

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 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. 03-0267-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CF000030

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID A. KRESS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County:
WILLIAM D. DYKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. David Kress appeals a judgment convicting him on one count of possessing methamphetamine and one count of retail theft, both as a repeater. The conviction came on Kress's no contest plea. The State obtained the evidence of the retail theft after detaining Kress in a store parking lot. The issue

on appeal is whether the trial court erred by denying Kress's motion to suppress that evidence. We affirm.

¶2 A pharmacist in a Dodgeville, Wisconsin drug store became suspicious of a man purchasing pseudoephedrine, a component in the manufacture of methamphetamines. He reported his suspicions to the Dodgeville police, along with the man's description and his vehicle license number.

¶3 An officer investigated and located the vehicle in a Wal-Mart parking lot. The officer entered the Wal-Mart and observed the suspect buying Sudafed, a product containing pseudoephedrine. The officer confronted the man, David Frommelt, and then arrested him after discovering drug paraphernalia in his possession.

¶4 By then officers knew that another man had accompanied Frommelt into the Wal-Mart. Frommelt described his companion, who was Kress. Using that information, officers in the store spotted Kress buying Sudafed and coffee filters, an item also commonly used in manufacturing methamphetamines.

¶5 Kress left the store after purchasing his items, looked toward Frommelt's vehicle, where officers and squad cars had congregated, and returned to the store's entryway. There, Officer Ron Gratz observed him "concentrating" on Frommelt's vehicle. As Kress started to reenter the store, Officer Gratz stopped him, placed one hand on his shoulder and one on his arm, and told Kress that they needed to talk. Officer Gratz testified that he then escorted Kress sixty to seventy feet from the store to the squad car congregation, while maintaining physical contact. There, a pat-down ensued. Officer Gratz discovered knives in a pants pocket, and two compact discs hidden inside Kress's shirt. When asked if he stole the CDs from Wal-Mart, Kress admitted that he had. Officers then formally

arrested him. Not more than five minutes elapsed from when Officer Gratz first detained Kress until his formal arrest.

¶6 After the State charged him, Kress moved to suppress the stolen CDs and his admission to stealing them as products of an illegal *Terry* stop and search. The trial court held that the officer who initially detained Kress had a reasonable basis to suspect that he was involved in criminal activity, and that circumstances justified the subsequent pat-down search for weapons. Kress subsequently entered pleas to the shoplifting and possession charges, and appealed his conviction. The issues on appeal are: (1) did Officer Gratz arrest Kress without probable cause in the entryway to Wal-Mart and; (2) if an arrest did not occur at that point, was the pat-down for weapons lawful?

¶7 An arrest occurs when a reasonable person in the defendant's position would have considered himself or herself in custody given the degree of restraint. *State v. Vorburger*, 2001 WI App 43, ¶14, 241 Wis. 2d 481, 624 N.W.2d 398, *rev'd on other grounds*, 2002 WI 105, 255 Wis. 2d 537, 648 N.W.2d 829. "The totality of the circumstances, including what the police officers communicated by their words or actions, controls the outcome under the test." *Id.* Custody means something more than the limited and temporary restraint occasioned by a *Terry* stop. *See Florida v. Royer*, 460 U.S. 491, 501-03 (1983). On reasonable grounds, police may move a person within the general vicinity of a stop without converting it into an arrest. *State v. Quartana*, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). Police may also physically restrain a stopped person without converting the stop into an arrest. *Id.* at 449. Of more significance is the length of the stop, and "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *Id.* at

448. Whether an arrest occurred, based on a given set of facts, is a question of law that this court decides de novo. See *Vorburger*, 241 Wis. 2d at 490.

¶8 We first note that in the trial court Kress challenged his detention in the Wal-Mart entryway as an illegal *Terry* stop. That is the issue he litigated, and the issue the trial court decided. It is only on appeal that he contends that the entryway detention was an unlawful arrest, tested under the more stringent probable cause standard. Generally, we do not consider issues that were not raised in the trial court. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). We may, however, consider constitutional issues if the facts are undisputed and the issue fully briefed. *W.W.W. v. M.C.S.*, 161 Wis. 2d 1015, 1025 n.7. We choose to address the merits of the arrest issue.

¶9 The record demonstrates that Officer Gratz stopped Kress in the Wal-Mart entryway, but did not arrest him until after frisking him in the parking lot. Officer Gratz reasonably put his hands on Kress and restrained him in order to move him away from a crowded shopping area. The physical restraint was brief and not particularly forcible nor incapacitating. It did not approach the restraint involved in transporting a person in the back of a police car, which may occur during a stop. See *Quartana*, 213 Wis. 2d at 449. Furthermore, the entire detention lasted only a few minutes and took place entirely in a public area. Until the frisk revealed stolen goods on Kress's person, neither the demeanor, statements, nor conduct of the detaining officers gave Kress any reasonable basis to believe that the detention would last any longer than necessary to conduct a brief investigation. We conclude that, under the totality of the circumstances, Kress was not arrested in the entryway but was detained for a *Terry* stop.

¶10 We also conclude that Officer Gratz lawfully frisked Kress. Police may frisk a detained individual on a reasonable belief that the individual is armed and presently dangerous to the detaining officers or to others. *Terry v. Ohio*, 392 U.S. 1, 23 (1968). The reasonable suspicion necessary to justify a frisk must be based on specific and articulable facts and any rational inferences that may be drawn from those facts. *Id.* at 21. Here, Officer Gratz and the other detaining officers had good reason to believe that Kress was involved in the methamphetamine trade. Officers may reasonably suspect that one involved in illicit drug activity may be armed and dangerous. *See State v. Kulp*, 2002 WI App 17, ¶7, 250 Wis. 2d 296, 640 N.W.2d 551. Moreover, the detention took place in a parking lot with “numerous people around.” These circumstances justified the frisk.

By the Court.—Judgment affirmed.

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

