

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2001

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. 00-1741-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY MOSLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
JOHN W. ROETHE, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Gregory Mosley appeals from a judgment convicting him of possessing heroin with intent to deliver it, within 1000 feet of a park. The issue is whether the trial court properly denied his motion to suppress the evidence of his crime. We affirm.

¶2 Police officer Randi Terhaar stopped a vehicle after identifying its driver as unlicensed. Mosley was a passenger in the car. Terhaar asked to search his person and Mosley consented. In Mosley's pockets, Terhaar found brass knuckles, a neatly folded roll of cash, and scraps of paper with phone and pager numbers on them. She then asked Mosley to remove his unlaced athletic shoes. Mosley initially consented and removed his right shoe. When Terhaar asked him to remove his left shoe, Mosley suddenly doubled over and started complaining about stomach pains. Terhaar testified that Mosley was hugging his knees and moving his hands toward his left foot while he was complaining. Terhaar and other officers helped Mosley lie down. Terhaar then pulled off Mosley's left shoe without Mosley's permission and, as she did so, the drug evidence leading to this prosecution fell to the ground. Mosley stopped complaining about and acting as though he had stomach pains, and was arrested.

¶3 At Mosley's suppression hearing, Terhaar testified that her discovery of brass knuckles and evidence of drug dealing in Mosley's pockets caused her to suspect he might have other weapons on him as well. She further testified that she was trained to search a suspect's shoes when she was concerned for her safety. Upon hearing her testimony, the trial court concluded that the search of the left shoe was not consensual, nor incident to an arrest. However, the court determined that it was a lawful, limited search for weapons under *Terry v. Ohio*, 392 U.S. 1 (1968).

¶4 *Terry* allows police to stop an individual for investigative purposes, and where the officer reasonably believes the detainee may be armed, the officer may "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault [the officer]." *Id.* at

30-31. Mosley does not contest Terhaar's reasonable belief that he may have been carrying weapons, and therefore does not contest her right to conduct a *Terry* frisk. However, he contends that the removal of his left shoe without permission went well beyond the limited search *Terry* allows. He compares the search in this case to the search held unconstitutional in a companion case of *Terry, Sibron v. New York*, 392 U.S. 40 (1968), where an officer placed his hand in the detainee's pocket without first attempting a pat-down of the pocket to determine whether it contained a weapon.

¶5 We need not determine whether the removal of Mosley's shoe exceeded the limit of a *Terry* search. Matters discovered during a *Terry* frisk permit a reasonable suspicion to ripen into probable cause that the detainee has or is committing a crime, thereby justifying a search incident to arrest. *See State v. Ford*, 211 Wis. 2d 741, 746, 565 N.W.2d 286 (Ct. App. 1997). The same may be said of matters discovered during a consensual search. Here, the consensual search revealed that Mosley was carrying a concealed dangerous weapon (brass knuckles), and evidence strongly suggesting drug dealing. At that point, there was probable cause to arrest for carrying a concealed weapon and justification to remove and search the left shoe whether or not the search fell within the limited pat-down allowed by *Terry*.¹ *See Ford*, 211 Wis. 2d at 749 n.5 (a search may immediately precede an arrest if probable cause already exists). Although the trial court relied on different grounds to uphold the search, our review of the question is *de novo*. *State v. Richardson*, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990). We are not confined to the reasons given by the trial court.

¹ Discovery of the brass knuckles gave probable cause to arrest for violating WIS. STAT. § 941.23 (1997-98), Carrying Concealed Weapon. *See State v. Frey*, 178 Wis. 2d 729, 739, 505 N.W.2d 786 (Ct. App. 1993) (brass knuckles are a dangerous weapon *per se*).

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5
(1999-2000).

