COURT OF APPEALS DECISION DATED AND RELEASED

March 25, 1997

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. 96-1907-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Wilfredo Melo,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Wilfredo Melo appeals from the judgment of conviction, following his guilty plea, for possession with intent to deliver cocaine. He argues that the trial court erred in denying his motion to suppress evidence. We affirm.

I. FACTUAL BACKGROUND

At the trial court hearing on Melo's motion to suppress the cocaine, City of Milwaukee Police Detective Lawrence DeValkenaere testified that on the afternoon of August 31, 1995, he and Detective Willie Brantley saw Julio Rivera, a man they knew to be wanted on a felony drug warrant from the state of New York, on the stoop of an apartment building. They followed Rivera into the restaurant located in the same building and arrested him.

After the arrest, the detectives entered the adjoining portion of the apartment building to investigate possible drug trafficking in the building. On the second floor Detective DeValkenaere knocked on the partially-open door of the first apartment he encountered. His knock caused the door to open more and allowed him to observe a man, later identified as Roberto Almonte, sitting on a couch. DeValkenaere testified that he then identified himself as a police officer, displayed his badge, and announced that he "would like to talk to you about narcotics problems here in the building." He heard Almonte call in Spanish, using the word "policia," to someone in the next room. In response to that call, Melo appeared.

Detective DeValkenaere recognized Melo. He had had contact with Melo "in the past in regards to ... investigations in the area ... dealing cocaine base in the City of Milwaukee." Specifically, DeValkenaere knew of two occasions when Melo had been stopped in a car. On one of those occasions, police seized "a large sum of money from him" and, on the other, police recovered a sawed-off shotgun from "a hidden electronically locked magnetic compartment ... usually used for transportation of large quantities of narcotics or money."[1] As a result, he believed "[t]hat Mr. Melo was involved in narcotics trafficking."

[1] Detective DeValkenaere also testified, "There was a car stop and one time there was a magnetic compartment. Another time there was a sawed-off shotgun, if it was the same incident, I'm not sure."

DeValkenaere then, "for the safety factor," asked or told Almonte and Melo to step out in the hallway.[2] He explained:

> I was out there by myself in this apartment; unknown threats. Rooms to my right, rooms on the left and I didn't want to be in there. I already encountered two people that were possibly involved in narcotics trafficking; one downstairs, known felon wanted on warrant. Individual upstairs and now a third person that was seated on the couch ... I felt that for my safety the hallway was a better bet to conduct the interview and that is where I asked him to go.

When Detective Brantley then joined him in the hallway, Detective DeValkenaere patted down Melo for weapons. During the pat-down, a plastic baggie with seventy-seven individually wrapped packages of cocaine fell from Melo's left pants leg.

Almonte testified that on the day Detective DeValkenaere arrested Melo, he (Almonte) was at Melo's apartment for a haircut. He explained that Melo was operating a barber shop in the apartment, that "[e]veryone comes there to get their hair cut," and that the door was partially open so customers could enter. Almonte said that DeValkenaere identified himself as a police officer but did not show his badge. Almonte confirmed that he called to Melo telling him the police were there. Almonte said that DeValkenaere "grabbed us," handcuffed him and Melo while they still were in the apartment, and said,

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[2] DeValkenaere testified:

> At that point I asked Mr. Melo and the other individual, I was by myself in this apartment. It was rather large area. For my safety, I was going to talk to them. I wanted them, asked them to step into the hallway. I asked them, Come on. Step out here with me.

He also testified, "I don't remember the exact words, but it was to the effect, Would you step in the hallway? I would like to speak with you regarding narcotics investigation."

"Let's go to the hall."[3] He said he saw the drugs fall to the floor when DeValkenaere was searching Melo's waistband area.

[3] In rebuttal, Detective Brantley testified that when he arrived in the hallway, Melo and Almonte were not handcuffed. Denying Melo's motion, the trial court found that Detective Brantley, who had arrived at the hearing after Detective DeValkenaere had departed, was "more credible than Mr. Almonte ... as to this business of whether or not they were handcuffed."

II. DISCUSSION

Melo argues that the stop was improper and that, even if the stop was proper, the search was not. Melo premises his argument on the theory that Detective DeValkenaere conducted a ***Terry***[4] stop that, under § 968.24, STATS., he could do only if he reasonably suspected that Melo had committed, was committing or was about to commit a crime.[5] The State responds, however, that even absent any reasonable suspicion that Melo had committed, was committing, or was about to commit a crime, Detective DeValkenaere's conduct was lawful if: (1) he was rightfully in Melo's presence when he frisked him; and (2) he reasonably suspected that Melo was armed and dangerous. The State is correct.

In reviewing a trial court's order denying a motion to suppress, we will uphold the trial court's factual findings unless they are clearly erroneous. *See* ***State v. Williamson***, 113 Wis.2d 389, 401, 335 N.W.2d 814, 820, *cert. denied*, 464 U.S. 1018 (1983). We will also, however, "independently examine those facts to determine whether the constitutional requirement of reasonableness is satisfied." ***Id.***

Our supreme court has explained:

> In ***Terry***, the majority stated a two-part test to determine whether the police office acted within permissible, constitutional grounds for initiating the search: (1) whether the officer was rightfully in the presence of the party frisked; and (2) whether the

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[4] ***Terry v. Ohio***, 392 U.S. 1 (1968).

[5] Section 968.24, STATS., in part, states:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime.

> officer suspected the party was armed and dangerous.

State v. Guy, 172 Wis.2d 86, 104 n.5, 492 N.W.2d 311, 318 n.5 (1992) (Heffernan, C.J., dissenting on other grounds), *cert. denied*, 509 U.S. 914 (1993). Here, we apply both tests.

A. Rightful Presence

Although ordinarily an officer's "rightful[ ] ... presence" preceding a frisk will result from a ***Terry*** stop, that is not always the case. In ***State v. Smith***, 119 Wis.2d 361, 351 N.W.2d 752 (Ct. App. 1984), for example, this court concluded that no stop or seizure of the suspect had occurred despite the following facts:

> [Two police detectives] went to the defendant's apartment. Defendant answered the door. The officers told him that his name had come up during a sexual assault investigation and asked if he was willing to accompany them to the police station. He agreed to do so. At the station he was taken to an interview room and advised of his rights. After he stated that he was with the victim on the night of the assault, he was charged.

Id., at 363, 351 N.W.2d at 753. Here, even more certainly, where DeValkenaere had not told Melo he was a suspect, and where Melo had not been taken to the police station but only had stepped from his apartment/barber shop to the adjoining hallway, Melo would not have reasonably believed he was not free to leave. Therefore, at that point, Melo had not been "seized." *See* ***id.*** at 366, 351 N.W.2d at 755.

Thus, even assuming Detective DeValkenaere's contact with Melo could not be justified as a ***Terry*** stop, he was rightfully in Melo's presence. The detectives had lawfully entered the apartment building for legitimate investigative purposes and Melo's apartment/barber shop door was open. The trial court, resolving the only factual dispute at the hearing, made a reasonable

credibility call and found that Melo was not cuffed when he exited the apartment/barber shop. Therefore, whether DeValkenaere asked or told Melo to accompany him to the hallway, he had not seized Melo at that point.

B. Reasonable Suspicion—Armed and Dangerous

Melo, quoting ***Ybarra v. Illinois***, 444 U.S. 85, 91 (1979), argues that "'mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.'" We agree. However, in this case Detective DeValkenaere was not required to meet a "probable cause" standard and, in any event, much more than Melo's "mere propinquity" to Rivera justified the frisk.

An officer conducting a frisk "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, 891 (1995) (quoting ***State v. Guy***, 172 Wis.2d at 94, 492 N.W.2d at 314).

Clearly, Detective DeValkenaere reasonably suspected that Melo was armed and dangerous, based on four factors: (1) Melo had previously been armed; (2) Melo was suspected of past drug dealing based on previous stops that had produced a large amount of money and a sawed-off shotgun; (3) the presence of Rivera, a fugitive drug trafficker, in the doorway of Melo's building; and (4) the frequent possession of weapons by drug dealers that, as DeValkenaere testified based on his experience with thousands of narcotics arrests, was "common." *See* ***State v. Richardson***, 156 Wis.2d 128, 144, 456 N.W.2d 830, 836 (1990) ("drug dealers and weapons go hand in hand, thus warranting a ***Terry*** frisk for weapons").

Accordingly, we conclude that the police conduct leading to the seizure of the cocaine was constitutional and, therefore, we affirm the trial court's denial of Melo's motion to suppress evidence.

By the Court.—Judgment affirmed.

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