COURT OF APPEALS
DECISION
DATED AND RELEASED

May 22, 1997

NOTICE

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.

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

No. 96-0077-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN D. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed.*

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

PER CURIAM. John D. Walker appeals a judgment of conviction on one count of possession of cocaine with intent to deliver. There are two issues: Did the investigating officer have reasonable suspicion to pat Walker down, and was the seizure of controlled substances during the pat down lawful? We conclude the answer to both questions is yes, and we therefore affirm.

Walker was a passenger in a vehicle shortly after midnight in Beloit. A police officer testified he saw the vehicle back up approximately fifty feet in the middle of the road. Believing this was an unsafe maneuver, the officer pulled up to the car and turned on his emergency lights. The car proceeded into a nearby parking lot, and the driver got out and ran. A passenger in the back seat attempted to get out of the car, but the officer ordered her to remain inside. Walker did not attempt to flee. A second officer arrived at the scene. The first officer ordered him to remove Walker from the vehicle and pat him down. While doing so, the officer felt an object in Walker's pocket which ultimately turned out to be a package of crack cocaine.

The trial court denied Walker's motion to suppress the cocaine evidence. He was subsequently found guilty by a jury of possessing cocaine with intent to deliver. He appeals the judgment convicting him of this offense.

Walker argues that the officers lacked the required reasonable suspicion based on specific, articulable facts, that he may have been armed. *See* § 968.25, STATS.; ***Terry v. Ohio***, 392 U.S. 1 (1968). This is a question of law we review without deference to the trial court. ***State v. Betterly***, 191 Wis.2d 406, 416, 529 N.W.2d 216, 219 (1995). We conclude the officers had reasonable suspicion based on the time of day, the action of the vehicle, and the other occupants' attempts to flee. Walker argues that the acts of the other occupants do not give any indication that he shared their reasons for flight. We agree that there could have been reasons for their flight which do not involve Walker. However, there were also possible explanations for their flight which do involve Walker. The totality of circumstances present in this case is sufficient to support the pat down.

Walker also argues that the pat down went beyond what is permitted under ***Minnesota v. Dickerson***, 508 U.S. 366 (1993). The facts in that case are similar to this one. During a pat down search an officer felt an item in the defendant's pocket from the outside, believed that it was a controlled substance, and then reached into the pocket to retrieve the item. The question for the court was "whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by ***Terry***." ***Id.*** at 573. The Court concluded that they may, "so long as the officers' search stays within the bounds marked by ***Terry***." ***Id.*** The court concluded that the officer's pat down in ***Dickerson*** was excessive because the officer continued to manipulate the defendant's pocket from the outside after he had concluded that it contained no weapon. ***Id.*** at 378.

Here, the investigating officer testified to his discovery of the cocaine in Walker's pocket as follows:

> After patting down his left pocket, I touched what I believe was a controlled substance ….
>
> ….
>
> I felt it the first time and believed that it was a controlled substance. I felt it again, squeezed it, and I believe I looked over to [a fellow officer] and told him, dope, and I placed Mr. Walker under arrest for controlled substance.

The officer also testified that the time between his first and second touch was "a second or two"; that he "believed" the object was a controlled substance when first touched; and that he was "sure" on the second touch.

We conclude the difference between ***Dickerson*** and the present case is the extent of the officer's pat down before concluding that the item in question

was contraband. The ***Dickerson*** opinion noted that the officer did not "immediately" recognize the object as contraband, but did so only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket. ***Id.*** In this case, the officer testified that although he touched the object in Walker's pocket twice, he believed it was a controlled substance the first time he felt it. We are satisfied that the officer's search did not go beyond that which is authorized by ***Terry.*** *See* ***State v. Guy***, 172 Wis.2d 86, 102, 492 N.W.2d 311, 317-18 (1992), *cert. denied*, 509 U.S. 914 (1993) (officer may lawfully seize contraband that is plainly felt during pat down and immediately recognized as evidence of criminal activity).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.