

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2012AP728-CR

Cir. Ct. No. 2011CM154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL J. JACOBS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Samuel J. Jacobs appeals from his conviction for marijuana possession on the grounds that the circuit court erroneously denied his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

motion to suppress evidence obtained during a pat-down search. The circuit court concluded that although the pat-down search of Jacobs was unlawful, the evidence discovered during the search was admissible nonetheless because it ultimately would have been discovered as an inevitable result of his arrest following the lawful search of his vehicle. We affirm, but on the grounds that the pat-down search was lawful.

BACKGROUND

¶2 The following uncontroverted testimony was provided at the hearing on Jacobs' motion to suppress. Jacobs was stopped by members of the Ozaukee County Anti-Drug Task Force while driving a vehicle on December 20, 2010, in the town of Belgium. At the time of the stop, the task force was investigating possible drug activity related to Jacobs' workplace. Management at Jacobs' workplace had reported that second-shift employees were suspected of returning from their break under the influence of drugs. According to Ozaukee County Sheriff's Detective Demaine Milbach, who testified at the hearing, the sheriff's department had been informed that individuals were "either using controlled substances or selling them." Milbach observed Jacobs' vehicle depart from the workplace during the time frame when a break during the second shift would occur. It was dark, and Milbach and another detective stopped Jacobs' vehicle because one of the headlights was out.

¶3 Milbach asked Jacobs to exit the vehicle, but informed him he was not under arrest. Milbach testified at the suppression hearing that Jacobs was "very cooperative" and although "a little nervous[,] his nervousness was "typical" and Jacobs "[d]idn't seem overly upset." Jacobs was wearing a large overcoat that Milbach believed "could conceal a weapon." As Milbach spoke with

Jacobs, other task force members spoke with passengers from the vehicle. Shortly thereafter, another officer spoke with Jacobs for two to three minutes, after which Milbach spoke with Jacobs again and noticed a significant change in his demeanor. Milbach testified as follows:

There was a marked change in his behavior where he was nervous, moving from one foot to the other foot. Definitely outside the norm of the behavior he was exhibiting when I first made contact with him.

....

I thought there was something seriously going on with [Jacobs] now after [the other officer] talked to him. And I advised him—I asked him if he was having a medical problem. He stated that he wasn't. And at that point I told him that I was going to pat him down for my own safety because I was worried that he had something on that could hurt me or a weapon of some sort.

Milbach further testified that his concern was in part based on his past experience—which included sixteen years as a sheriff's deputy and twenty-six years in the Air Force security services. Specifically, Milbach stated that “there's probably been five to six times in the past where the behavior that [Jacobs] was exhibiting at that time directly led to my recovery of a concealed weapon.” After Milbach told Jacobs he was going to search Jacobs for weapons, Jacobs stated that he did not have any weapons but that he did have marijuana and a pipe. Milbach then patted down Jacobs for weapons, and marijuana and a pipe were discovered.

¶4 Jacobs was charged with possession of marijuana and drug paraphernalia. He moved to suppress the evidence seized during the pat-down search on the basis that the search unlawfully infringed on his constitutional rights. The circuit court denied Jacobs' motion after a hearing. The court determined that

with the number of law enforcement officers present² and “simply [observing] a change in [Jacobs’] demeanor from being unnervous to nervous,” Milbach did not have a sufficient reason to search Jacobs for weapons. The court concluded, however, that Jacobs ultimately would have been arrested and searched lawfully because of contraband other officers discovered during a lawful search of Jacobs’ vehicle, and thus the evidence he sought to suppress inevitably would have been found. Jacobs subsequently pled no contest to marijuana possession and now appeals.

DISCUSSION

¶5 Whether evidence must be suppressed due to an unconstitutional search presents a mixed question of fact and law. *See State v. Buchanan*, 2011 WI 49, ¶8, 334 Wis. 2d 379, 799 N.W.2d 775. A court’s factual findings will be accepted unless they are clearly erroneous; but whether a search is unreasonable under the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution is a question of law we decide de novo. *State v. Sykes*, 2005 WI 48, ¶¶12, 13, 279 Wis. 2d 742, 695 N.W.2d 277.

¶6 A pat-down search conducted to find concealed weapons and protect a law enforcement officer from harm is permissible so long as “a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger.” *Terry v. Ohio*, 392 U.S. 1, 27 (1968). “[D]ue weight must be given ... to the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his [or her] experience.” *Id.*

² Six law enforcement officers were involved with the stop.

¶7 Whether such reasonable suspicion exists to justify a protective search requires a case-by-case evaluation that considers the totality of the circumstances at the time of the search. *Buchanan*, 334 Wis. 2d 379, ¶9. An officer conducting a pat-down search “need not reasonably believe that an individual is armed; rather, the test is whether the officer ‘has a reasonable suspicion that a suspect may be armed.’” *State v. Morgan*, 197 Wis. 2d 200, 209, 539 N.W.2d 887 (1995) (citation omitted). Prior cases have identified numerous factors that might weigh in favor of the constitutionality of a search. Those that apply in this case include: a suspect’s “out-of-the-ordinary nervousness,” *State v. McGill*, 2000 WI 38, ¶31, 234 Wis. 2d 560, 609 N.W.2d 795; an officer’s articulated concern for his or her safety, *State v. Kyles*, 2004 WI 15, ¶39, 269 Wis. 2d 1, 675 N.W.2d 449; a suspect’s bulky clothing, *id.*, ¶53; reduced visibility due to darkness, *id.*, ¶58; and an officer’s active investigation into suspected drug activity, *State v. Johnson*, 2007 WI 32, ¶¶28-29, 299 Wis. 2d 675, 729 N.W.2d 182.

¶8 Based on the totality of circumstances known to Milbach when he searched Jacobs, Milbach’s belief that his safety was in danger was reasonable. The circuit court articulated one factual finding to justify Milbach’s search of Jacobs—that Jacobs’ demeanor changed “from being unnervous to nervous.” This finding is supported by the record. Milbach testified that Jacobs’ demeanor had altered significantly enough in the short period of time that he had spoken with the other officer that Milbach thought Jacobs might be having a medical episode. He described a “marked change” in Jacobs’ demeanor from “typical” nervousness to shifting from foot to foot and exhibiting behavior “outside of the norm” of what he had displayed earlier.

¶9 We believe additional, undisputed facts further support the reasonableness of the search. *See Morgan*, 197 Wis. 2d at 210-11 (court of appeals as part of a de novo review of the reasonableness of a search can consider additional factors outside circuit court’s factual findings). Milbach testified that he was concerned for his safety, and, based upon his past experiences, suspects who displayed demeanor similar to that Jacobs displayed after speaking with the other officer had subsequently been found to have concealed weapons. Further, it was dark out and Jacobs was wearing a large overcoat that could conceal a weapon. Lastly, the nature of the criminal activity the task force was investigating at the time related to second-shift employees at Jacobs’ workplace “either using controlled substances or selling them” during their break, which would provide Milbach additional reason to be concerned about potential weapons.

¶10 Considering the totality of the circumstances, Milbach’s pat-down search of Jacobs was reasonable. As a result, the evidence of illegal drug activity gathered from the search was lawfully procured and thus Jacobs’ motion to suppress was properly denied.

By the Court.—Judgment affirmed.

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

