COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1995

Nos. 95-1595-CR
95-1596-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY HARRIS,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

FINE, J. This is a consolidated appeal by Anthony Harris from judgments convicting him, on his guilty pleas, of the following misdemeanors: unlawfully possessing marijuana, *see* §§ 161.14(4)(t), 161.41(3r), 161.01(14), STATS., and of carrying a concealed weapon, *see* § 941.23, STATS. He claims the trial court erred in not suppressing the evidence against him.[1] We affirm.

[1] A defendant may appeal from an order denying a motion to suppress evidence even though the

1. *The marijuana charge – 95-1596-CR.*

Police officers stopped a car in which Harris was a passenger because they believed that a robbery suspect for whom they were searching, John D. Smith, was in the car. The car had just pulled away from the curb when the officers, who were not in uniform, blocked it with their unmarked squad. The officers went over to the car with their guns drawn. The driver rolled down his window and, according to one of the officer's testimony, "smoke came out of the car which smelled like burning marijuana." The officers ordered Harris out of the car and discovered that he had marijuana. The testifying officer told the trial court that he "could not observe the occupants [of the car] until I approached it," agreeing in response to a question asked by defense counsel that he "had no idea" who was in the car at the time of the stop.

In seeking to suppress the marijuana, Harris argued that the police acted unlawfully in stopping the car. Although the trial court agreed that the officers did not have sufficient reason to stop the car, the trial court held that Harris lacked standing to complain.[2]

Whether Harris may challenge the lawfulness of the stop of the car in which he was riding as a passenger is governed by ***State v. Howard***, 176 Wis.2d 921, 501 N.W.2d 9 (1993). Howard was a passenger in a car stopped by police who believed that the car's tinted windows were illegal. ***Id.***, 176 Wis.2d at 924, 501 N.W.2d at 10. Police ordered Howard out of the car and patted him down. ***Ibid.*** Police discovered cocaine and more than $8,000 in Howard's overalls. ***Ibid.*** Howard challenged the stop, but the supreme court held that the

(..continued)
judgment of conviction rests on a guilty plea. Section 971.31(10), STATS.

[2] Although the parties discuss this issue in terms of "standing," ***Rakas v. Illinois***, 439 U.S. 128 (1978), has "refocused" the inquiry from "traditional concept[s]" of "standing" to an analysis of whether "`the disputed search and seizure has infringed on an interest of the defendant which the Fourth Amendment was designed to protect.'" ***State v. Fillyaw***, 104 Wis.2d 700, 710, 312 N.W.2d 795, 800 (1981) (*quoting* ***Rakas***, 439 U.S. at 140), *cert. denied*, 455 U.S. 1026. *See also* ***State v. Howard***, 176 Wis.2d 921, 926, 501 N.W.2d 9, 11 (1993). ***Rakas*** recognized, however, that the new terminology was but old "standing" writ large: "The inquiry under either approach is the same." ***Rakas***, 439 U.S. at 139.

stop "did not infringe upon any of the defendant's fourth amendment rights relative to" the car in which he was riding, reasoning that Howard, like Harris here, did not have either "a property or possessory interest in the car" or "dominion or control over" it. ***Id.***, 176 Wis.2d at 928, 501 N.W.2d at 12. Further, *at the time of the stop* (that is, without considering events after the actual stop), the "officers' conduct was not so intimidating that a reasonable person in the defendant's position would have believed his freedom of movement had been restricted in any meaningful way" over and above restrictions inherent in his status as a passenger. ***Id.***, 176 Wis.2d at 929, 501 N.W.2d at 13. Although the dissent in ***Howard*** criticized this as illogical—the stop prevented the car and its passenger from continuing their journey, *see* ***id.***, 176 Wis.2d at 932, 501 N.W.2d at 14 (Heffernan, C.J., dissenting), the majority in ***Howard*** specifically eschewed recognizing a bright-line rule. ***Id.***, 176 Wis.2d at 930–931, 591 N.W.2d at 13.

The dual thrust of Harris's argument, and the bases for the State's concession that the trial court erred (a concession that we reject), is that first, unlike the situation in ***Howard***, the officers approached the car in which Harris was riding with their guns drawn, and, second, that Harris was a "target" of the stop because the officers suspected that one of the occupants might be the sought-after Smith. *See* ***State v. Guzy***, 139 Wis.2d 663, 672, 407 N.W.2d 548, 552–553 (1987). The fact that the officers approached the car with their guns drawn, however, is not material to our decision; as already noted, ***Howard*** commands that the situation be assessed at the time of the actual stop. The actual stop here is largely indistinguishable from that in ***Howard***.

The "target" analysis upon which both Harris and the State rely is no longer the law. ***Rakas v. Illinois***, 439 U.S. 128 (1978), "expressly reject[ed]" so-called "target" language from an earlier decision discussing a defendant's "standing" to challenge a police search, ***Jones v. United States***, 362 U.S. 257, 261 (1960) ("In order to qualify as a `person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."), and held that "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed," ***Rakas***, 439 U.S. at 134, irrespective of

whether the aggrieved person was the "target" of the search, ***id.***, 439 U.S. at 132–136. Thus, ***Howard*** retired ***Guzy***'s "target" analysis:

> "[T]o the extent that *Guzy* has relevance to this case, we question its reasoning. *Guzy* apparently relied, at least in part, on a `target' theory of standing that the United States Supreme Court rejected in *Rakas*."

Howard, 176 Wis.2d at 928, 501 N.W.2d at 12. Harris's Fourth Amendment rights were not violated by the stop. We affirm the judgment of conviction in 95-1596-CR.

2. *The carrying concealed weapon charge – 95-1595-CR.*

A police officer testified at the suppression hearing that he received a police broadcast that a maroon van with no license plates might be involved in a stolen-auto case. The broadcast reported that the van had been last seen southbound on North Teutonia Avenue in Milwaukee approaching West Capitol Drive. Within a few minutes of the broadcast, the officer saw a maroon van without license plates in that area. The officer called for backup, followed the van for approximately ten blocks, stopped it, and walked to the van's passenger side. Harris was driving the van, and testified that he showed the officer papers that indicated that it was a rental van, although in someone else's name.

The police officer testified that he directed Harris to get out of the van and walk over to where the other officers were standing. The testifying officer told the trial court how he found the gun: "When I first went in I first looked in the back to see if anyone was hiding in the back of the van, and I then looked at the ignition area, saw that there were keys in the ignition, checked the back again, and that's when I saw the handgun." Harris claims that the officer unlawfully stopped and searched the van. We disagree.

The question of whether the investigatory stop of the van was legally justified presents a question of law that we decide *de novo*. ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). ***Terry v. Ohio***, 392 U.S. 1 (1968), recognizes 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; *see also* ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). Here, the van matched the broadcast description of a vehicle that was suspected of involvement in a crime. Harris's argument that the police were not justified in stopping the van is close to frivolous. Also without merit is Harris's contention that the officer unlawfully searched the van.

Although Harris testified that the officer conducted a full search of the van, the officer testified and the trial court found that the officer spotted the

gun during the second of two quick glances that were to ascertain whether anyone was lurking in the back of the van.[3] We are bound by a trial court's findings of fact unless they are "clearly erroneous." *See* RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.11(1), STATS.

The trial court's findings in this case are supported by the officer's testimony. The officer acted within the scope of reasonable prudence to make certain that no one else was in the van. *Cf.* ***Maryland v. Buie***, 494 U.S. 325, 334 (1990) (approving, as an incident to an arrest, warrantless protective sweep of places in home "from which an attack could be immediately launched"). In so doing, he spied the gun, which he testified was in plain sight. The trial court believed this testimony as well. The Fourth Amendment is not violated when police seize an object in plain view if the officer's position to see the object does not result from a Fourth Amendment violation. ***Arizona v. Hicks***, 480 U.S. 321, 326 (1987). In light of the trial court's findings of fact, the officer's actions in checking the van to see if someone was hiding in the back, and in seizing the gun in plain view, were lawful. We affirm the judgment of conviction in 95-1595-CR.

By the Court.—Judgments affirmed.

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

[3] A search of the van for weapons is only permissible if the officer "reasonably suspects that he or another is in danger of physical injury." ***State v. Moretto***, 144 Wis.2d 171, 178, 423 N.W.2d 841, 843 (1988) (quoting § 968.25, STATS., and holding it applicable to the search of automobiles that have been stopped). The trial court did not find that the officer was searching for weapons.