COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 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 Nos. 01-2355-CR
01-2356
01-2357

Cir. Ct. No. 99-CM-251
99-TR-2221
99-TR-2222

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 01-2355-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID R. MELSTRAND,

DEFENDANT-APPELLANT.

NO. 01-2356
NO. 01-2357

COUNTY OF VILAS,

PLAINTIFF-RESPONDENT,

V.

DAVID R. MELSTRAND,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] David Melstrand appeals judgments for possession of marijuana, speeding and driving without a license. He argues that he consented only to a frisk for weapons and that officer Scott Poupart exceeded the scope of the consent when he reached inside Melstrand's coat and removed what turned out to be a marijuana cigarette. Because Melstrand consented to the frisk and the officer did not exceed the scope of the frisk, this court affirms the judgments.[2]

BACKGROUND

¶2 On November 24, 1999, Poupart and Robert Brandenburg, Lac du Flambleau tribal police officers, pulled Melstrand over for speeding. Brandenburg approached the car and asked Melstrand for a driver's license. Melstrand responded that he did not have a driver's license because he did not have a social security number, which is needed to obtain a license. Melstrand also said that he did not need a driver's license and had caselaw to support his position.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Melstrand also makes numerous other arguments. They include his contentions that the court lacked jurisdiction over the speeding and lack of a driver's license offenses, that he was not required to have a driver's license, that he should not be charged because his violations of the statutes injured no particular person and that his constitutional right to travel was infringed. These issues were either (1) not sufficiently developed or supported by applicable authorities to be susceptible of meaningful appellate review or (2) first raised in the reply brief. As a result, this court does not address them. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988); *see also* ***Northwest Wholesale Lmbr. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

Brandenburg asked Melstrand to step out of the car into the area illuminated by the squad car's headlights.

¶3 Poupart asked Melstrand for permission to conduct a pat-down frisk for weapons, and Melstrand consented. During the frisk, Poupart felt a foreign object in Melstrand's pocket. He described it as something "that could have been small enough, as a pocket knife or something that I did not know, something that could have been in there that might have been able to hurt Officer Brandenburg or myself or possibly yourself."

¶4 Poupart then reached into and removed the object from Melstrand's pocket and found that it was a hand-rolled marijuana cigarette. Poupart then arrested Melstrand.

¶5 Melstrand filed several motions to dismiss, citing various constitutional concerns. The trial court construed these as motions to suppress the marijuana cigarette. It denied them after finding that Melstrand consented to the search and Poupart did not exceed the scope of the consent. The court stated:

> Now, in some instances, Mr. Melstrand may be correct relative to reaching into someone's pocket and the invasion of the Fourth Amendment as a result. Here, however, the officer clearly testified that when he engaged in the weapons search, he felt a bulge that he indicated he was concerned could have been an object such as a pocketknife or something that he felt could have been used by Mr. Melstrand to inflict harm to him or to others, and the reason that he went in is to determine, in fact, whether it was, in fact, a weapon in his pocket and he pulled out the marijuana cigarette.
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> ….
>
> Regardless, the court is going to find that, as Mr. Melstrand has indicated, a weapons search or a pat down is for that purpose, and I believe the law does allow

> an officer to proceed further and reach into a pocket to remove an item that the officer believes may be a weapon and may be used by the individual.

¶6 A jury convicted Melstrand of possession of marijuana, speeding and driving without a license. He now appeals, and all three judgments are consolidated on appeal.

DISCUSSION

¶7 Melstrand concedes that he consented to a pat-down frisk for weapons. He nevertheless argues that Poupart exceeded the scope of consent when he reached inside Melstrand's coat and removed what turned out to be a marijuana cigarette. He contends that his consent to a frisk for weapons did not include Poupart reaching into his pocket and removing the marijuana cigarette. However, reaching into a pocket to ascertain whether an object is in fact a weapon is a natural part of a weapons frisk. Because Melstrand consented to the frisk and Poupart did not exceed the scope of the frisk or the consent, this court affirms the judgments.

¶8 A pat-down for weapons conducted by police, commonly known as a "frisk," is a search. ***State v. Morgan***, 197 Wis. 2d 200, 208, 539 N.W.2d 887 (1995). Consequently, a frisk must satisfy the reasonableness requirement of the Fourth Amendment to the United States Constitution and article I, section 11, of the Wisconsin Constitution. "A consent search is constitutionally reasonable to the extent that the search remains within the bounds of the actual consent." ***State v. Douglas***, 123 Wis. 2d 13, 22, 365 N.W.2d 580 (Ct. App. 1985). "Whether a subsequent investigative intrusion is a continuation of a lawful initial entry to search can only be determined in light of the facts and circumstances of each case." ***Douglas***, 123 Wis. 2d at 23.

¶9 This court applies a two-step standard of review to constitutional search and seizure inquiries. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. The trial court's findings of evidentiary or historical fact will be upheld unless they are clearly erroneous. ***Id.*** This court independently evaluates those facts against the constitutional standard to determine whether the search was lawful. ***Id.***

¶10 The trial court found that Melstrand consented to the frisk. Its finding was not clearly erroneous because both Melstrand and Poupart testified that Melstrand consented. As part of the weapons frisk, Poupart was authorized, after feeling a bulge in Melstrand's pocket, to determine whether the item was a weapon. *See* ***State v. McGill***, 2000 WI 38, ¶34-36, 234 Wis. 2d 560, 609 N.W.2d 795. An officer cannot determine whether certain objects are in fact weapons without removing and examining them. Therefore, the removal of the marijuana cigarette from Melstrand's pocket was reasonable to determine whether it was a weapon. It was not a separate investigative intrusion and was part of the frisk to which Melstrand consented.

By the Court.—Judgments affirmed.

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