OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

October 17, 2013

To:

Hon. Richard T. Werner
Circuit Court Judge
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Eldred Mielke
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Mary E. Bricco
Asst. District Attorney
51 S. Main Street
Janesville, WI 53545-3951

Patricia A. FitzGerald
Patricia A. FitzGerald Law Office
229 N. Grove St.
Mt. Horeb, WI 53572-1615

Sally L. Wellman
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2012AP2785-CR State of Wisconsin v. William Russell McKinney
(L.C. # 2011CF56)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

William McKinney appeals a judgment convicting him of felony theft. The sole issue on appeal is whether the police had sufficient grounds to execute the search of McKinney's person that revealed the stolen property. After reviewing the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

According to ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be based on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action would be appropriate. During such an investigative stop, an officer may also conduct a protective pat down search of the suspect if, under the totality of the circumstances, a reasonably prudent officer would be warranted in the belief that the suspect might be armed and dangerous. ***State v. Johnson***, 2007 WI 32, ¶¶21-22, 299 Wis. 2d 675, 729 N.W.2d 182. An officer may properly seize any object felt during a protective pat down whose incriminating nature is immediately apparent, such that there is probable cause to link the object to a crime. ***State v. Guy***, 172 Wis. 2d 86, 101-02, 492 N.W.2d 311 (1992).

Here, the arresting officer was specifically directed while on patrol to look for McKinney—who was identified by name, physical description and clothing, and who was previously known to the officer from prior professional contacts—in relation to the theft of about $3,100 in cash from a private residence. The officer made contact with McKinney sometime after midnight in a location a couple of miles from the theft victim's residence, which was described by the officer as being a "somewhat high crime area known for drugs, gangs, weapons [and] other violent types of crimes." Immediately after confirming McKinney's identity, the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

officer conducted a pat down search, during which he felt "a large soft bulge consistent with what would be a large amount of U. S. currency" in one of McKinney's front pockets. The officer testified that he "expected, based on the feel and the substance of it, that it was probably money," and that expectation was confirmed when the officer reached into McKinney's pocket and pulled out what turned out to be a wad of twenty-eight hundred dollar bills.

On this appeal, McKinney argues that the totality of the circumstances was insufficient to establish reasonable suspicion for either the stop or the pat down search, and that the officer lacked probable cause to seize the cash from McKinney's pocket. We do not address the first contention because McKinney's motion to the circuit court claimed only that the search had "exceeded its permissible scope" of the investigative stop. Therefore, the State had no reason to put on additional evidence relating to the basis for the stop, and McKinney has forfeited any challenge to the legality of the stop.

With respect to the grounds for the pat down search, an officer's perception of a location as being in a high crime area and the time of day are both appropriate factors to consider in a reasonable suspicion analysis. ***State v. Morgan***, 197 Wis. 2d 200, 211, 213-14, 539 N.W.2d 887 (1995). The totality of the circumstances here also included the highly relevant fact that the officer knew that McKinney was suspected of stealing over $3,000 that evening. It was not necessary for the officer to have information that a weapon had been used in the crime to have a reasonable suspicion that someone walking through a dark, high crime area after midnight, potentially with a large amount of cash from a recent theft, might be armed.

As to seizing the cash, the circuit court's finding that the bulge the officer felt in McKinney's pocket was consistent with currency was directly based upon the officer's testimony

and was not clearly erroneous. We are further satisfied that the court could reasonably find it would have been immediately apparent to the arresting officer that what felt like a large wad of money in McKinney's pocket was linked to the theft of a large amount of money that the officer was investigating. Therefore, the officer had probable cause to remove the cash from McKinney's pocket.

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals