COURT OF APPEALS
DECISION
DATED AND RELEASED

July 9, 1996

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. 96-0781-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN L. ANDERSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS COOPER, Judge. *Reversed*.

FINE, J. This is an appeal from a judgment convicting Marvin L. Anderson of illegally possessing cocaine in violation of §§ 161.16(2)(b)1 and 161.41(3m), STATS. Following the trial court's order denying his motion to suppress, Anderson pled guilty. The sole issue presented on this appeal is whether a Milwaukee police officer had sufficient reason to stop Anderson on the street and pat him down.[1] The State confesses error. We agree.

[1] Anderson pled guilty. A defendant may appeal from an order denying a motion to suppress

The question of whether an investigatory stop was legally justified presents a question of law that we decide *de novo*. ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). An investigatory stop is permissible if the law enforcement officer reasonably suspects, considering the totality of the circumstances, that some type of criminal activity either is taking place or has occurred. ***Alabama v. White***, 496 U.S. 325, 328–331 (1990); ***State v. Richardson***, 156 Wis.2d 128, 139–140, 456 N.W.2d 830, 834 (1990).

The seminal case in this area is ***Terry v. Ohio***, 392 U.S. 1 (1968), which recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest," ***id.***, 392 U.S. at 22, and that officers are potentially at risk whenever they so investigate suspicious activity, ***id.***, 392 U.S. at 23–24. Thus, a pat-down search for weapons is permitted when the officer is justified in believing that the person he or she confronts may be armed. ***Id.***, 392 U.S. at 24–27. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." ***Id.***, 392 U.S. at 27. The test is objective. ***Florida v. Royer***, 460 U.S. 491, 498 (1983). Stated another way, the frisk is lawful when "a reasonably prudent person in the circumstances of the officer would be warranted in the belief that the action taken was appropriate." ***State v. Anderson***, 155 Wis.2d 77, 88, 454 N.W.2d 763, 768 (1990).

The evidence in this case is totally devoid of anything that would give a reasonable person in the officer's shoes grounds to suspect that Anderson was involved in criminal activity or that he was armed. Essentially, the officer testified at the suppression hearing that he and other police officers were investigating suspected drug dealing at a house where, almost a month earlier, they had arrested another person for, presumably, a drug-related crime. They were in the process of arresting a suspect when they saw Anderson leave the house. The officer testified that he did not know whether Anderson lived in the house and wanted to find out what he "was doing there." As the State points out in its brief, there was nothing to connect Anderson to any suspicious activity, other than his mere presence. That is not sufficient to trigger a ***Terry***–type inquiry and pat-down. *See* ***Brown v. Texas***, 443 U.S. 47, 51–52 (1979)

(..continued)
evidence even though the judgment of conviction rests on a guilty plea. Section 971.31(10), STATS.

(police may not stop a citizen unless the officers have "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity"; "look[ing] suspicious" in area frequented by drug users not sufficient).

By the Court.—Judgment reversed.

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