

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 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. 02-3315-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02-CF-122

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BARRY L. SCHOUTEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

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

¶1 PER CURIAM. The State appeals an order suppressing evidence in its prosecution of Barry Schouten. The case began when Police Officer Pfalzgraf of the Waupun Police Department stopped and frisked Schouten, and discovered a quantity of marijuana on his person. The trial court concluded that Officer

Pfalzgraf lacked sufficient grounds to frisk Schouten after stopping him. We affirm on the ground that the initial stop was unconstitutional.

¶2 Officer Pfalzgraf was patrolling the downtown area of the City of Waupun just after 2:00 a.m. on April 11, 2002. He observed Schouten and Luke Peachey walking on a moderately lit stretch of Main Street. Officer Pfalzgraf recognized Schouten because Officer Pfalzgraf had arrested him on December 3, 2001, for possessing marijuana and drug paraphernalia. Officer Pfalzgraf also knew that a month earlier the police department had received an anonymous, unverified tip that Schouten was selling illegal drugs in Waupun. Officer Pfalzgraf also knew of several recent late night or early morning burglaries in central Waupun.

¶3 Officer Pfalzgraf proceeded to pull up behind the men, who noticed his presence but continued walking at the same pace. He then got out of his squad car and stopped and questioned them. After they refused to consent to a search, Officer Pfalzgraf frisked them and discovered drug paraphernalia on Peachey, and marijuana on Schouten. The State then commenced this prosecution against Schouten charging felony possession of marijuana with intent to deliver it. The trial court granted Schouten's motion to suppress the marijuana, resulting in this appeal.

¶4 The constitutional standard for police stops, set forth in *Terry v. Ohio*, 392 U.S. 1, 38 (1968), and codified in WIS. STAT. § 968.24 (2001-02), permits a police officer to stop and temporarily detain a person when the officer suspects that the person is committing, is about to commit, or has committed a crime. A police officer need not rule out the possibility of innocent behavior before initiating a stop. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681

(1996). However, the officer's reasonable suspicion must rely on specific and articulable facts and rational inferences from those facts. *Terry*, 392 U.S. at 21. Additionally, "reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." *State v. Williams*, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. In determining whether reasonable suspicion existed, the reviewing court must consider the totality of the circumstances. *Id.* Since the parties here do not dispute the material facts, our review presents a question of constitutional law, which we examine de novo. *Waldner*, 206 Wis. 2d at 54.

¶5 We conclude Officer Pfalzgraf lacked reasonable suspicion to stop Schouten. He knew that Schouten had possessed marijuana and paraphernalia four months earlier, but he observed nothing the night of the stop to believe Schouten again possessed those or other illegal substances. He knew of recent burglaries, but had no reason to suspect Schouten or Peachey of those crimes. They were walking casually, in plain sight, on a primary thoroughfare in downtown Waupun.

¶6 Additionally, Officer Pfalzgraf knew of an anonymous tip, a month old, that Schouten was selling drugs. However, he had no means to judge the reliability of that unverified information, and no other reason to believe Schouten was involved in selling drugs on the night of the stop. Additionally, nothing in Schouten's or Peachey's demeanor either before or after they noticed Officer Pfalzgraf's presence created a reasonable suspicion of recent or anticipated criminal activity. They did not appear furtive, nor did they appear alarmed or disconcerted by Officer Pfalzgraf's presence. In summary, Officer Pfalzgraf observed two men, one guilty of a past drug offense and purportedly though unverifiably involved in more recent drug activity, openly walking down a public

street late at night. Those circumstances did not create a reasonable suspicion of recent, ongoing, or anticipated criminal behavior.

¶7 Our decision makes it unnecessary to determine whether Officer Pfalzgraf lawfully frisked Schouten after stopping him.

By the Court.—Order affirmed.

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

