COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1389-CR **Cir. Ct. No. 2005CF3710**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMAR MARQUIS MCDANIEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Damar Marquis McDaniel appeals from a judgment of conviction for possessing cocaine as a subsequent offense. We conclude that McDaniel's reaching with his right hand around to the small of his back as the lone officer approached him during a traffic stop, in a vehicle that also

included a passenger, rendered the officer's belief that McDaniel may be armed and dangerous constitutionally reasonable to justify a protective search. Therefore, we affirm.

¶2 The facts are undisputed. Milwaukee Police Officer Michael Pendergast was alone, in uniform, driving an unmarked car on patrol around 7:00 p.m., when he saw McDaniel and a passenger in a vehicle travelling toward him displaying a front license plate in the vehicle's front window instead of on its bumper. McDaniel then made a U-turn in front of Pendergast and parked in front of the State Liquor Mart. Pendergast activated his lights, briefly activated his siren, and parked behind McDaniel.

¶3 Pendergast stopped McDaniel for an improper display of his front license plate and approached the driver's side of McDaniel's vehicle. When Pendergast was within about twelve to eighteen inches of McDaniel, he saw McDaniel reach with his right hand toward his waistband. Although Pendergast did not see anything in McDaniel's hand, he knew he was outnumbered, and thought that McDaniel may have been reaching to hide a weapon. Pendergast immediately ordered McDaniel to exit the vehicle. Pendergast then conducted a protective search of McDaniel from behind and felt a lump in the area of McDaniel's buttocks, which Pendergast recognized from experience, was a typical place for concealing narcotics. When questioned, McDaniel admitted that he had cocaine; he removed it and gave it to Pendergast, at Pendergast's request.

¶4 McDaniel was charged with possessing cocaine as a subsequent offender. He moved to suppress the cocaine, challenging the traffic stop and protective search. The trial court conducted a suppression hearing and concluded that the stop and search were justified, and denied the motion. Immediately

thereafter, McDaniel pled guilty to the charge, but challenges the denial of his suppression motion on appeal, pursuant to WIS. STAT. § 971.31(10) (2005-06).[1]

¶5 On appeal, McDaniel concedes the constitutionality of the traffic stop, and the officer's request that he exit his vehicle. He limits his appellate challenge to the constitutionality of the protective search. McDaniel contends that the recent case of ***State v. Johnson***, 2007 WI 32, ¶36, 299 Wis. 2d 675, 729 N.W.2d 182 supports suppression. We conclude that ***Johnson*** is factually distinguishable, and affirm.

¶6 In ***Johnson***, the supreme court summarized the law of search and seizure regarding a protective search incident to an investigative stop.

> During an investigative stop, an officer is authorized to conduct a search of the outer clothing of a person to determine whether the person is armed if the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The test is an objective one: "[W]hether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger" because the person may be armed with a weapon and dangerous. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience."

Id., ¶21 (alterations in ***Johnson***; citations omitted). To conduct a protective search of someone ordered out of a vehicle incident to a lawful investigative stop for a traffic violation, "[the] officer must be able to point to specific, articulable

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

facts supporting a reasonable suspicion that the person is dangerous and may have immediate access to a weapon." ***Id.***, ¶23 (citing ***Pennsylvania v. Mimms***, 434 U.S. 106, 111-12 (1977)). "There is no set standard for what constitutes a reasonable police reaction in all situations. Rather, the reasonableness of the reaction depends upon the circumstances facing the officer. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present." ***Id.***, ¶35 (citations omitted).

> "Whether evidence should be suppressed is a question of constitutional fact." A finding of constitutional fact consists of the [trial] court's findings of historical fact, and its application of these historical facts to constitutional principles. We review the former under the clearly erroneous standard, and the latter independently.

Id., ¶13 (citations omitted).

¶7 Here, the facts were undisputed; the dispute involves the interpretation of whether Pendergast's suspicion was reasonable. Pendergast testified that when he was within close range of McDaniel he saw him reach toward his back; he was concerned that he was "placing [a] weapon[] back there." Pendergast also knew he was alone without backup and outnumbered; he suspected that McDaniel may be carrying a weapon on his person when he exited the vehicle. We conclude that those two facts – that Pendergast saw McDaniel reach behind his back where it was reasonable to believe McDaniel may have had immediate access to a weapon on his person (even upon exiting the vehicle), and that Pendergast was outnumbered – rendered reasonable his suspicion that McDaniel may have been armed and dangerous, as opposed to a mere "inchoate and unparticularized suspicion or 'hunch.'" ***Terry v. Ohio***, 392 U.S. 1, 27 (1968).

¶8 McDaniel contends that ***Johnson***, in which the supreme court held that Johnson's furtive movement inside the vehicle – his head and shoulders moving and disappearing momentarily from view while apparently leaning forward and reaching underneath the car seat (although the officers could not see Johnson's hand(s)) – compels suppression. *See* ***Johnson***, 299 Wis. 2d 675, ¶3. We disagree. Unlike the officers in ***Johnson***, Pendergast observed McDaniel's hand reach behind his back, and knew that he was outnumbered by McDaniel and his passenger, bases to reasonably fear for his safety. Moreover, Johnson was stopped in part because the vehicle's registration had been suspended for an emissions violation, and Johnson had provided the officers with the paperwork indicating that the emissions problem had been corrected. *See* ***id.***, ¶¶2, 4. Thus, once the officers were shown the paperwork, indicating that the emissions problem had been corrected, one of their reasons for detaining Johnson dissolved.[2] *See* ***id.***, ¶4. Pendergast knew that his reason for stopping McDaniel, the improper display of his license plate, had not resolved.

¶9 This case is factually distinguishable from ***Johnson***. We conclude that Pendergast's belief that McDaniel was armed and dangerous, was reasonable considering the totality of the circumstances, and justified a protective search. McDaniel's movement was more than furtive; Pendergast saw him at close range, reaching behind his back, a common place to carry a weapon, and if McDaniel was hiding a weapon, as Pendergast believed he may have been, the reasonably suspected weapon would remain on McDaniel's person or in McDaniel's hand when he exited the vehicle. Johnson's furtive movement leaning forward, and

[2] Police had stopped Johnson for an emissions violation and for his failure to signal for a turn. *See* ***State v. Johnson***, 2007 WI 32, ¶40, 299 Wis. 2d 675, 729 N.W.2d 182.

perhaps reaching underneath the seat, would have revealed a weapon in his hand immediately visible when he exited the vehicle, or hidden underneath the seat and no longer readily accessible to him once Johnson exited his vehicle. Unlike the facts in ***Johnson***, Pendergast was outnumbered, and the problem for which he stopped the vehicle had not been resolved. We conclude that the protective search was justified by Pendergast's reasonable suspicion that McDaniel may have been armed and dangerous.

By the Court.—Judgment affirmed.

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