

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 14, 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. 96-2240-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Timothy J. Lee,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Timothy J. Lee appeals from a judgment of conviction for knowingly and unlawfully possessing marijuana contrary to §§ 161.14(4)(t) and 161.01(14), Stats. Lee claims the trial court erred in denying his motion seeking to suppress evidence. He claims the investigating police officer lacked reasonable suspicion necessary to justify stopping him and, accordingly, the marijuana discovered during a custodial search, incident to arrest, should have been inadmissible. Because a basis existed warranting a

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

reasonable suspicion on the part of the police officer for the stop, the trial court did not err in refusing to suppress the evidence and this court affirms.

I. BACKGROUND

With some exceptions, the factual background setting the stage for this appeal is not in dispute. On January 12, 1996, at approximately midnight, City of Milwaukee Police Officer Jay M. Jackson was on routine patrol in the 2100 block of West Mitchell Street. He observed seventeen-year-old Lee standing in the doorway of a closed television store near a pay phone. The temperature was fourteen degrees Fahrenheit and it was snowing. Lee was wearing a knee-length leather coat. Prior to arriving at the store, Lee had been across the street visiting a friend. He left his friend's apartment and came across the street to use the pay phone to call for a cab. He had been standing waiting for the cab for over one-half hour. When Officer Jackson first saw Lee, Lee had his hands in his coat pockets and was nervously looking around. Jackson decided to circle the block several times to see what Lee might do. Finally, Jackson decided to park his squad twenty-to-thirty feet down the block from where Lee was standing. Lee saw Jackson drive by, park his squad and then approach him.

It is at this point in the exchange between Jackson and Lee that versions of what happened vary. Lee states that as Jackson approached him, he asked Lee to take his hands out of his pockets, which he did immediately. Lee claims Jackson asked him only once to remove his hands from his pockets. In answer to the question why he was there, Lee says he explained that he was waiting for a cab. Lee claims that the officer then reached into his right coat pocket, found a three-inch pocket knife, handcuffed him and then patted him down. During the pat-down, the officer discovered the marijuana and pipe.

Jackson offered a very different account as to what transpired. He stated that he decided to ask Lee why he was standing at the store front because Lee was looking around nervously. Earlier, Jackson had noticed the length of Lee's coat, which concerned him because he feared Lee may have a hidden weapon. There had been two or three homicides in the vicinity. As Jackson approached Lee, Jackson believed that Lee was nervous about his presence. He noted that Lee had his hands in his coat pockets and ordered him to remove

them. When Lee did not do so immediately, Jackson repeated the order several times until Lee finally complied. Jackson observed that Lee seemed to be holding on to something as he removed his hand from the right pocket. Jackson became concerned for his own safety and decided to conduct a pat-down search. During the pat-down, he discovered a three and one-half inch throwing knife. Jackson arrested Lee for carrying a concealed weapon and immediately conducted a custodial search which produced the marijuana and pipe.

II. ANALYSIS

In reviewing an order denying a motion to suppress evidence, this court will uphold a trial court's findings of fact unless they are clearly erroneous. *State v. Turner*, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987); § 805.17(2), STATS. Whether, however, a search or seizure satisfies the constitutional requirement of reasonableness is a question of law, which this court reviews independently. *Id.* at 137-38, 456 N.W.2d at 833.

The validity of an investigatory stop is governed by *Terry v. Ohio*, 392 U.S. 1 (1968), as codified by § 968.24, STATS. *Terry* and its progeny require that a police officer reasonably suspect, in light of his or her experience, that some criminal activity has taken or is taking place before stopping an individual. This reasonable suspicion must be based on specific articulable facts which, when taken together with rational inferences from those facts, reasonably warrant any intrusion. *State v. King*, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191-92 (Ct. App. 1993). The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of the circumstances. *State v. Chambers*, 55 Wis.2d 289, 296-97, 198 N.W.2d 377, 380 (1972). The question of what constitutes reasonableness is a common sense test, i.e., what a reasonable police officer would reasonably suspect in light of his or her training and experience considering all the circumstances. *State v. Anderson*, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990).

Lee asserts that Officer Jackson had no specific and articulable facts upon which to act and that the facts that did exist were insufficient to give rise to anything more than a hunch because all of Lee's actions were lawful. In sum, Lee argues that the facts do not provide a basis to reasonably suspect that

some criminal activity had taken or was taking place. This court is not persuaded.

Police officers are not to turn their backs on their training nor their experience. To act reasonably, they are required to act just the opposite. Moreover, officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. "If a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry." *State v. Waldner*, No. 95-1291, slip op. at 8, (Wis. Dec. 13, 1996) (citing *Anderson*, 155 Wis.2d at 84, 454 N.W.2d at 766.).

The trial court found the following facts: (1) that Lee was standing in front of a closed television store sometime after midnight; (2) that he had his hands in his pockets; (3) that he was looking around "nervously"; (4) that there had been two or three homicides in the neighborhood recently; and (5) that when the "overall circumstances" are viewed from the officer's perspective, there was sufficient reasonable suspicion for the officer to conduct a *Terry* stop.

The record supports the trial court's findings as well as its conclusion that Jackson's suspicion of criminal activity was reasonable. *Anderson*, 155 Wis.2d at 83, 454 N.W.2d at 766. From Lee's perspective, each of his actions, i.e., going to the pay phone, waiting for the cab and looking about for its anticipated arrival, and keeping his hands in his pockets because of the cold weather, can only be viewed as entirely innocent. This court does not agree. Under the totality of the circumstances present here, both an inference of innocent conduct and an inference of unlawful conduct could be discerned. Jackson's training caused him to approach Lee to clear up why he was where he was when he was. Jackson was concerned about the length of Lee's coat, which could easily hide a gun, because he knew that several homicides had occurred in the vicinity. Even though Lee might innocently have his hands in his pockets, it is equally reasonable to infer that they might also contain a gun. Although it is disputed whether Lee immediately responded to Jackson's request to remove his hands from the pockets of his coat, Lee's response was not satisfactory to Jackson because he noticed hesitancy when removing his right hand.

From this review of the record, we conclude there is a sufficient enough basis to remove this incident from the realm of “hunch.” The record demonstrates sufficient grounds for a reasonable officer to suspect that criminal activity was afoot, the record substantiates the desirability for a pat-down for safety purposes and, therefore, the sequential arrest for carrying a concealed weapon and incident custodial search was legal.

By the Court. – Judgment affirmed.

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