

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 2003

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. 02-2319-CR

Cir. Ct. No. 02-CM-116

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CONSTANTINO ELMER MIRANDA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Constantino Miranda appeals from a judgment convicting him of unlawfully possessing THC in violation of WIS. STAT. § 961.41(3g)(e). Miranda contends that the search of a cigarette box found on him

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

exceeded the lawful pat down for weapons and that the marijuana found in the box should have been suppressed. We disagree and affirm the conviction.

¶2 The underlying facts are undisputed. Officer Thomas Glau of the Spooner Police Department received a call from dispatch that a runaway juvenile was at the residence of Kip Olson. As Glau approached the Olson residence, he observed a small gray car and van leave the residence at a high rate of speed while kicking up dirt. The mother of the runaway juvenile was in the driveway and told Glau that her daughter was in one of the vehicles speeding away from the residence. Glau pursued the vehicles with his siren and emergency lights activated. He observed both vehicles continuing to speed and run through stop signs. Wisconsin State Patrol Trooper Tony DeStefano heard Glau broadcast the chase over the radio and indicated to Glau he would assist in the chase. The van pulled over, and Glau continued to pursue the car, which finally stopped behind an auto laundry.

¶3 Glau placed his squad car behind the gray car and notified dispatch that he had the vehicle stopped. Within seconds, DeStefano joined Glau. After Glau explained to DeStefano what had happened and because both officers were concerned for their safety due to the eluding, they drew their weapons and ordered the vehicle's occupants to come out with their hands on their head. Initially, the driver and front seat passenger came out of the car. Moments later, the officers noticed Miranda in the rear seat. Glau took charge of the driver. DeStefano took Miranda, handcuffed him and then searched him for weapons. In Miranda's front pocket, DeStefano felt an object he feared might be a weapon. He removed the object, which turned out to be a box-type package of cigarettes. DeStefano flipped open the lid to see if the box contained any kind of weapon and found two marijuana cigarettes, which were the basis for the unlawful possession of

marijuana charge. After finding the marijuana, DeStefano placed Miranda under arrest.

¶4 At the suppression hearing, DeStefano explained that from police training he knew the cigarette box could contain a small weapon. This was his sole reason for looking inside the box. At the suppression hearing, Miranda argued that DeStefano's search of the cigarette box exceeded a lawful pat down for weapons and the evidence should be suppressed. Miranda argued that he was not arrested until after DeStefano searched him and found the marijuana. The trial court concluded that the search was incident to a lawful arrest and denied the suppression motion.

¶5 Miranda does not contest the officer's right to question or search him under *Terry v. Ohio*, 392 U. S. 1 (1968). He renews his argument that he was not arrested until after the search and, therefore, the officer's search was unlawful because it exceeded the scope of a *Terry* pat-down search. He argues that it was unreasonable to look inside the cigarette box for weapons.

¶6 Even if we accept Miranda's argument that the search was limited under the rules of a *Terry* stop and not as a search incidental to an arrest, this court is satisfied the search was permissible. According to *Terry*, a search incident to an investigatory stop must be confined to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29. Wisconsin has codified the *Terry* standard for protective searches in WIS. STAT. § 968.25, which provides in pertinent part:

When a law enforcement officer has stopped a person for temporary questioning pursuant to s. 968.24 and reasonably suspects that he or she or another is in danger of physical injury, the law enforcement officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury and of a sort not ordinarily carried in public places by law abiding persons.

¶7 In *State v. Moretto*, 144 Wis. 2d 171, 174, 423 N.W.2d 841 (1988), the court held that WIS. STAT. § 968.25 permits an officer to search the passenger compartment of a vehicle for weapons where the individual who recently occupied the vehicle is stopped for temporary questioning under sec. 968.24, and the officer reasonably suspects that he or another is in danger of physical injury. Such a search is justified as a preventive measure to ensure that there are no weapons that could be used against the police officers once those detained are allowed to reenter their vehicle. *Id.* at 187. The central policy of § 968.25 is to provide for the safety of the officer by permitting a search for weapons. Comment, Laws of 1969, ch. 255, § 63.

¶8 The discovery of the marijuana was inadvertent. DeStefano was not searching for contraband, but was frisking Miranda for weapons when he encountered the cigarette box, which he reasonably believed may conceal a weapon. DeStefano testified that from his training, small weapons could also be found in items such as a wallet. Obviously, small weapons such as razors or knives could be stored in a cigarette box. Thus, we conclude that it was proper for DeStefano to alleviate his reasonable concern that the cigarette box may have concealed a weapon. The fact that the marijuana cigarettes were discovered in plain view does not render the frisk for a weapon constitutionally infirm.

By the Court.—Judgment affirmed.

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

