

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-3422-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DURAL NICHOLSON,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

SCHUDSON, J.<sup>1</sup> Dural Nicholson appeals from a judgment of conviction, following his guilty plea, for one count of possession of a controlled substance (cocaine base), contrary to §§ 161.14(7)(a) & 161.41(3m), STATS. He

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

argues that the trial court erroneously denied his motion to suppress cocaine found on his person as the fruits of an alleged illegal arrest.<sup>2</sup> This court affirms.

Nicholson was arrested for loitering and resisting an officer. A search of Nicholson subsequent to the arrest produced a small amount of cocaine. Nicholson moved to suppress the cocaine arguing that his arrest was unlawful. The trial court concluded the police officers had probable cause to arrest Nicholson for loitering and denied his motion. Nicholson subsequently pled guilty to possession of cocaine base.

On March 22, 1994, at approximately 8:45 p.m., City of Milwaukee Police Officers Andre Williams and Manfred Harpole were on patrol in the area of 35th and Galena Streets in the City of Milwaukee. They were patrolling the area because of several reports of loitering, drug dealing, and gun activity in the area. At the suppression hearing Officer Williams testified that he observed three men standing in front of a store "talking." Approximately twenty minutes earlier, he and his partner had witnessed the same individuals in the same location. Williams stated that he drove around the corner, parked the squad, and that he and his partner approached the group from different directions. Williams stated that he approached the group "[t]o find out what they were doing," and identified himself as a police officer. Williams stated that when Nicholson saw Officer Harpole approach from the other direction, Nicholson "kind of pushed off" Williams's chest and tried to run. Williams caught Nicholson after Nicholson got "five to ten feet" away. Nicholson was then arrested for loitering and resisting an officer. Williams explained that he did not have the opportunity to question Nicholson about what he was doing because of Nicholson's attempt to flee.

Glendora Schicker testified that she lived above the store and had given the men permission to be there.

Michael Wynos testified that he, Nicholson and another friend had been in front of the building "drinking." Wynos said that Officer Williams

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<sup>2</sup> A defendant may appeal from an order denying a suppression motion even though the judgment of conviction rests on the defendant's guilty plea. Section 971.31(10), STATS.

approached Dural from behind, grabbed him by the arm and simultaneously identified himself as a police officer. Wynos stated that Nicholson never attempted to flee from Officer Williams. Wynos also stated that he and his friends had permission to be there.

Finally, Officer Harpole testified that while on patrol he observed two or three men sitting outside the store "talking to other persons that walked by." He stated that twenty minutes later the men were still there. Officer Harpole said that he "suspected they were dealing narcotics" and that they were "illegally loitering there." He stated that the police had previously received complaints regarding loitering, drug activity, and gun violations in the vicinity and that they had received complaints concerning the specific location where the men were located. Officer Harpole stated that Nicholson "almost immediately ... tried to flee" when Officer Williams approached the men and after Nicholson saw him (Harpole). Officer Harpole further stated that Nicholson was taken into custody because "he was resisting our actions. We were fearful for our safety, and we already knew that he was loitering there."

The trial court upheld Nicholson's arrest and denied his suppression motion. The trial court concluded that the officers had probable cause to arrest Nicholson for loitering, stating:

The loitering ordinance for the City reads as follows:  
106-31(1)(a), loitering. Loitering or prowling in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of person or property in the vicinity. That's basically the ordinance. It goes on a little bit further to indicate some circumstances that can be considered by the officer in determining whether such alarm is warranted. One of these is the fact that the actor takes flight upon appearance of a police officer.

Under the circumstances, I find the officers' versions of the events to be more credible versions of the events, and I think that the officers did have a basis for arresting the defendant on the charge of loitering,

particularly in that the defendant was loitering in a manner not usual for law-abiding individuals, and that I think is consistent with the officers' indications of narcotics activity that was going on in the areas that they were aware of. And also, I think that it was under circumstances that warranted alarm for the safety of persons or property in the vicinity, particularly to the extent that the police were getting calls from individuals concerning the loiterers, and apparently there was alarm that was being caused to individuals—other individuals in the area who then contacted the police. And I think that the defendant's attempt to flee the officer when the officer identified himself then further gave the officer an indication that there was cause for concern as to potential illegal conduct going on, and also cause for concern for the officer's safety when the officer identified himself and then received physical contact from the defendant.

Because the facts surrounding Nicholson's arrest were disputed, this court reviews the trial court's findings of fact under the clearly erroneous standard. *State v. Wilks*, 117 Wis.2d 495, 501, 345 N.W.2d 498, 501 (Ct. App. 1984), *aff'd*, *State v. Wilks*, 121 Wis.2d 93, 358 N.W.2d 273 (1984), *cert. denied*, *Wilks v. Wisconsin*, 471 U.S. 1067 (1985). Whether those facts pass statutory and constitutional muster, however, are questions of law subject to independent review. *Id.* at 501, 345 N.W.2d at 500.

Nicholson does not raise a *Terry*-stop challenge.<sup>3</sup> Instead, he argues that he was not loitering and that his flight alone could not give rise to probable cause. Alternatively, he contends that even if the officers had probable cause to arrest him for loitering, the officers violated the law by not questioning him about what he was doing. We reject his arguments.

Milwaukee Ordinance 106-31(1)(a) prohibits:

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<sup>3</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

Loiter[ing] or prowl[ing] in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the police officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the police officer at the time, would have dispelled the alarm.

The trial court concluded that the officers' version of events was more credible than the versions of other witnesses. The weight and credibility of the testimony of witnesses is for the finder of fact to determine. *See State v. Marty*, 137 Wis.2d 352, 359, 404 N.W.2d 120, 123 (Ct. App. 1987). Based on the record, this court cannot conclude that the trial court's findings of fact were clearly erroneous.

This court also concludes that the trial court correctly determined that the officers had probable cause to believe Nicholson was violating the anti-loitering ordinance. The officers had received numerous prior complaints of criminal activity in the area, it was approximately 8:30-9:00 p.m. in the middle of March, and the officers observed Nicholson standing in front of a store for approximately twenty minutes briefly talking to people passing by. Officer Harpole testified that he suspected Nicholson might be dealing narcotics. Before the officers could ask Nicholson to explain his presence, Nicholson initiated physical contact with one officer and attempted to flee. Officer Harpole testified that this led them to fear for their safety. Although Nicholson is correct

when he states that flight from an officer alone does not give rise to probable cause to arrest, *see State v. Anderson*, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990), the officers clearly had other facts to support this arrest.

Nicholson also argues that even if the officers had probable cause to arrest him for loitering, the officers did not question him about what he was doing prior to the arrest. The ordinance, however, states that “[u]nless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct.” Milwaukee Ordinance 106-31(1)(a) (emphasis added). Here, the officers testified that because of Nicholson's physical contact with Officer Williams and his flight they were unable to question him prior to arrest.

The trial court correctly determined that the police conduct complied with requirements of the ordinance and that the officers had probable cause to arrest Nicholson for loitering.<sup>4</sup> Because Nicholson's arrest was lawful, the search incident to his arrest was also lawful. *See State v. Murdock*, 155 Wis.2d 217, 228, 455 N.W.2d 618, 622-623 (1990).

*By the Court.* – Judgment affirmed.

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

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<sup>4</sup> Although the officers testified that they also arrested Nicholson for resisting an officer, the trial court did not address the issue of whether the police also had probable cause to arrest for this offense. Because of this court's holding on the loitering arrest, there is no need to consider whether there also was probable cause to arrest for resisting. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).