him not to. ***Id.***, ¶¶68-72. The court considered the following factors in their totality: Kyles was wearing a large, fluffy coat; Kyles repeatedly placed his hands in his pockets; the officer testified he did not feel any particular threat prior to the search; Kyles appeared nervous; and the stop occurred at 8:45 p.m., in a "pretty active" crime area. ***Id.***, ¶¶17, 68-72. The court said:

> We are not persuaded that the two key factors emphasized by the State, the size of the overcoat and the defendant's placement of his hands in his pockets, even

[10] The State concedes in its brief that Johnson did not believe he had a reasonable suspicion of danger when he requested to search Sumner's vehicle:

> Although Johnson was concerned about safety from the commencement of the traffic stop, he obviously did not believe he had reasonable suspicion to justify a frisk until after his partner started searching the car and Sumner exhibited nervousness with his sweating and he repeatedly put his hands into his pockets.

If Johnson had a reasonable, articulable concern for his safety—rather than a general concern for his safety that would likely accompany most traffic stops—he would have performed a frisk at that time.

> when considered in light of the totality of the circumstances, were sufficient to create reasonable suspicion in the mind of a reasonable law enforcement officer that the defendant was armed and dangerous…. There was not sufficient articulable, objective information to provide the officer with reasonable suspicion that the defendant was armed and dangerous to the officer or others.

Id., ¶72.

¶24 The State argues that ***Kyles*** is not controlling because Sumner was less cooperative and more threatening than Kyles. The State points out that Johnson testified Sumner was cooperative *except* that he kept putting his hands in his pockets, and that Johnson testified he did not know whether Sumner was non-threatening because he did not know what Sumner was doing when he placed his hands in his pockets. Thus, the State contends, Sumner's repeatedly placing his hands in his pockets was more threatening than the similar actions in ***Kyles***. We disagree.

¶25 In ***Kyles***, the defendant was wearing a large, fluffy coat that could readily conceal a weapon. ***Id***., ¶69. Here, Sumner was wearing a t-shirt and sweat pants or running pants, with no visible suspicious bulges. Both Kyles and Sumner repeatedly put their hands in their pockets after officers instructed them not to.[11] See ***id***., ¶¶69-72. In ***Kyles***, the officer testified he did not feel any particular threat

[11] Whether Johnson actually instructed Sumner to remove his hands from his pockets is not clear. Johnson testified that he instructed Sumner to remove his hands from his pockets two or three times, but also admitted he did not mention doing so in his police report. The trial court found that

> there is some question as to whether or not the officer told him to do that, and I place this in the context of the overall set of circumstances and the totality of the circumstances. It is clear, however, the defendant was putting his hands into his pockets and the court so finds on a number of occasions.

from Kyles, and that Kyles cooperated each time the officer told him to remove him hands from his pockets. ***Id***. Here, Johnson testified he did not know whether Sumner was threatening. He described Sumner as cooperative, except that he kept putting his hands in his pockets. Johnson did not testify that Sumner refused to take his hands out of his pockets when Johnson instructed him to, or that Sumner demonstrated any particularly threatening behavior. We do not agree that, on these facts, ***Kyles*** is distinguishable.

4. Totality of the Circumstances

¶26 Whether an officer has reasonable suspicion to perform a protective search must be determined by the totality of the circumstances. ***Id.***, ¶¶16-18. We thus examine the totality of the circumstances described above during Johnson's traffic stop of Sumner.

¶27 The traffic stop occurred at 9:00 p.m., and was for a traffic violation rather than suspected criminal activity.[12] The State does not contend the area in which the traffic stop occurred was a high crime area. Sumner was the only occupant of the vehicle, and there were two officers in the squad car. Sumner made a reaching gesture to the passenger side of his vehicle when he was pulled over. He had no identification on him. Sumner's vehicle was filled with objects, so that it could have readily concealed a weapon. However, fifteen minutes

[12] The State argues that the fact that Johnson stopped Sumner for a traffic violation rather than for suspected criminal activity is inconsequential because traffic stops often lead to violence and thus present a dangerous situation for police officers. We recognize that traffic stops may result in violence towards a police officer. *See* ***Maryland v. Wilson***, 519 U.S. 408, 413-14 (1997); ***Pennsylvania v. Mimms***, 434 U.S. 106, 110 (1977). However, Wisconsin cases have relied on the fact that a stop occurred as a result of a traffic violation rather than for suspected criminal activity as a factor in the totality of the circumstances when determining reasonable suspicion. *See* ***Kyles***, 269 Wis. 2d 1, ¶69; ***Johnson***, 288 Wis. 2d 718, ¶18.

elapsed after Johnson's initial contact with Sumner before he re-approached Sumner's vehicle. During that time, Johnson left Sumner unattended while the officers remained in their squad car. The officers did not observe Sumner engage in any suspicious activity in that interim. When Johnson re-approached Sumner's vehicle and asked him to exit to be fingerprinted, Johnson was cooperative. The officers conducted the fingerprinting without incident. After Kevin Johnson began searching Sumner's vehicle, Sumner appeared "very" and "particularly" nervous, was sweating, and kept placing his hands in his pockets after Johnson instructed him not to.

¶28 We cannot conclude on these facts that a reasonable officer would have an objectively reasonable suspicion that Johnson was both armed and dangerous. As in ***Mohr***, the lapse of time between the stop and the frisk mitigated any reasonable suspicion of danger. An objectively reasonable officer would not leave an occupant of the vehicle who was believed to be armed and dangerous unattended for fifteen minutes. While the reaching gesture at the initiation of the stop may have aroused suspicion, the fact that the stop proceeded for the next fifteen minutes without incident while Sumner was unattended mitigated that suspicion. Further, as in ***Kyles***, Sumner's nervous demeanor and his repeated placement of his hands in his pockets did not, under the totality of the circumstances, amount to reasonable suspicion that Sumner was both armed and dangerous. We conclude that, on the facts in the record, there was insufficient evidence to justify a protective frisk for weapons. We therefore reverse and remand for proceedings consistent with this opinion.

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

Not recommended for publication in the official reports.