

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2010

A. John Voelker
Acting 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. 2009AP2934-CR

Cir. Ct. No. 2009CF13

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEANDRE A. BUCHANAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Deandre Buchanan appeals a judgment of conviction, entered on his no contest plea, for possession of THC with intent to deliver (two hundred grams or less). Buchanan argues the circuit court erred by denying his motion to suppress marijuana found during a protective search for

weapons following a routine traffic stop. We conclude the search was justified by specific, articulable facts supporting a reasonable suspicion that Buchanan posed a threat to the officers. Accordingly, we affirm.

BACKGROUND

¶2 At approximately 9:37 p.m. on March 4, 2009, state trooper Randy Gordon clocked Buchanan's vehicle travelling at seventy-eight miles per hour in a posted sixty-five mile-per-hour zone. After Gordon activated his emergency lights, he noticed Buchanan weaving within the lane. Using his vehicle's spotlight, Gordon could see Buchanan moving his shoulder and arm up and down. Gordon would later testify this movement "looked like [Buchanan] was stuffing something either underneath the seat or under his foot area."

¶3 After Buchanan stopped, Gordon approached and informed Buchanan he was speeding. Buchanan explained his speedometer was broken. Gordon asked for Buchanan's license, and then returned to his squad. Throughout the exchange, Buchanan appeared very nervous, and his hands were shaking.

¶4 While checking Buchanan's license, Gordon learned of a pending charge for possession with intent to deliver. Gordon also learned that Buchanan had multiple previous arrests for murder, armed robbery and false imprisonment. Gordon waited for a backup officer before approaching Buchanan again.

¶5 Concerned Buchanan was armed, the officers conducted a protective search of Buchanan and the portions of the vehicle accessible from the driver's seat. The pat-down search produced no weapons. As Gordon bent down to inspect the area around the driver's seat, he smelled marijuana and noticed a green plant underneath the ashtray. Gordon tested the plant, confirmed it was marijuana,

and arrested Buchanan. The circuit court denied Buchanan's motion to suppress the drug evidence.

DISCUSSION

¶6 “Whether evidence should be suppressed is a question of constitutional fact.” *State v. Alexander*, 2008 WI App 9, ¶7, 307 Wis. 2d 323, 744 N.W.2d 909. “A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles.” *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634 (citations omitted).

¶7 Buchanan argues the protective search of his vehicle violated his constitutional rights because it was not based on reasonable suspicion he was dangerous. In *State v. Johnson*, 2007 WI 32, ¶21-22, 299 Wis. 2d 675, 729 N.W.2d 182, our supreme court reiterated the legal principles applicable to protective searches:

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: Whether 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.

....

Circuit courts must decide on a case-by-case basis, evaluating the totality of the circumstances, whether an officer had reasonable suspicion to effectuate a protective search for weapons in a particular case. (Quotations and citations omitted.)

¶8 At the inception of the stop, Gordon witnessed furtive movements that he believed to be an effort to conceal weapons or contraband. While these movements are not enough, standing alone, to establish reasonable suspicion of dangerousness, *see Johnson*, 299 Wis. 2d 675, ¶¶42-43, several other facts absent in *Johnson* are present in this case. During the stop, Gordon learned Buchanan had a pending charge for delivering narcotics. Wisconsin courts have repeatedly noted “the link between dangerous weapons and the drug trade.” *Id.*, ¶29 (collecting cases). In addition, and unlike the defendant in *Johnson*, Gordon had reason to suspect Buchanan was dangerous based on his past criminal history, which included arrests for murder and armed robbery. *See id.*, ¶41. Finally, we note “unusual nervousness is a legitimate factor to consider in evaluating the totality of the circumstances.” *State v. Kyles*, 2004 WI 15, ¶54, 269 Wis. 2d 1, 675 N.W.2d 449.

¶9 Based on the totality of the circumstances, the protective search was supported by reasonable suspicion that Buchanan was dangerous. Consequently, the circuit court properly denied Buchanan’s suppression motion.

By the Court.—Judgment affirmed.

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

