

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2011

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. 2010AP2407-CR

Cir. Ct. No. 2009CM1263

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FELTON O. SHANDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Felton O. Shands appeals from a judgment entered after the circuit court denied his motion to suppress and he pled no contest to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

carrying a concealed weapon in violation of WIS. STAT. § 941.23. Shands argues that the police lacked a reasonable belief that he was armed and dangerous when they searched him during a field interview and discovered a concealed weapon. We disagree and affirm.

BACKGROUND

¶2 The facts as developed at the suppression hearing were as follows. On March 11, 2009, in the 3500 block of North Ninth Street in the City of Milwaukee, Milwaukee Police Officers Jasen Rydzewski and Jermel Wilder were on a directed foot patrol mission in a known high crime area, on the lookout for drug trafficking and violent crime. Officer Rydzewski testified that at about 10:22 p.m. he observed a legally parked vehicle with the engine running and the rear tail lights on. Officer Rydzewski stated that Milwaukee police officers know that drug traffickers often deal drugs within vehicles and also transport narcotics and firearms within vehicles. Officer Rydzewski testified that in his experience, the area where the vehicle was parked was a high crime area, known for drug trafficking and violence, and an individual sitting inside a parked vehicle in that area could possibly warrant further investigation.

¶3 Officer Rydzewski testified that he and Officer Wilder approached the vehicle to see if anybody was inside, if the vehicle was vacant, or if there was anything going on inside the vehicle. He testified that he “had previous dealings with ... pistols and also narcotics inside vehicles that are running.” When Officers Rydzewski and Wilder reached the vehicle, they shined their lights inside, and Officer Rydzewski saw an individual, later identified as Shands, holding what appeared to be a hand-rolled cigarette. Officer Rydzewski saw Shands

immediately make a snap or jerk movement, which Officer Rydzewski described as “furtive,” throwing the cigarette to the floor.

¶4 Officer Rydzewski testified that he found Shands’s sudden movement suspicious, as though Shands wanted to get rid of evidence. Consequently, Officer Rydzewski suspected that the cigarette may have contained narcotics.² Based on that belief, Officer Rydzewski opened the driver’s door and asked Shands to exit the vehicle. Shands complied and Officer Rydzewski immediately searched Shands for weapons out of concern for the officers’ safety, recovering a gun under Shands’s left front breast pocket.

¶5 Officer Wilder testified that he and Officer Rydzewski approached the running vehicle to perform a welfare check to see if anyone needed assistance. When they flashed their lights into the vehicle, Officer Wilder observed Shands lower a hand-rolled cigarette and drop it to the floor. Officer Wilder testified that he asked Shands what he had in his hand; Shands denied having anything in his hand and appeared very tense and nervous. Shands’s gesture with the hand-rolled cigarette, coupled with his denial of having had anything in his hand, raised Officer Wilder’s suspicions because, as he said, “I know what I saw.”

¶6 Although Officer Wilder admitted on cross-examination that, to him, the hand-rolled cigarette did not appear to contain marijuana, the totality of the circumstances—including Shands’s location in a high crime area, the running vehicle, Shands’s gesture with the cigarette, and Shands’s nervousness and denial of having anything in his hand—made Officer Wilder suspicious that criminal

² Presumably Officer Rydzewski used the word “narcotics” to refer to illegal drugs generally, although its precise definition is more limited.

activity was afoot and left him concerned for the officers' safety. Officer Wilder asked Shands for his name. Officer Rydzewski then asked Shands to step out of the vehicle, and performed the search.

¶7 After discovering the weapon, the officers took Shands into custody, and conducted a routine “wanted check[.]” The check revealed that the license plates on Shands’s vehicle were listed for a different vehicle and that Shands had an outstanding arrest warrant for operating a vehicle after revocation. Officer Rydzewski testified that even if he had not found the gun, a routine check on the plates and of Shands’s name would have revealed that the plates did not belong to that vehicle and that Shands had an open warrant. Officer Wilder testified that even if they had not found the gun, he would have asked Shands for his name and run a check on it.

¶8 The State filed a criminal complaint charging Shands with carrying a concealed weapon. Shands moved to suppress the seizure of the gun. During a hearing on the motion to suppress, Officer Rydzewski, Officer Wilder, and Shands all testified. Following the hearing, the circuit court denied the motion to suppress finding that the officers had reasonable suspicion to justify a protective search for weapons, and that even if they did not have reasonable suspicion, the police officers would have inevitably found the gun after discovering that there was a warrant out for Shands’s arrest. Following the circuit court’s decision, Shands pled no contest to the charges. He now appeals.³

³ Generally, a guilty or a no-contest plea waives the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. See *County of Racine v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). In a criminal case, an exception exists for orders denying motions to suppress evidence or motions challenging the admissibility of a statement of a defendant. WIS. STAT. § 971.31(10).

DISCUSSION

¶9 Shands argues that the circuit court erred in denying his motion to suppress because the police lacked an objectively reasonable belief that he was armed and dangerous when they searched him for weapons. Shands's challenge is limited to two specific findings of fact and the circuit court's overall finding of the reasonableness of the search. Shands disputes the circuit court's findings that: (1) Shands's movement was "furtive"; and (2) it was reasonable for the officers to infer that his hand-rolled cigarette may contain narcotics. Shands contends that the search was unreasonable because throwing or dropping the cigarette was not a furtive gesture, the cigarette did not contain narcotics, and the balance of the circuit court's unchallenged findings was insufficient to establish reasonable suspicion for a search. We conclude, based upon the totality of the circumstances, including Shands's movement with the hand-rolled cigarette, that the officers' concerns for their safety were objectively reasonable and the search was lawful. We affirm.

¶10 Although the Fourth Amendment prohibits unreasonable searches and seizures, it is well established that a protective search of an individual suspected of criminal activity is permitted if "'a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety and that of others was in danger' because the individual may be armed with a weapon and dangerous." *State v. Kyles*, 2004 WI 15, ¶10, 269 Wis. 2d 1, 675 N.W.2d 449 (footnote and citations omitted). Thus, the test is an objective one, based upon the totality of the circumstances, including the police officer's subjective fears or beliefs, see *State v. Sumner*, 2008 WI 94, ¶47, 312 Wis. 2d 292, 752 N.W.2d 783, the officer's experiences, see *State v. Bailey*, 2009 WI App 140, ¶¶36-37, 321 Wis. 2d 350, 773 N.W.2d 488, and any fact known to the officer at the time of the

search, see *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); see also *State v. McGill*, 2000 WI 38, ¶24, 234 Wis. 2d 560, 609 N.W.2d 795.

¶11 A police “officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger.” *State v. Guy*, 172 Wis. 2d 86, 94, 492 N.W.2d 311 (1992) (citing *Terry*, 392 U.S. at 27). “[A]n officer must have a reasonable suspicion—less than probable cause, but more than a hunch—that someone is armed before frisking that person for weapons.” *Id.* at 95.

¶12 Ultimately, the test balances the need for police protection against the intrusion of the search on an individual’s rights. See *id.* at 94. Noting that the police need to protect themselves from violence, the Wisconsin Supreme Court stated:

[T]here is the more immediate interest of the police officer in taking steps to assure himself [or herself] that the person with whom he [or she] is dealing is not armed with a weapon that could unexpectedly and fatally be used against [the officer]. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

Id. at 93-94 (citing *Terry*, 392 U.S. at 23) (first set of brackets in *Guy*).

¶13 In a review of the reasonableness of a police officer’s suspicions, “we uphold [the] circuit court’s findings of fact unless they are against the great weight and clear preponderance of the evidence.” *Kyles*, 269 Wis. 2d 1, ¶6 (footnote and citation omitted). “Whether the facts satisfy the constitutional requirement for performing a protective search for weapons ... is a question of

constitutional law” which we decide independently of the circuit court but benefitting from its analysis. *Id.*, ¶7.

¶14 Here, the circuit court found the search reasonable under the *Terry* analysis set forth above, but regardless, also determined that the search was valid under the inevitable discovery doctrine. Because we conclude that the police had reasonable suspicion for a weapons search, we need not address the applicability of the inevitable discovery doctrine. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

¶15 In ruling that the search was reasonable, the circuit court found both Officers Rydzewski and Wilder credible and specifically found that where their testimony conflicted with Shands’s testimony, Shands was not credible. We give deference to the credibility findings of the circuit court as it is in the best position to determine credibility. *See* WIS. STAT. § 805.17(2). The circuit made the following findings of fact:⁴

- In March 2009, Officers Rydzewski and Wilder were on a special directed foot patrol mission because of high crime levels, including drug trafficking and violent crime, in the area.

⁴ The circuit court also made findings pertinent to its inevitable discovery ruling. Because we do not reach the issue of inevitable discovery, we do not repeat those findings here.

- It was 10:22 p.m. when the officers observed a vehicle that was running and parked with its rear tail lights on.
- Because of the purpose of the special patrol, Officer Rydzewski approached the vehicle to see if anyone was in it, if the vehicle was vacant, and if there was anything going on in the vehicle.
- Milwaukee police officers know that drug traffickers do drug deals within vehicles and transport narcotics and firearms inside vehicles.
- The officers shined their lights inside the vehicle and saw a hand-rolled cigarette in Shands's hand, which Shands immediately and intentionally threw to the floor in a snap or jerk motion.
- Officer Rydzewski opened the door and asked Shands to step out; Shands complied and Officer Rydzewski searched him, discovering the concealed gun.
- Shands's furtive movement with the hand-rolled cigarette, led Officer Rydzewski to believe that the cigarette may contain narcotics, causing him to search Shands out of concern for the officers' safety.
- Officer Wilder saw Shands make a furtive movement with his right hand in which he lowered and dropped a hand-rolled cigarette.
- When Officer Wilder asked Shands what was in his hand, Shands appeared very nervous and denied holding anything. Shands's demeanor and deception caused Officer Wilder to wonder what Shands was trying to hide and whether he had weapons.

¶16 Shands challenges two specific factual findings of the circuit court: (1) that the snap or jerk movement was “furtive”; and (2) that it was reasonable for Officer Rydzewski to believe that there were narcotics in the vehicle based on the hand-rolled cigarette.

¶17 First, “furtive” is an apt characterization of suddenly tossing a hand-rolled cigarette to the floor as soon as uniformed police officers shine lights on it. It is not clearly erroneous for the circuit court to consider that gesture, under the circumstances here, as an attempt to hide something to avoid its detection. *See, e.g., Bailey*, 321 Wis. 2d 350, ¶32 (defendant’s three to five kicks, which officer believed were an attempt to hide something, described as “furtive”).

¶18 Second, and more importantly, whether the toss-down of the hand-rolled cigarette fits the definition of “furtive” is really beside the point. The point is that the gesture and timing, vis-à-vis the shining of the light, can reasonably be interpreted as an attempt to hide something. It is noteworthy that Shands does not dispute the circuit court’s finding that he had a hand-rolled cigarette in his hand and that he threw it to the floor in a snap or jerk motion as soon as the police officers shined their lights on it. Thus, the issue is whether that gesture of the snap or jerk motion, tossing down the hand-rolled cigarette when the light shone on it, could reasonably be viewed by officers under all the circumstances here, as an attempt to get rid of evidence of a crime. We conclude that it can.

¶19 Shands argues that the gesture was not “furtive” but rather resulted because Shands was startled by the sudden light. However, “[p]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.” *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). Perhaps

more important to the objective analysis, we note that it is equally reasonable that the officers would find Shands's nervousness unusual and suspicious, given the fact that Shands chose to sit in his parked vehicle, while it was running with the rear tail lights on, in a high crime neighborhood at night. He in effect advertised his presence. It should not have been so surprising to him then to be approached by someone.

¶20 Next, Shands contends that it was unreasonable for Officer Rydzewski to conclude that the cigarette contained narcotics. Officer Rydzewski testified that because Shands threw the hand-rolled cigarette down as soon as they illuminated it, it looked to him like Shands wanted to get rid of evidence, which caused him to believe that the cigarette may contain narcotics. It was reasonable for Officer Rydzewski to infer the presence of narcotics, or illicit drugs, based on his experience with drug arrests in that neighborhood, the general police knowledge about drug and gun activity in that area as evidenced by the special directed foot patrol he and Officer Wilder were assigned to, and Shands's furtive gesture with the hand-rolled cigarette. Even when applying the objective test, the officers' general and specific knowledge are appropriate considerations. *See Kyles*, 269 Wis. 2d 1, ¶39.

¶21 It is true that Officer Wilder testified on cross-examination that he did not think that the cigarette contained marijuana. But, like Officer Rydzewski, he became suspicious of criminal activity when he asked Shands what had been in his hand and Shands denied having anything. As Officer Wilder put it, "I know what I saw." Shands's denial along with the fact that he was very tense and nervous, contributed to Officer Wilder's suspicions of criminal activity and made him concerned for the officers' safety.

¶22 Both officers subjectively believed that Shands was involved in some criminal activity. To investigate further, they asked Shands to get out of the vehicle, leading to the discovery of the concealed gun. When Officer Rydzewski was asked on cross-examination to explain the reason a thrown-down cigarette caused him concern over officer safety, he explained:

if it was narcotics, you know, possibly this particular person has a -- has a choice to make on whether he's going to possibly fight, possibly flee. I don't know what his current situation is. I don't know this particular subject that we're talking to. There is an unknown aspect of this that I don't know exactly where this particular traffic stop can go.

If this is narcotics, it's -- it's a particularly precarious position for an officer to be in when he's got a violation such as, you know, how many other narcotics he may have on him. I've had other subjects like that. So, in this particular case, all -- all elements combined, we conducted that officer safety pat-down because of the unknown.

¶23 We conclude, based upon the totality of the circuit court's findings of fact, that Officers Rydzewski and Wilder had sufficient reasonable suspicion that Shands may be armed and dangerous to justify the search. We identify five factors, present here, that we have recognized as relevant to the reasonable suspicion analysis in other cases, that contributed to the totality of the circumstances justifying the search.

¶24 High crime area: Shands does not dispute that he was in a high crime area at the time of the search. Location is a well-established relevant factor in justifying a search. See *Kyles*, 269 Wis. 2d 1, ¶62 (“Whether the geographical area in which a frisk occurs is perceived as a ‘high-crime’ area can be one of the factors considered in justifying a frisk.”); see also *Bailey*, 321 Wis. 2d 350, ¶37.

¶25 Time of day: Shands does not dispute that the search occurred at 10:22 p.m. “We have consistently upheld protective frisks that occur in the evening hours, recognizing that at night, an officer’s visibility is reduced by darkness and there are fewer people on the street to observe the encounter.” *McGill*, 234 Wis. 2d 560, ¶32; *see also Kyles*, 269 Wis. 2d 1, ¶58.

¶26 Unusual nervousness: Shands does not dispute that he appeared nervous and tense when approached by the police officers. “[U]nusual nervousness is a legitimate factor to consider in evaluating the totality of the circumstances.” *Kyles*, 269 Wis. 2d 1, ¶54. Although Shands tries to characterize his nervousness as a common startle reflex, his explanation fails because *he* was the one who *chose* to sit in a running vehicle with the tail lights on, at night in a high crime neighborhood. Having placed himself in a position to be observed and intruded upon, his nervousness was unusual and cause for reasonable suspicion.

¶27 “Furtive” or unexplained gesture: Whether “furtive” or not, Shands’s gesture of throwing down the hand-rolled cigarette was relevant to the overall evaluation of whether Shands was engaged in criminal activity. It was reasonable to believe, as Officer Rydzewski did, that the cigarette was suspect, perhaps containing drugs, given the nature of the officers’ directed patrol, the officers’ knowledge that they were in a high crime area known for drug trafficking, the officers’ experience with drug trafficking out of vehicles, and the timing of the disposal of the cigarette as soon as the officers’ lights shone on it. Shands’s subsequent denial enhanced the reasonableness of that belief. “The importance of a movement or gesture is influenced by its nature, its timing, and whether it can be explained either by the suspect or by the officer’s subsequent observations.” *Sumner*, 312 Wis. 2d 292, ¶26.

¶28 Disingenuous response: Officer Wilder gave Shands an opportunity to explain his snap or jerk of the cigarette and his nervousness when Officer Wilder asked him what was in his hand. Instead, Shands denied having had anything in his hand. If Shands was in fact simply startled by the officers, causing him to snap or jerk the cigarette to the ground, Shands could have explained as much to Officer Wilder, but he did not. A reasonable officer, having just seen something in the suspect's hands and hearing this denial, had a reasonable basis to believe the suspect was engaged in criminal activity. *State v. Bridges*, 2009 WI App 66, ¶20, 319 Wis. 2d 217, 767 N.W.2d 593 (“The response that a person provides to an officer’s inquiry, including the absence of or refusal to provide a response, may provide information that is relevant to whether a protective search is reasonable, and is therefore a factor to be considered alongside other factors that together comprise the totality of the circumstances.”); *see also Bailey*, 321 Wis. 2d 350, ¶38.

¶29 The officers thus had a reasonable suspicion that Shands may be involved in drug trafficking, prompting further investigation. When they asked him to get out of the vehicle, the officers became concerned for their safety because they were in close proximity to someone who may be involved in drug trafficking. Because they knew that drug trafficking is often linked with guns, they reasonably believed they were in danger and were justified in searching Shands. Consequently, we affirm.

By the Court.—Judgment affirmed.

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

