COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1069-CR **Cir. Ct. No. 2009CM5918**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMONTE D. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE K. FIORENZA, Judge. *Reversed.*

¶1 FINE, J. Demonte D. Miller appeals the judgment entered on his guilty plea to illegally carrying a concealed weapon, *see* WIS. STAT. § 941.23

(2009–2010), and from the circuit court's order denying his suppression motion.[1] He contends that the police unlawfully stopped and frisked him. We agree and reverse.

I.

¶2 At approximately 8 p.m. in mid-November of 2009, Milwaukee police officers stopped and frisked Miller, and found a handgun in the right back pocket of his baggy jeans. Miller and about a dozen others were holding a quiet candlelight vigil for Miller's best friend, who had been killed the night before. One of the officers, Jeffrey Cline, testified that he and other officers were on what he called a "directed patrol mission" of an "Anti-Gang Unit," to flood high-crime areas with officers under a "Safe Streets Initiative." According to the officer, they were in that area because of the previous night's homicide, presumably the one for which the deceased's friends and neighbors were holding the vigil. He told the circuit court that there were three patrol cars cruising the area together when he and his partner saw Miller, who was at the vigil, walk away from the group, after "tak[ing] a look at us." He was the only one to leave the group at that time. The officer testified that as Miller walked away, "[h]e appeared to grab his right side[,]" which the officer and his partner interpreted as "a weapon retention" check. The officer said that this was significant because the "majority of people, on the streets don't have holsters."

[1] 2011 Wis. Act 35 modified Wisconsin's laws to permit licensed persons to carry concealed weapons. *See* 2011 Wis. Act 35, § 38 (creating WIS. STAT. § 175.60(2g); § 54 (creating WIS. STAT. § 941.23(2)(d); § 101 (With exceptions not material here, the "act takes effect on the first day of the 4th month beginning after publication," which was July 22, 2011.).

A defendant may appeal the denial of a motion to suppress evidence even though he or she has pled guilty. WIS. STAT. § 971.31(10).

> They carry their weapons, if it's a gun or a knife, pretty much in their pants pocket, which makes it loose. If they see the police, they -- they'll make a movement towards the gun just to make sure that it's still there, that it's not going to fall out, or that it's not in plain view. And that's why, like I said, they do a security check. They grab hold of it. That may not be the weapon, maybe in the general vicinity of where the weapon is.

¶3 Officer Cline had his partner stop their squad car, and Cline got out to confront Miller. He told Miller to stop and to "keep your hands up." Miller complied. The officer then asked Miller if he was armed, and Miller replied that he was not. Officer Cline testified that "[f]or officer safety purposes, believing that he may have a weapon, I patted him down. I attempted -- I attempted to pat him down." He told the circuit court that he "was not able to continue" because Miller started to lower his arms. An officer from one of the other squad cars then finished the frisk. That officer, who also testified at the suppression hearing, discovered a "9 mm Ruger" in Miller's "[r]ight rear pants pocket."[2] Both officers told the circuit court that neither had seen Miller before that night.

¶4 Although Miller and two friends testified and gave slightly different takes on what happened that night, the circuit court credited the officers' version and found the following:

- "The defendant was the sole person that was walking away as the police approached."
- "He made his move to the right side. The officer did believe [this] to be a security check for a weapon."

[2] As seen below, the circuit court referred to the gun as a "Luger." Both "Ruger" and "Luger" appear in the transcript. Both are firearms. Whether the gun was a Luger or a Ruger is not material to our analysis.

- "And this all occurred the night after a homicide occurred at that exact address."

The circuit court concluded: "I do believe, based upon all the facts before the officers, they had a right to stop this defendant, and did have a right for officer safety to do this pat down, and a Luger was found in the right side, and the officer did see it on the execution [of the search]." Miller does not contest the circuit court's findings of fact. On our *de novo* review of the circuit court's legal conclusion, we reverse.

II.

¶5 The dispositive issue here is whether Officer Cline lawfully stopped Miller to pat him down. If he did not, a curtain falls and everything the officers did after that falls with it. *Cf.* ***State v. Morgan***, 197 Wis. 2d 200, 217, 539 N.W.2d 887, 894 (Geske, J., concurring on behalf of six justices) ("[H]indsight cannot constitutionally be employed to justify a pat-down."); ***Id.***, 197 Wis. 2d at 223, 539 N.W.2d at 897 (Abrahamson, J., dissenting) ("[H]indsight does not satisfy the federal or state constitution.") As Miller recognizes by not challenging the circuit court's findings of fact, a circuit court's findings are invulnerable on appeal unless they are "clearly erroneous." *See* WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Our review of the circuit court's legal conclusion is, however, *de novo*. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137–138, 456 N.W.2d 830, 833 (1990).

¶6 The seminal stop-and-frisk decision is ***Terry v. Ohio***, 392 U.S. 1 (1968), which recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an

arrest." ***Id.***, 392 U.S. at 22. Merely "'look[ing] suspicious'" is not enough, however. ***Brown v. Texas***, 443 U.S. 47, 51–52 (1979). Rather, the officer must have "a reasonable suspicion that something unlawful might well be afoot," ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681, 685 (1996), which must be more than an "inchoate and unparticularized suspicion or 'hunch,'" ***Terry***, 443 U.S. at 27. We apply an objective test, ***id.***, 392 U.S. at 21, to "all of the circumstances," *see* ***State v. Williamson***, 58 Wis. 2d 514, 520, 206 N.W.2d 613, 616 (1973) (quotation marks and quoted source omitted).

¶7 As seen from the circuit court's findings of fact and the officers' testimony, all we have here is that Miller was peaceably at a peaceful candlelight vigil near the place where the person whom he testified was his best friend was killed the night before. That the police saw only him leave the group is not, by any stretch of the imagination, "suspicious" activity. That he, as Officer Cline testified, looked at the group of police cars passing the vigil is not, by any stretch of the imagination, "suspicious" activity. That he felt his pants or pants pocket as he walked away from the group also is not, in light of everything else, "suspicious" activity; he could have just as realistically been feeling for his keys, cell phone, or wallet (especially given the officers' assessment of the locale as a high-crime area). Thus, what Officer Cline characterized as a "retention" check stands alone. Under the facts here, the officers' assessment that Miller may have been armed with a gun or other weapon was no more than a "hunch," and ***Terry*** tells us that a "hunch" is not enough. *See also* ***State v. Washington***, 2005 WI App 123, ¶¶3, 17, 284 Wis. 2d 456, 460, 471, 700 N.W.2d 305, 307, 312 (Seeing a suspect in front of vacant house is insufficient reason to stop him even though: (1) the officer knew that the suspect did not live in the area, (2) the suspect had

been previously arrested for selling narcotics, and (3) the police had received a complaint that someone was loitering in the area.). We reverse.[3]

By the Court.—Judgment and order reversed.

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

[3] All of the cases upon which the State relies have significant indications of potential criminal activity. *See* ***State v. Morgan***, 197 Wis. 2d 200, 204, 539 N.W.2d 887, 889 (1995) (Lawful traffic stop in high-crime area. Officers saw a car with three males at 4 a.m. drive out of one alley, make "several turns in the space of a few city blocks," and drive into another alley. When stopped, the driver could not produce a driver's license and seemed nervous.); ***State v. Jackson***, 147 Wis. 2d 824, 826, 434 N.W.2d 386, 387 (1989) (Suspect ran from officer reporting to a "possible stabbing." Although the report was false, the officer discovered before he stopped the suspect that the suspect had outstanding "'warrants.'"); ***State v. Williamson***, 113 Wis. 2d 389, 392–393, 335 N.W.2d 814, 816 (1983) (Before the officer frisked the suspect, suspect admitted that he had previously been convicted for "'carrying a gun[,]'" and that he was "currently 'wanted.'"); ***State v. Bridges***, 2009 WI App 66, ¶¶3–6, 319 Wis. 2d 217, 221-223, 767 N.W.2d 593, 595–596 (Lawful traffic stop in an area from where police had shots-fired reports. Upon approaching the car, the officer saw the suspect "lean back and make a shoving motion, and that this motion caused him to be concerned: 'I know when I see that motion, that they're trying to conceal something illegal ... and it usually is a weapon or controlled substances.'") (ellipses by ***Bridges***). In connection with ***Morgan*** and ***Bridges***, lawful traffic stops are notoriously dangerous to law-enforcement officers, *see* ***State v. Buchanan***, 2011 WI 49, ¶18, 334 Wis. 2d 379, 395–396, 799 N.W.2d 775, 784, and this adds to the circumstances that must be objectively assessed.