COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1472-CR **Cir. Ct. No. 00-CF-3138**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVIS GARNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Davis Garner appeals an amended judgment convicting him of one count of possession of cocaine as a second offense and one count of possession of THC as a habitual criminal. He also appeals an order denying his motion for postconviction relief. Garner claims the evidence against him should have been suppressed because the police lacked reasonable suspicion

to detain him and exceeded the permissible scope of a subsequent pat-down search for weapons. We disagree and affirm for the reasons discussed below.

BACKGROUND

¶2 At the suppression hearing, the arresting officer testified that he responded to a citizen tip that a black male dressed in black overalls and riding a black bicycle had been seen on a certain street corner engaged in a transaction with someone in a passing car involving a white substance. The officer knew the informer as a concerned citizen who had made prior reliable calls regarding drug activity. The officer was also aware that the location described was known to both the police and the community as a drug area which had experienced a wide range of disturbances involving armed subjects, including gunfire.

¶3 The officer arrived at the scene and saw a black male on a dark-colored bicycle nearly up against the passenger side of a car that was stopped in the street. When the officer approached, the car drove off and the man on the bicycle pedaled away. The officer followed and made contact with the cyclist, who turned out to be Garner. The officer instructed Garner several times that he wanted to see Garner's hands, but Garner kept putting them back into his pockets.

¶4 Officer Garner testified he felt concerned for his safety and, therefore, patted Garner down for weapons, working down from Garner's shoulders. The officer felt a bulge in Garner's right front pocket of his jeans area, and squeezed it to see whether it was a weapon. Upon squeezing the object, the officer said he formed the opinion that the object was a plastic baggie, likely filled with marijuana. The officer asked what was in Garner's pocket, and Garner told him keys. The officer then reached into Garner's pocket and retrieved a plastic

baggie filled with marijuana. Another search incident to Garner's subsequent arrest revealed individually packaged rocks of crack cocaine.

¶5 After being charged with possession of THC and cocaine, Garner moved to suppress the evidence obtained during the investigatory stop. The trial court denied the motion, as well as a postconviction motion for reconsideration of the suppression issue, and Garner appeals.

STANDARD OF REVIEW

¶6 When we review a suppression motion, we will defer to the trial court's credibility determinations and will uphold its findings of fact unless they are clearly erroneous. *See* ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238; ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). We will independently determine, however, whether the facts establish that a particular search or seizure violated constitutional standards. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

DISCUSSION

Investigatory Stop

¶7 The reasonable suspicion necessary to detain a suspect for investigative questioning must be based on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that taking action would be appropriate. *See* ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). "The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer

reasonably suspect in light of his or her training and experience?" ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶8 The officer here was able to articulate numerous facts in support of his suspicion that Garner might be involved in drug activity, including that a citizen had reported seeing a person matching Garner's description make a transaction involving white powder, and the officer himself had observed Garner engaged in a conversation with a driver from the passenger side of a stopped car. We agree with the trial court that it was reasonable for the officer to detain Garner to investigate the officer's suspicion that Garner was involved in selling drugs to passing motorists.

Pat-Down Search

¶9 The legality of the initial protective search turns on whether the officer had a reasonable basis to suspect that Garner might be armed and dangerous. *See* ***State v. McGill***, 2000 WI 38, ¶¶17-21, 234 Wis. 2d 560, 609 N.W.2d 795. The officer's suspicion that Garner was engaged in drug dealing and his observation that Garner's hands kept returning to his pockets, coupled with the officer's knowledge that there had been past gunfire incidents in the area, provided a reasonable basis for the officer to perform a protective pat-down search for weapons.

¶10 Garner claims that the officer exceeded the permissible scope of the pat-down search by squeezing the bulge he felt in Garner's pocket. Unlike the situation in ***Minnesota v. Dickerson***, 508 U.S. 366 (1993), however, the officer here testified that he had not yet determined whether Garner had a weapon when the officer manipulated the object in Garner's pocket. Rather, it was only by squeezing the baggie that the officer both satisfied himself that it was not a

weapon and concluded that it was most likely a bag of marijuana. The trial court credited the officer's testimony, and we defer to its credibility determination. Therefore, there is no factual basis to conclude that the officer exceeded the permissible scope of the pat-down search.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).