

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 21, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0936-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN E. MILLER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Green County:
GERALD W. JAECKLE, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Marvin Miller appeals from a judgment convicting him as a party to the crime of burglary. The issue is whether police officers unlawfully seized the evidence of that crime. We conclude that they did not, and therefore affirm.

Two police officers stopped the pick-up truck Miller was driving for minor equipment violations. A license check revealed felony warrants for Miller in Missouri. The officers called for help and two other officers arrived on the scene. Miller was then arrested, escorted to the back of the pick-up truck and handcuffed.¹ Miller's companion, Edward Miller, was also escorted to the back of the truck and handcuffed. After searching the cab and finding nothing of immediate interest, an officer opened and searched a duffel bag found in the open bed of the truck, where he found burglary tools and a large sum of money.

On Miller's suppression motion, the trial court concluded that the duffel bag was lawfully seized and searched incident to Miller's arrest, despite finding that "Marvin and Edward were handcuffed prior to the time that Chief Brown searched the bag and were guarded by ... officers and [had] little if any opportunity to get to the bed of the truck to obtain weapons or destroy evidence" The issue on appeal is whether the search and seizure of the duffel bag under those circumstances violated § 968.11, STATS., or the prohibition against unreasonable searches contained in both the United States and Wisconsin constitutions.² The legality of Miller's arrest is not challenged.

The duffel bag search did not violate the statutory and constitutional restrictions on searches incident to an arrest. In *State v. Fry*, 131

¹ Two officers who testified at the suppression hearing disagreed as to whether Miller was handcuffed when the challenged search occurred. The trial court found that he was, and we accept that finding of fact as a credibility determination.

² Section 968.11, STATS., provides:

Scope of search incident to lawful arrest. When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:

- (1) Protecting the officer from attack;
- (2) Preventing the person from escaping;
- (3) Discovering and seizing the fruits of the crime; or
- (4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

Wis.2d 153, 174-75, 388 N.W.2d 565, 574-75, *cert. denied*, 479 U.S. 989 (1986), the supreme court held that searching the interior of an automobile, incident to the arrest of its occupant, is both constitutionally and statutorily permitted for safety purposes even when that person has been handcuffed and placed under guard in a squad car. The rationale for that "bright-line" rule was, in the court's opinion, the impracticality of examining automobile searches on a case-by-case basis to determine whether valid safety concerns were present. *Id.* As a result, "[a] police officer may assume ... that the interior of an automobile is within the reach of a defendant when the defendant is still at the scene of an arrest, but the defendant is not physically in the vehicle." *Id.* at 174, 388 N.W.2d at 574. If an officer may assume that the interior of the vehicle remains within reach for one handcuffed and far removed from it, then the officer may necessarily assume that its exterior also remains within reach. *Fry* allows no other conclusion.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.