**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

January 21, 1997



**NOTICE**



**No. 96-2698-FT**

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

**In the Interest of Anthony K.,**
**a person Under the Age of 18:**

**State of Wisconsin,**

**Petitioner-Respondent,**

**v.**

**Anthony L.K.,**

**Respondent-Appellant.**

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

SCHUDSON, J.[1] Anthony K. appeals from the dispositional order and adjudication of delinquency, following his admission, for possession of marijuana. He argues that the trial court erred in denying his motion to suppress evidence. This court affirms.

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

Most of the facts relevant to resolution of this appeal are not in dispute. As summarized by the trial court in its written decision denying Anthony K.'s motion:

> On 9/21/95, Jack Bleir, a math teacher at Whitefish Bay High School (WFB), smelled a pungent odor of marijuana while walking through the area of the Memorial Gym of the school. Investigating the source of the odor and climbing the stairs to the balcony of the gym, Mr. Bleir located Anthony [K.], a student at WFB. [Anthony K.] was alone and the only person in this isolated area of the school. Mr. Bleir did not observe [Anthony K.] in possession of or using marijuana. However, [Anthony K.] was not authorized to be in that location at the time and subsequent investigation revealed that he should have been in a classroom far-removed from the Memorial Gym.
>
> Mr. Bleir took [Anthony K.] to the office of Gerald Luecht, an associate principal at WFB. Ed Davis, [Anthony K.'s] special education teacher, was asked to come to the office as well, apparently because of his relationship with [Anthony K.].
>
> Dr. Luecht immediately noted a strong odor of marijuana on the clothing and hands of [Anthony K.]. When asked to empty his pockets, Mr. Luecht noted a similar odor emanating from the cigarette lighter [Anthony K.] produced; in excess of $200 was also found in his pockets.
>
> School records, the contents of which were known to Mr. Luecht, indicated that [Anthony K.] had at least one prior disciplinary referral involving use or possession of drugs at WFB, together with a longstanding pattern of truancy. [Anthony K.] had been arrested recently for possession of a firearm, a fact also known by the associate principal.

[Anthony K.] denied the use or possession of marijuana on school premises and school authorities contacted the police. Police Officer Tom Hrycyna responded to WFB. While his testimony lacked specificity with respect to how many of the facts detailed above were told to him when he initially arrived at school, it is clear from the testimony of Mr. Luecht that all of those facts were made known to the officer prior to the initial patdown. (Officer Hrycyna had independent knowledge of [Anthony K.'s] prior arrest for possession of a gun.)

Shortly after encountering [Anthony K.], the officer conducted a patdown for weapons due to safety concerns. Initially, he discovered a pager on [Anthony K.] which he turned over to school authorities in that pagers are prohibited at WFB. In [Anthony K.'s] crotch area, the officer felt an object, later determined to be a leather pouch containing marijuana, which further heightened Officer Hrycyna's suspicions. It is clear from the testimony of the officer that he did not believe the object to be a weapon, nor could he immediately discern that it was contraband.

When questioned about the object, [Anthony K.] initially refused to acknowledge it was there and subsequently refused to remove it until the officer threatened to "go in and get it". When he was compelled to remove it and the contents was examined, he was arrested for possession of marijuana.

No warrant had been issued authorizing the arrest or search of [Anthony K.].

(Footnote omitted).[2]

Anthony K. does not challenge Officer Hrycyna's legal authority to conduct the initial investigatory stop. He argues, however, that "Officer Hrycyna did not have a reasonable suspicion that [he] was armed and dangerous" and, further, that Officer Hrycyna's search could not be justified as a search incident to arrest. This court concludes that Officer Hrycyna had a reasonable suspicion that Anthony K. was armed and, therefore, regardless of whether the search could have been justified as one incident to an arrest, Officer Hrycyna's search of Anthony K. and seizure of the marijuana pouch were lawful.

The supreme court has explained:

> A frisk is a search. The fourth amendment does not proscribe all searches, only unreasonable searches. In order to

[2] Anthony K. disputes the factual findings in one respect. He contends that "the trial court's finding that Officer Hrycyna was aware of 'all of those facts' known by Assistant Principal Luecht, is not supported by the evidence." Although the testimony at the evidentiary hearing may leave some slight uncertainty regarding whether Officer Hrycyna knew every detail known by Assistant Principal Luecht, and although the trial court's reference to "all of those facts" may leave some uncertainty about the exact facts the trial court had in mind, the record does support the trial court's finding. Luecht testified:

> I explained to Officer Hrycyna our suspicions and where Tony had been found and the smell of marijuana ... and I explained there was also a strong smell on Tony's breath and hands and coat; and at that point, I mentioned that Tony voluntarily emptied his pockets and denied having anything else on him.

Luecht also testified:

> I said Tony was in the hallway, the only one in the hallway. There was a strong odor of marijuana, strong smell of marijuana on his coat and hands. At the time those were my suspicions. He may possibly have other things, but I wasn't sure.

It is undisputed that Officer Hrycyna knew of Anthony K.'s prior weapons arrest. He also testified that he "had contact with [Anthony K.] for various things," although he did not have "the specific record" in front of him at the hearing.

> determine whether a search is reasonable, we balance the need for the search against the invasion the search entails.
>
> In ***Terry [v. Ohio***, 392 U.S. 1 (1968)], the Court applied this balancing test to determine the legality of an on-the-street frisk of a person suspected of casing a robbery location. The Court first considered the need for the search, *emphasizing the need for police to protect themselves from violence*:

[T]here is the more immediate interest of the police officer

> in taking steps *to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him*. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

The Court then balanced the need for police protection against the intrusion on individual rights which a frisk entails. Although the Court viewed a frisk as "a severe, though brief, intrusion upon cherished personal security" and an "annoying, frightening, and perhaps humiliating experience[,]" the Court held that when an officer has a reasonable suspicion that a suspect may be armed, the officer can frisk the suspect for weapons.

> The facts of each case determine the reasonableness of the frisk, and we judge those facts against an objective standard.

> *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.... And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.
>
> In the years since the Court decided ***Terry***, the Court has applied the ***Terry*** standard to different facts. *The constant refrain in these cases has been that the need for police to protect themselves can justify a limited frisk for weapons.*

***State v. Guy***, 172 Wis.2d 86, 93-95, 492 N.W.2d 311, 313-14 (1992) (citations omitted; emphasis added), *cert. denied*, 509 U.S. 914 (1993). *See also* § 968.25, STATS.

In assessing whether police *reasonably* suspected that a person might be armed, this court must determine, from an objective viewpoint, whether the facts, reasonable inferences from the facts, and surrounding circumstances confronting the police justified the frisk. ***State v. Richardson***, 156 Wis.2d 128, 143-44, 456 N.W.2d 830, 836 (1990). Here, where the essential facts are undisputed, this court reviews the trial court's legal conclusion *de novo*. ***State v. Goodrum***, 152 Wis.2d 540, 546, 449 N.W.2d 41, 44 (Ct. App. 1989).

This court concludes that Officer Hrycyna reasonably suspected that Anthony K. might be armed. Hrycyna testified:

Q:Why did you pat him down?

A:Okay. I've known [Anthony K.] for six, seven, eight years. I was aware that a year and a half, year ago, he was arrested by the City of Milwaukee for a weapons charge.

Q:And based on that information, why were you patting him down?

A:For my safety and for the safety of other individuals in the school.

....

Q:Once you decided that you were going to pat him down ... what happened?

A:I patted him down. I noticed a pouch-like object in his crotch. I asked him to remove it. He refused to remove it.

Q:When you say he refused to remove it, what exactly do you mean?

A:I asked him to take whatever it was in his crotch area out. He said no.

Q:At this point did you think that what was in his crotch area was a weapon?

A:I don't know what it was. It could have been a weapon. I wasn't sure.

....

Q:You indicated that you thought it could have been a weapon or anything. What type of weapon did you think it might have been?

A:I wasn't sure. It could have been a small knife, a razor, or any number of different types of items.

Under cross-examination, Officer Hrycyna reiterated that he conducted the patdown for weapons because he feared for his safety.

This court concludes that Officer Hrycyna's fear was understandable and his suspicion that Anthony K. might be armed was reasonable. Officer Hrycyna had been informed that Anthony K. had just been found in a secluded part of a school building under circumstances indicating that he probably was in possession of marijuana. He knew of Anthony K.'s prior arrest involving a handgun.

Although Anthony K. argues that Officer Hrycyna "apparently did not believe [he] was dangerous when he came into the office, because he did not search him then," Officer Hrycyna's "belief" was not required to justify the search. Indeed, ***Terry*** and ***Guy*** anticipate that a suspect's use of a weapon often can be "'unexpected[ ].'" ***Guy***, 172 Wis.2d at 94, 492 N.W.2d at 314. That is, even if Officer Hrycyna did not "believe" that Anthony K. was armed, he reasonably suspected that he might be based on specific reasonable inferences drawn from knowledge of Anthony K.'s prior weapons arrest and Anthony K.'s current suspected possession of marijuana. Officer Hrycyna acted as "a reasonably prudent man" would have acted "in the circumstances," *see* ***id.***, to assure safety for himself and others at the school.[3]

*By the Court.* – Order affirmed.

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

[3] Having affirmed the trial court's denial of Anthony K.'s motion to suppress on this basis, this court need not address the parties' arguments about whether the search could have been justified, as the trial court concluded, as one incident to an arrest. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).