COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP2974-CR

Cir. Ct. No. 2005CF3822

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Antonio D. Harris appeals a judgment of conviction, entered after a jury found him guilty of possession of cocaine, with

intent to deliver (between one and five grams), second or subsequent offense. *See* WIS. STAT. §§ 961.41(1m)(cm)1r., 961.48(2)(m) (2005–06).[1] The only issue on appeal is whether the circuit court erred when it denied Harris's motion to suppress the cocaine. We affirm.

¶2 The essential facts are undisputed, and are found in the suppression–hearing testimony of the two police officers who arrested Harris. Milwaukee Police Officer Roosevelt Jenkins, who had been assigned to undercover narcotics duty for the past three years, testified that the 2600 block of North 5th Street was a "high drug trafficking area," and that he had personally made undercover drug buys on that block. On June 21, 2005, as part of an investigation into neighbor complaints of drug–dealing in front of 2660 North 5th Street, Jenkins spoke with Angie B., who lived in the lower flat at that address. Angie B. told Jenkins that she had six daughters and, therefore, young men often were hanging around the house. Angie B. told Jenkins that she knew drugs were being sold but she was afraid to ask the young men to leave. Jenkins encouraged her to call the police and assured her that she could remain anonymous. Jenkins told her that police would increase the frequency of patrols in the neighborhood.

¶3 On July 8, 2005, Officer Jenkins was patrolling the area with his partner, Officer Shawn Burger, when they saw two young men standing inside the fenced–in front yard of 2660 North 5th Street. The officers, both wearing full, military–style police uniforms, parked their squad car and got out to talk to the men. Jenkins testified that one of the men, later identified as Harris, "began

[1] All references to the Wisconsin Statutes are to the 2005–06 version unless otherwise noted.

walking backwards." As they approached, Burger asked Jenkins if he had noticed that both men were "wearing ankle bracelets." The officers asked the men to identify themselves and whether they knew anyone at the house. Harris identified himself and said he was visiting "Lisa," who lived in the lower unit. Jenkins testified that Harris "seemed kind of nervous" and that he "kept repeating the questions." Jenkins testified that the officers performed a pat–down search of both men for weapons. Burger patted down Harris. Burger told Jenkins that Harris "was tensing up" and did not spread his legs upon request. Burger told Jenkins that he could feel a "bulge" in Harris's buttocks area. After a computer check showed the existence of a felony "VOP" warrant for Harris, the officers arrested him. Jenkins estimated that he learned of the warrant "within five minutes" of the stopping of the squad car. At the station, Harris retrieved nineteen "corner–cuts" of crack cocaine from his buttocks, at the officers' request.

¶4 Officer Burger testified that Jenkins had told him about the drug–dealing complaints related to the house at 2660 North 5th Street. Burger testified that Harris "started backing up" when the officers walked inside the fenced–in part of the yard. The officers asked Harris "general questions" such as where he lived. Burger testified that Harris kept repeating the questions which "immediately alerted [Burger] that [Harris] [wa]s a little nervous." Harris was wearing shorts, and Burger noticed that Harris was wearing an electronic monitoring bracelet on his ankle, indicating that Harris was either on probation or parole supervision. Burger testified that he thought that Harris may start running. Burger decided to do a pat–down search for weapons because they were in a known drug trafficking area and he feared for his safety. During the pat–down search, Harris's muscles were tense and his hands were shaking. Burger testified that Harris did not spread his feet and "didn't want to comply" with the frisk. Burger testified that he felt an

"unnatural bulge in [Harris's] buttocks area." Burger did not feel anything that threatened the officers' safety and, therefore, did not recover anything from Harris at that time.

¶5 The circuit court made the following findings of fact:

- Both police officers were "very credible."
- The entire block, and "especially" the house at 2660 North 5th Street, was a "high drug trafficking area," and both officers knew that the house had been the subject of drug-dealing complaints.
- Harris "start[ed] walking backwards" when the officers approached.
- When the officers asked Harris for his name and whether he knew anyone at the house, he was "very nervous" and "still doing some backpedaling."
- Officer Burger noticed that Harris was wearing an electronic monitoring ankle bracelet and alerted Officer Jenkins to that fact.
- Because drug dealers are often armed, the officers feared for their safety and, therefore, decided to do a pat-down search of both men.

¶6 A circuit court's ruling on a motion to suppress evidence presents a mixed question of fact and law. ***State v. Wallace***, 2002 WI App 61, ¶8, 251 Wis. 2d 625, 634, 642 N.W.2d 549, 553, overruled on other grounds by ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611. "We will not reverse the circuit court's factual findings unless they are clearly erroneous. However, whether those facts satisfy the constitutional requirement of

reasonableness presents a question of law that we review de novo." ***Ibid.*** (citations omitted).

¶7 An investigatory stop is permissible if the officers reasonably suspect, considering the totality of the circumstances, that some type of criminal activity either is taking place or has occurred. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968); *see also* WIS. STAT. § 968.24.[2] An officer need not have probable cause to arrest; rather an investigatory stop requires only reasonable suspicion. *See* ***State v. Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 470, 700 N.W.2d 305, 312. The reasonable suspicion standard requires an officer to have "a particularized and objective basis for suspecting the person stopped of criminal activity." ***Ornelas v. United States***, 517 U.S. 690, 696 (1996) (citation omitted). An officer must have more than an "inchoate and unparticularized suspicion or hunch." ***Terry***, 392 U.S. at 27. "[T]o justify an investigatory stop, the police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." ***Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d at 470, 700 N.W.2d at 312 (citation and first set of brackets omitted). "[A]n officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop." ***Ibid.***

[2] WISCONSIN STAT. § 968.24 provides:

> 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, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

¶8 In his brief, Harris characterizes the issue on appeal as "whether the officers had a right, based on all of the circumstances … to detain, search and then begin questioning" Harris. Harris suggests that the men were merely "standing in a high crime area" and that factor, standing alone, does not justify detaining Harris. *See* ***State v. Allen***, 226 Wis. 2d 66, 75, 593 N.W.2d 504, 508 (Ct. App. 1999) (Although a person's presence in an area known for drug trafficking is a permissible factor for police consideration, mere presence in such an area, standing alone, will not suffice.).

¶9 Harris's argument is misplaced because it rests on factual findings that the circuit court did not make. Harris asserts that Officers Jenkins and Burger "restrained" Harris and "conduct[ed] the pat[–]down search[] prior to questioning" him. The circuit court, however, found that the officers asked several questions of Harris before conducting the pat–down search.[3] Harris's nervousness when answering those questions was one of the factors that led to the officers' decision to perform a pat–down search. Harris's "backpedaling" away from them was another factor that the officers cited in their testimony. And, the presence of the electronic monitoring ankle bracelet alerted the officers that Harris was either on probation, parole, or released on bail. Those factors, combined with the fact that Harris was standing in the front yard of a house known for drug trafficking, constitute "specific articulable facts" that gave rise to a "reasonable suspicion" that Harris is or was violating the law. *See* ***Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d at 470, 700 N.W.2d at 312.

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[3] Harris does not argue that the circuit court's factual findings were clearly erroneous.

¶10 We conclude that the pat–down search of Harris did not violate Harris's constitutional rights. Harris's conduct during that search—his shaking hands, tensed muscles, and lack of cooperation, coupled with the "unnatural bulge" noticed during the pat–down search, justified the continued detention while the officers ran Harris's name through their computer. Once the officers learned of the existence of the "VOP" warrant, they had probable cause to arrest Harris. Therefore, the circuit court correctly denied Harris's suppression motion.

By the Court.—Judgment affirmed.

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