COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3172-CR **Cir. Ct. No. 02CF001379**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD A. WASHINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Reginald A. Washington appeals from the judgment of conviction entered against him. He argues on appeal that he was unlawfully searched when he was stopped by the police, and that the circuit court erred when it denied his motion to suppress evidence. Because we conclude that

the officer who frisked Washington did so with a reasonable suspicion that Washington might be armed, we affirm the judgment of conviction.

¶2 Washington pled no contest to one count of possession of a controlled substance with intent to distribute. The court sentenced him to three years of initial confinement and four years of extended supervision. Prior to entering his plea, Washington moved to suppress evidence obtained when he was frisked by a police officer.

¶3 Officer Joseph Labatore testified at the suppression hearing that on the night of the stop, he was patrolling at about 10:30 p.m. with another officer in what he described as a "high drug crime area" in Kenosha. As they drove, they saw a car parked in front of what he described as a "known drug house." They noted the license plate of the car and found out that the plate had been suspended for an emissions violation. They went back to find the car and discovered that the car was then moving. The officers then turned on the lights and attempted to stop the car. They followed the car for about two blocks before it stopped. While they were following the car, Labatore noticed that the passenger was "making movements in his seat back and forth."

¶4 Labatore testified that after stopping the car, he went to the passenger side of the car and saw Washington sitting "still and straight … just kind of rigid." The other officer told Labatore that because they had seen Washington making unusual movements in the car, Labatore should pat him down for weapons. Labatore did so and found a bag of crack cocaine in Washington's pocket. The circuit court then denied the motion to suppress, finding that:

> Given the time of night it was, given the movement in the car that was observed by the officer, given the manner in which Mr. Washington was conducting himself, the officer

> I believe was justified for his own protection and safety while the car was stopped to pat down the passenger for weapons again because of the neighborhood, because of where the vehicle had just come from, the time of night.

¶5 Washington argues that the circuit court erred when it denied his motion to suppress because the officer's concern was a generalized concern for safety and not a reasonable suspicion that Washington was armed. Courts determine whether such a search is reasonable by balancing the government's need to conduct the search against the invasion the search entails. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). In reviewing the denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Williamson***, 113 Wis. 2d 389, 401, 335 N.W.2d 814 (1983). We then independently review those facts to determine whether the constitutional requirement of reasonableness is satisfied. ***Id.***

¶6 The Wisconsin Supreme Court has held that

> protective frisks are justified when an officer "has a reasonable suspicion that a suspect may be armed." ***State v. Morgan***, 197 Wis. 2d 200, 209, 539 N.W.2d 887 (1995) (citing ***State v. Guy***, 172 Wis. 2d 86, 94, 492 N.W.2d 311 (1992), *cert. denied*, 509 U.S. 914 (1993)). The "reasonable suspicion" must be based upon "specific and articulable facts," which, taken together with any rational inferences that may be drawn from those facts, must establish that the intrusion was reasonable. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (citing ***Terry***, 392 U.S. at 27).
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> The reasonableness of a protective frisk is determined based upon an objective standard. That standard 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." ***Terry***, 392 U.S. at 27. We apply this standard in light of the "totality of the circumstances." ***Richardson***, 156 Wis. 2d at 139-40.

State v. McGill, 2000 WI 38, ¶¶22-23, 234 Wis. 2d 560, 609 N.W.2d 795.

¶7 We conclude, as did the circuit court, that based on the totality of the circumstances known to the officers at the time, including the location, the time of night, and Washington's movements in the car and nervousness when stopped, the officer had a reasonable suspicion that Washington might be armed. Washington argues that this case is similar to ***State v. Mohr***, 2000 WI App 111, ¶15, 235 Wis. 2d 220, 613 N.W.2d 186, in which we concluded that a frisk was unreasonable. We conclude that ***Mohr*** can be distinguished on its facts. In that case, we concluded that the frisk was unreasonable because the frisk occurred more than twenty-five minutes after the initial traffic stop and "the most natural conclusion [was] that the frisk was a general precautionary measure, not based on the conduct or attributes of Mohr." ***Id.***[1] In this case, however, the officers decided to frisk shortly after the car was stopped and because of the neighborhood, their observations of Washington, and time of night. The officers had a reasonable suspicion that Washington was armed and the circuit court properly denied the motion to suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

[1] We also are not persuaded by the State's argument that Washington's case is distinguishable from ***State v. Mohr***, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186, because Washington was more cooperative than Mohr. His cooperation does not make the frisk more reasonable.