

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 13, 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. 2010AP864-CR**

**Cir. Ct. No. 2008CF941**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DENNIS BUTLER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County:  
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 REILLY, J.<sup>1</sup> Dennis Butler appeals from a judgment of the circuit court convicting him of possession of cocaine. Butler argues that the circuit court

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

improperly denied his motion to suppress the evidence obtained when he was frisked and detained. He contends that the officer did not have probable cause or reasonable suspicion to frisk him. This appeal requires us to decide whether the officer's conduct fell within the "community caretaker" exception to the Fourth Amendment's warrant requirement, and whether the officer was justified in frisking Butler. Because we hold that the officer was lawfully utilizing his community caretaker function, and that his frisk of Butler was reasonable, we affirm the circuit court's judgment.

### FACTS

¶2 At 1:28 a.m. on August 31, 2008, Police Officer Brian Pergande was on routine patrol when he observed a male subject—later identified as Butler—dressed all in black standing in the middle of an intersection. The intersection borders northwest Milwaukee and is considered a high-crime area. Pergande parked his squad car and asked Butler to come out of the traffic intersection and come over to the squad car. Pergande testified that he wanted to make sure Butler was alright, and that Pergande considered it dangerous for someone dressed in all black to stand in the middle of an intersection at night. As Butler moved towards Pergande's squad car, Pergande instructed Butler to remove his hands from his pockets for safety purposes. Butler complied, and provided identification upon Pergande's request.

¶3 Pergande's initial observation of Butler was that he was fidgeting, sweating, and appeared lost and confused. Upon inquiry, Butler said he was looking for the Silk Gentleman's Club. Pergande told Butler that Silk was about one-half mile from the intersection. During this conversation, Butler began walking away from the squad car and put his hands in his pockets again. Pergande

testified that Butler “appeared like he wanted to get away from me.” Based on this conduct, Pergande decided to frisk Butler because Pergande feared that Butler either had a weapon on him or that he was trying to get rid of something.

¶4 During the frisk Pergande felt what he thought was a crack pipe in Butler’s pocket. While Pergande patted him down, Butler reached into his pocket again. Fearing for his safety, Pergande handcuffed Butler. Afterwards, Pergande pulled out the crack pipe from Butler’s pocket and informed Butler that he was under arrest for possession of drug paraphernalia. Subsequently, Pergande found a white rock substance in Butler’s pocket that turned out to be cocaine.

¶5 Butler filed a motion to suppress the evidence, arguing that his stop, frisk, seizure, and arrest by Pergande were conducted without probable cause or reasonable suspicion. Following a suppression hearing, the circuit court denied Butler’s motion to suppress. Butler subsequently pled no contest and was convicted for possession of cocaine. This appeal followed.

¶6 This court is presented with two issues: (1) did Pergande have authority under the community caretaker exception to the Fourth Amendment’s warrant requirement to seize Butler and (2) was Pergande justified in conducting a frisk of Butler?

### STANDARD OF REVIEW

¶7 When we review a denial of a motion to suppress evidence, we uphold the circuit court’s factual findings unless they are clearly erroneous. *State v. Pinkard*, 2010 WI 81, ¶12, \_\_\_ Wis. 2d \_\_\_, 785 N.W.2d 592. Whether Pergande properly exercised the community caretaker function consistent with constitutional requirements is a question of law that we review de novo. *See id.*

¶8 Likewise, we conduct a de novo review to determine whether the facts support Pergande’s claim that he had reasonable suspicion that Butler was armed such that he could frisk Butler. See *State v. Kyles*, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449. The test for whether a frisk for weapons was reasonable is “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger because the individual may be armed with a weapon and dangerous.” *Id.*, ¶10 (citation omitted). In determining whether a frisk was reasonable, “[w]e may look to any fact in the record, as long as it was known to the officer at the time he conducted the frisk and is otherwise supported by his testimony at the suppression hearing.” *State v. McGill*, 2000 WI 38, ¶24, 234 Wis. 2d 560, 609 N.W.2d 795.

## DISCUSSION

### Community Caretaker Function

¶9 Police officers exercise either law enforcement functions or community caretaker functions. *Pinkard*, 785 N.W.2d 592, ¶18. “An officer exercises a community caretaker function ‘when the officer discovers a member of the public who is in need of assistance.’” *Id.* (citation omitted). Thus, police are not limited to taking action only when they have probable cause that a crime was committed. *State v. Anderson*, 142 Wis. 2d 162, 167, 417 N.W.2d 411 (Ct. App. 1987).

¶10 We apply a three-step test to determine whether an officer’s conduct properly falls within the scope of the community caretaker exception to the Fourth Amendment’s warrant requirement. When an officer asserts that he or she is using the community caretaker function, the circuit court must determine: (1) whether a search or seizure within the meaning of the Fourth Amendment occurred; (2) if so,

whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised. *Anderson*, 142 Wis. 2d at 169. The state bears the burden of proof. *State v. Kramer*, 2009 WI 14, ¶17, 315 Wis. 2d 414, 759 N.W.2d 598.

¶11 There is no dispute that Pergande’s frisk of Butler constituted a search within the meaning of the Fourth Amendment. This court must now decide whether the State has satisfied the second and third elements of the *Anderson* test.

¶12 Regarding whether Pergande acted as a bona fide community caretaker, Butler concedes that Pergande acted appropriately when he initially stopped Butler at the intersection. Butler, however, argues that Pergande acted outside the scope of the community caretaker function when he prevented Butler from walking away from the squad car after Butler received directions to the Silk Gentleman’s Club.

¶13 We hold that Pergande properly exercised his community caretaker function during his entire encounter with Butler. Initially, Pergande was acting as a bona fide community caretaker when he investigated why a man dressed in all black was standing in the middle of an intersection at 1:28 in the morning. After removing Butler from the intersection for safety reasons, Pergande observed that Butler was fidgeting, sweating, and appeared lost and confused. Furthermore, Butler did not obey Pergande’s command to keep his hands out of his pockets. Indeed, at one point during his conversation with Pergande, Butler began walking away from the squad car. Pergande even testified that Butler “looked like he wanted to get away from me.” Based upon the totality of the circumstances, we

are satisfied that Pergande continued to act in his community caretaker role throughout his encounter with Butler.

¶14 Finally, regarding the third element of the *Anderson* test, we hold that the public interest in safety outweighs Butler's privacy concerns such that the community caretaker function was reasonably exercised.

### **Officer Pergande's Frisk of Butler**

¶15 To determine whether Pergande's frisk of Butler was reasonable, we will apply the standard set forth by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Court struck a balance between the need for law enforcement officers to protect themselves from harm and the individual's right to personal liberty. *See id.* at 23-25. The Court recognized the dangers faced by police when conducting close-range investigations of suspects. *Id.* at 23-24. Where an officer reasonably believes that his or her safety may be in danger because the suspect the officer is investigating may be armed, it would be unreasonable not to allow the officer to conduct a limited search for weapons. *Id.* at 24.

¶16 In order to limit the state's power to intrude upon individual rights, however, the Court held that to justify a frisk "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. The Court went on to explain that "due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27.

¶17 Using the *Terry* standard, we find that Pergande had a reasonable basis for frisking Butler. When Pergande found Butler, Butler was standing in the middle of an intersection at 1:28 a.m. in a high-crime neighborhood. Butler was fidgeting, sweating, and refused Pergande's commands to keep his hands out of his pockets. Based on these facts, Pergande could draw a reasonable inference that Butler was armed and dangerous. His frisk of Butler was thus justified.

### CONCLUSION

¶18 This court is satisfied that Pergande lawfully seized Butler in the role of the community caretaker function. As noted by the circuit court, this event was all one incident; the transition from the initial questioning to the frisk was based on Pergande's reasonable safety concerns. We also hold that under the *Terry* standard Pergande was justified in frisking Butler.

*By the Court.*—Judgment affirmed.

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

