

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP455-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF1136

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD E. CROCKETT,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Ronald Crockett appeals from judgments convicting him of possession with intent to deliver non-narcotics and possession of a controlled substance. On appeal, Crockett challenges the circuit court's refusal to suppress drug evidence obtained as a result of a protective search for

weapons during an investigative stop. We conclude that the police officer had reasonable suspicion to make an investigative or *Terry*¹ stop of Crockett and to conduct a protective search of Crockett for a weapon. Therefore, we affirm.

¶2 We independently consider whether the facts found by the circuit court show a constitutional violation warranting suppression of evidence. *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). We will sustain the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. *Id.*

¶3 Crockett moved the circuit court to suppress drugs found on his person during a protective search. Officer Yandel testified at the suppression hearing that he was on patrol at 2:05 a.m. on October 19, 2009, in his uniform and a marked squad car. He and his partner observed three individuals standing in an unlit parking lot at the rear of a closed business. The business, a car and motorcycle shop, was in a generally high crime area where numerous car entries and burglaries had occurred “in the past couple months.” When the individuals saw the squad car, they started to walk away. Officer Yandel noticed that the individuals were wearing dark clothing, two of the individuals had their hoods up and were wearing gloves, and the third individual was dressed in camouflage and carrying a camouflage back pack. Officer Yandel thought the scene was notable given the time of day and the appearance of the individuals.

¶4 Officer Yandel exited his vehicle and his attention was drawn to Crockett because Crockett's right hand immediately went into his right pants

¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

pocket. Officer Yandel noticed a large bulge in Crockett's pocket, but could no longer see Crockett's hand. The officer was concerned because he did not know if Crockett had a weapon in his pocket. Officer Yandel was concerned for his safety and that of his partner. Officer Yandel ordered Crockett to remove his hand from his pocket, but Crockett did not comply. He kept his hand in his pocket, and it appeared to Officer Yandel that Crockett was trying to push something down or pull something out of his pocket. To safeguard himself, Officer Yandel approached Crockett, put his hands on him and ordered him to remove his hand from his pocket. Officer Yandel asked Crockett if he had any illegal weapons on him; Crockett did not respond. Officer Yandel remained uneasy and concerned for his safety because he could still see the bulge in Crockett's pocket, and he did not know what it was. Officer Yandel could feel the bulge when he patted down Crockett, but Crockett said he did not know what the bulge was. Crockett then consented to let Officer Yandel feel inside the pocket. In Crockett's pocket, Officer Yandel found baggies containing pills and rolled up money. The officer then suspected illegal narcotic possession or sales.

¶5 The circuit court accepted Officer Yandel's description of events and the high crime status of the area where he encountered Crockett. The court determined that Officer Yandel had reasonable suspicion to conduct an investigative stop and then undertook a limited search of Crockett for safety purposes. The court also found that Crockett gave Officer Yandel consent to investigate the contents of his pocket.

¶6 An investigative or *Terry* stop "is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *State v. Young*, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. Reasonable suspicion means that the officer possessed "specific and

articulable facts that warrant a reasonable belief that criminal activity is afoot.” *Id.*, ¶21. An officer need not rule out the possibility of innocent behavior before initiating an investigative stop. *Id.*

¶7 Crockett argues that Officer Yandel did not have reasonable suspicion to justify the investigative stop. We disagree. Officer Yandel encountered three individuals, two dressed in dark clothing and gloves and one dressed in camouflage with a backpack, behind a closed business in the early morning hours. The car and motorcycle shop was located in a high crime area where car entries and burglaries had occurred. The individuals started to walk away as the officers approached. The circuit court’s findings about Officer Yandel’s observations and the circumstances of the stop are not clearly erroneous based on this record. Officer Yandel articulated facts that, “taken together with rational inferences from those facts,” permitted him to “reasonably conclude in light of his [or her] experience that criminal activity may be afoot.” *State v. Matthews*, 2011 WI App 92, ¶11, 334 Wis. 2d 455, 799 N.W.2d 911 (citation omitted), *review denied*, 2011 WI 100, 337 Wis. 2d 52, 806 N.W.2d 640.

¶8 We turn to the validity of Officer Yandel’s protective search of Crockett. Under certain circumstances, an officer conducting a valid *Terry* investigative stop may also perform a protective search for weapons. *State v. Kyles*, 2004 WI 15, ¶7, 269 Wis. 2d 1, 675 N.W.2d 449. “[A]n officer must have reasonable suspicion that a person may be armed and dangerous to the officer or others” in order to perform a protective search. *Id.* Applying an objective standard, the question is whether a reasonably prudent person in the circumstances would be warranted in the belief that safety was jeopardized because the detained individual may be armed and dangerous. *Id.*, ¶10. In determining whether the protective search was reasonable, a court may look to any fact in the record that

was known to the officer at the time the officer conducted the protective search.
Id.

¶9 Officer Yandel testified that when he exited his vehicle, he saw Crockett place his hand in his pants pocket. There was a bulge in the pocket, and Crockett refused to remove his hand or identify the contents of the pocket. The bulge remained after Crockett complied with the officer's command to remove his hand. "Various cases have held that darkness, visibility, isolation of the scene, and the number of people in an area may all contribute to the determination of reasonable suspicion." *Id.*, ¶58. A court may also consider whether a protective search occurred in a high-crime area. *Id.*, ¶62. All of these factors were in play here. These facts, when considered with the other circumstances of the encounter, would cause a reasonably prudent person in the circumstances to believe that his or her safety was jeopardized. The protective search was valid.²

¶10 Crockett argues that the protective search was unlawful under *Kyles*. The *Kyles* court held that the protective search in that case was invalid because the officer did not have reasonable suspicion under the totality of the circumstances to justify a protective search for weapons. *Id.*, ¶2. *Kyles* involved the following facts. Around 8:45 p.m. on a December night, police stopped the vehicle in which Kyles was a passenger for operating without headlights, a traffic violation. *Id.*, ¶11. "No one in the vehicle was suspected of a crime." *Id.* The occupants exited the vehicle so that it could be searched. *Id.*, ¶12. Kyles was wearing a "big, down, fluffy" coat appropriate for cold winter weather. *Id.*, ¶13. Kyles "appeared

² Because we hold that the protective search was valid, we need not address whether Crockett consented to the search of his pocket.

nervous, looked around, and was ‘kind of trying to keep his hands in his pockets.’” *Id.* Kyles did not try to flee. *Id.* When he exited the vehicle, Kyles put his hands in his coat pockets. *Id.*, ¶14. The officer directed Kyles to remove his hands, but Kyles returned his hands to his pockets while walking to the rear of the car. *Id.* The movement of Kyle’s hands seemed like a nervous habit. *Id.* Four to eight seconds elapsed between the time Kyles exited the vehicle and the time the officer performed a protective search for weapons. *Id.*, ¶15. The officer found marijuana, but no weapon. *Id.*

¶11 *Kyles* is distinguishable. Kyles’ encounter with the police began with a stop for a traffic violation, not reasonable suspicion that criminal activity was afoot, as in this case. That Kyles repeatedly placed his hands in his pockets was only one factor in assessing, under the totality of the circumstances, whether there was reasonable suspicion to conduct a protective search. *Id.*, ¶50. There was nothing outwardly suspicious in Kyles’ pockets. In this case, a bulge remained in Crockett’s pocket even after he removed his hand, and Crockett would not describe the pocket contents for Officer Yandel. Officer Yandel had reasonable suspicion that Crockett was armed and dangerous. This is not a *Kyles* case.

By the Court.—Judgments affirmed.

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

