

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3232-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN RICHARD EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
C. A. RICHARDS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Steven Evans appeals a judgment convicting him of possessing THC. He argues that the trial court should have suppressed evidence seized from his pocket when he was searched. The trial court found that

Evans consented to the search. Because the evidence presented at the suppression hearing supports the trial court's decision, we affirm the judgment.

¶2 The trial court's findings of historical fact are sustained unless they are clearly erroneous. *See State v. Johnson*, 177 Wis. 2d 224, 232-33, 501 N.W.2d 876 (Ct. App. 1973). However, this court independently determines whether those facts satisfy constitutional requirements. *See id.*

¶3 After a traffic stop, a police officer asked Evans "if he minded" that the officer searched his car. Evans consented to the search. At the officer's request, Evans got out of the car and stood near the trunk. The officer then asked, "let's start with you. Do you have anything illegal on your person?" After Evans responded "no," the officer said "if you don't mind, I'll start checking – or I'll check you first." Evans did not verbally respond, but turned around and placed his hands on the trunk of his car. The officer told him he did not have to place his hands on the car and could turn around and face the officer. The officer then unbuttoned and searched Evans' left breast pocket and found marijuana.

¶4 The State has the burden of proving by clear and convincing evidence that Evans voluntarily consented to the search. *See State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). Consent may be in the form of words, gestures or conduct. *See id.* Mere acquiescence to the assertion of police authority, however, does not by itself constitute consent. *See State v. Johnson*, 177 Wis. 2d 224, 234, 501 N.W.2d 876 (Ct. App. 1993).

¶5 The record supports the trial court's finding that Evans consented to be searched. Whether he voluntarily consented or merely acquiesced in the assertion of police authority depends on the totality of the circumstances, such as the words spoken, their context, tone of voice and gestures. *See State v. Hughes*,

2000 WI 24, ¶41, 233 Wis. 2d 280, 301-02, 607 N.W.2d 621 (2000). Some of these factors are not readily susceptible to interpretation from a printed transcript. We defer to the trial court's findings regarding these circumstances. *See Younglove v. City of Oak Creek*, 218 Wis. 2d 133, 140, 579 N.W.2d 294 (Ct. App. 1998). The language the officer used does not suggest acquiescence to an assertion of police authority. When he asked for permission to search the car moments earlier, the officer asked Evans "if he minded" a search of the car. He used similar phraseology when he said "if you don't mind, I'll start checking – or I'll check you first." That language, while not in the form of a question, clearly suggests that Evans had the right to refuse. The trial court's finding that by his gesture of assuming a "frisk position" he consented to be searched is not erroneous.

By the Court.—Judgment affirmed.

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

