

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2002

Cornelia G. Clark
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. 01-1545-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-322

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CLINTON T. DONAHUE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
MICHAEL W. BRENNAN, Reserve Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Clinton Donahue appeals from a judgment convicting him of possessing THC, as a second offense. He challenges the denial of a suppression motion, claiming that the police lacked reasonable suspicion to search his car for weapons and that, even if a search was justified, the police exceeded the permissible scope of that search by reaching into the pockets of a

jacket on the front seat of the car. We conclude that the weapons search was reasonable under the circumstances and that Donahue waived any objection to the scope of the search by failing to raise that argument before the circuit court. We therefore affirm.

BACKGROUND

¶2 The police were called to investigate a complaint about a parked car running its engine with a loud exhaust system. The first officer on the scene observed Donahue stretched out on the front seat of the car with a jacket over his head, arms, and torso. When Donahue failed to respond to the officer's knocking on the car window for several minutes, the officer called for an ambulance and backup.

¶3 After continued knocking, Donahue finally began to move his hands underneath the jacket. He then looked out from under the jacket, saw the police, and covered his head again, continuing to move underneath the jacket. Concerned that these furtive movements might indicate that Donahue had a weapon, the officer drew his firearm. Eventually, Donahue sat up, turned off the ignition, rolled down the window, identified himself to the police, and explained that he had dropped off a friend and then had fallen asleep in the car.

¶4 The officer asked Donahue to step out of the car. Donahue said he would if the officer stepped back from his vehicle. Donahue finally exited the vehicle, but immediately reached back into it. The officer pulled Donahue away from the car with some struggling, and asked what he was reaching for. Donahue did not respond. The officer then handcuffed Donahue while he searched the car for a weapon. He did not find a weapon, but did find two baggies of marijuana,

one baggie of cocaine, one baggie of LSD, a digital scale, and a wallet containing \$2,412 in the jacket that was on the front seat.

STANDARD OF REVIEW

¶5 When reviewing the denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000);¹ *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional principles and provisions. *State v. Ellenbecker*, 159 Wis. 2d 91, 94, 464 N.W.2d 427 (Ct. App. 1990).

ANALYSIS

¶6 The parties agree that the officer initiated the contact in his role as a community caretaker, with a legitimate concern that Donahue's failure to respond might be the result of carbon monoxide poisoning.² The police may perform a "protective sweep" of an area within the context of bona fide community caretaker activity to ensure the safety of those on the scene, so long as the sweep is reasonable under the totality of the circumstances. *State v. Horngren*, 2000 WI App 177, ¶20, 238 Wis. 2d 347, 617 N.W.2d 508, *review dismissed*, 2000 WI 121, 239 Wis. 2d 313, 619 N.W.2d 95 (Wis. Sept. 7, 2000) (No. 99-2065-CR). We are

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² The State also notes that the officer would have been justified in detaining Donahue based on the loud exhaust, although no traffic citation was issued. *See* WIS. STAT. § 347.39(1). In light of our decision we need not address this alternate theory.

satisfied that the officer's search of the car for weapons was reasonable under the totality of the circumstances.

¶7 First, the officer could see that Donahue was moving his hands around under his jacket, even after he had seen the police officer knocking on his car windows. Next, Donahue had to be asked several times to exit his vehicle and wanted the officer to back away. Upon exiting his vehicle, Donahue immediately reached back for something. He struggled briefly with the officer who pulled him away from the car, and refused to say what he had been reaching for. Given the percentage of police shootings that occur upon approaching individuals in their cars, *see Michigan v. Long*, 463 U.S. 1032, 1048 (1983), it was reasonable for a police officer confronted with Donahue's actions to be concerned that Donahue might have been hiding a weapon.

¶8 In light of the furtive movements that Donahue had been making under his jacket, we are further satisfied that the jacket was a reasonable place to look for a weapon. On appeal, Donahue argues that the officer could have ascertained that there was no weapon in the jacket by patting it down, and therefore exceeded the permissible scope of the search when the officer reached into the jacket pockets. Donahue did not argue this theory to the trial court, however, and consequently the record does not contain sufficient factual findings to evaluate it. We therefore deem the argument waived. *See State v. Hayes*, 167 Wis. 2d 423, 426, 481 N.W.2d 699 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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

