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DISTRICT III

March 14, 2023

To:

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Clerk of Circuit Court
Polk County Justice Center
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You are hereby notified that the Court has entered the following opinion and order:

2021AP759-CR State of Wisconsin v. Christopher Ronald Weiss
2021AP760-CR (L. C. Nos. 2019CF295, 2020CM4)

Before Gill, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Christopher Weiss appeals convictions for possession of drug paraphernalia and misdemeanor theft, both as a repeater. Weiss argues that Officer Damon DeRosier lacked reasonable suspicion to frisk Weiss, and, as a result, the circuit court should have suppressed the evidence found during the frisk. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. We summarily reverse the

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

judgments of conviction and remand for further proceedings consistent with this summary order. *See* WIS. STAT. RULE 809.21.

In August of 2019, DeRosier was dispatched to a convenience store due to a report of a possibly impaired driver who had recently exited a red van, was inside the store, and was acting strange. Once DeRosier arrived, he determined that the van was registered to Christopher Weiss. Upon entering the store, DeRosier made contact with an individual, Bruce Carr, who was "not able to stand still, talking very fast, and just seemed out of the ordinary." While no store employee verbally identified Carr as the person about whom the report was made, DeRosier noted that "one of the employees kind of nodd[ed] her head, … and … implied that that was the person they were requesting me to contact." When confronted by DeRosier, Carr stated that he was not driving and that, instead, Weiss had been driving the vehicle. Carr further disclosed that Weiss was in the bathroom. Around that time, Assistant Chief Vierkandt arrived to the scene as well. Prior to DeRosier interacting with Weiss, he was advised by dispatch that Weiss was "on probation for drug-related offenses."

After speaking with Carr, DeRosier went inside the bathroom to speak to Weiss while Vierkandt stayed with Carr. DeRosier testified that the bathroom was empty except for the furthest stall, which he discovered to be locked and occupied. DeRosier asked by name if it was Weiss inside the stall, to which Weiss responded in the affirmative. DeRosier requested that Weiss step outside of the stall to speak with him, and Weiss then exited the stall. While the two spoke, DeRosier was located between Weiss and the bathroom exit.

DeRosier testified that during their interaction, Weiss spoke in a normal tone of voice, was standing relatively still, and did not have bloodshot or glassy eyes. DeRosier further stated

that at one point, while speaking with Weiss, "Weiss started putting his hands in his pockets and digging deeper and deeper." Other than putting his hands in his pockets, Weiss was not acting strangely, and DeRosier had no information that Weiss might have a weapon on him. When DeRosier asked Weiss to remove his hands from his pockets, Weiss complied. DeRosier testified that after Weiss removed his hands from his pockets, he completed a frisk, or pat down search, of the outside of Weiss's clothing based upon concerns for his own safety.

While patting down the outside of Weiss's pants, DeRosier felt what he believed to be a pipe. DeRosier then escorted Weiss outside the convenience store and removed the pipe, finding it to be a glass pipe with white powdery residue in it.

The State filed a criminal complaint against Weiss in Polk County case No. 2019CF295, charging him with possession of methamphetamine as well as possession of drug paraphernalia, both as a repeater. Weiss entered pleas of not guilty and filed a motion to suppress the evidence obtained as a result of the frisk.

The circuit court held a hearing on Weiss's motion and concluded that DeRosier had a legitimate purpose in speaking with Weiss: to confirm who was driving the van. The court noted, however, that the main issue in the case was whether the pat down was necessary. At the end of the hearing, the court requested additional briefing from the parties on the issue of

whether DeRosier had reasonable suspicion to conduct the frisk, as well as on the applicability of 2013 Wis. Act 79 (Act 79).[2]

The circuit court addressed whether DeRosier had reasonable suspicion to conduct the frisk in an oral ruling. Relying on ***State v. Sumner***, 2008 WI 94, 312 Wis. 2d 292, 752 N.W.2d 783, the court found the frisk to be justified as a protective search for officer safety. As a result, the court denied Weiss's motion to suppress.

Weiss subsequently entered into a global plea agreement, pursuant to which he pled guilty to possession of drug paraphernalia, as a repeater, in Polk County case No. 2019CF295, and to an amended charge of receiving stolen property, as a repeater, in Polk County case No. 2020CM4.[3] The circuit court accepted Weiss's pleas and found him guilty. The court then withheld sentence and placed Weiss on probation for one year on each count, with thirty days of conditional jail time ordered on the paraphernalia charge. Weiss now appeals.

[2] "Act 79 allows law enforcement to search a person with a specified probation, parole, or extended supervision status without consent or a warrant if the officer reasonably suspects that the person is committing, is about to commit, or has committed a crime." ***State v. Anderson***, 2019 WI 97, ¶2, 389 Wis. 2d 106, 935 N.W.2d 285 (footnote omitted); *see also* WIS. STAT. § 973.09(1d).

During a May 2020 scheduling conference, the State informed the circuit court that it did not believe that the search at issue qualified as an Act 79 search and thus it would not be pursuing any arguments related to the applicability of Act 79. Based upon the position of the State and its own independent research, the court found that Act 79 was not an issue in the case.

[3] These are consolidated appeals under WIS. STAT. RULE 809.10(3). While Weiss makes no arguments suggesting that there were errors in Polk County case No. 2020CM4, because the cases were resolved as part of a global plea agreement, Weiss requests that if we agree that the frisk was unlawful that this court "vacate the judgments of convictions" in both cases and "remand to the circuit court." We therefore vacate Weiss's pleas in each case and the global plea agreement because the two convictions are connected. *See* ***State v. Briggs***, 218 Wis. 2d 61, 72-73, 579 N.W.2d 783 (Ct. App. 1998). We remand to the circuit court for further proceedings in both cases.

Weiss argues that DeRosier lacked reasonable suspicion to frisk him, and, as a result, the circuit court should have granted his motion to suppress the evidence stemming from the unlawful search. Weiss argues that the totality of the circumstances did not support a reasonable belief that Weiss was armed and dangerous. We agree and conclude the court should have granted Weiss's motion to suppress.[4]

We employ a two-step process when reviewing a circuit court's ruling on a motion to suppress evidence. ***Sumner***, 312 Wis. 2d 292, ¶17. First, "we apply the clearly erroneous standard to [our review of] the circuit court's findings of fact." ***State v. Bean***, 2011 WI App 129, ¶14, 337 Wis. 2d 406, 804 N.W.2d 696. Second, we independently review the court's application of constitutional principles to its factual findings. ***Id.***

Both the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution state that "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. Evidence obtained in violation of the Fourth Amendment typically must be suppressed. ***State v. Van Linn***, 2022 WI 16, ¶11, 401 Wis. 2d 1, 971 N.W.2d 478. "The Fourth Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances, eschewing bright-line rules and

[4] We note that the State never submitted a respondent brief on appeal. We admonish the State for this failure and encourage the State to comply with the rules of appellate procedure, specifically WIS. STAT. RULE 809.19(3). We further note that while we have decided to address the merits of this case, "[w]e may summarily reverse a judgment or order if the respondent fails to file a brief" and "[f]ailure to file a respondent's brief tacitly concedes that the [circuit] court erred." ***State v. R.R.R.***, 166 Wis. 2d 306, 311, 479 N.W.2d 237 (Ct. App. 1991).

emphasizing instead the fact-specific nature of the reasonableness inquiry." ***Sumner***, 312 Wis. 2d 292, ¶20.

Weiss argues that the totality of the circumstances did not support a reasonable belief that Weiss was armed and dangerous, and, therefore, the frisk of his person was unlawful. An officer conducting "an investigative stop … is authorized to conduct a search of the outer clothing of a person to determine whether the person is armed if the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" ***State v. Johnson***, 2007 WI 32, ¶21, 299 Wis. 2d 675, 729 N.W.2d 182 (citation omitted). "The purpose of a protective search is 'to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.'" ***Sumner***, 312 Wis. 2d 292, ¶21 (citation omitted). Whether an officer had reasonable suspicion to conduct a protective search for weapons is decided "on a case-by-case basis, evaluating the totality of the circumstances." ***Johnson***, 299 Wis. 2d 675, ¶22 (citation omitted). "The reasonableness of a protective search for weapons is an objective standard." ***State v. Kyles***, 2004 WI 15, ¶10, 269 Wis. 2d 1, 675 N.W.2d 449. Specifically, we consider whether a reasonably prudent person in the officer's circumstances would be warranted in the belief that his or her safety or that of others was in danger because the individual in question might be armed with a weapon and dangerous. ***Id.***

In concluding the search was permissible, the circuit court weighed four factors from ***Sumner***: (1) reaching gestures; (2) nervousness; (3) repeatedly putting hands in pockets; and (4) the officer stating concerns about his or her safety. *See* ***Sumner***, 312 Wis. 2d 292, ¶24. The court stated that reaching gestures and nervousness were absent from this case. Regarding the third factor, the court relied on DeRosier's testimony that Weiss was putting his hands "deeper

and deeper into his pockets." As for the fourth factor, the court noted that DeRosier testified that he was concerned about his safety. In addition to examining the above factors, the court explicitly mentioned that Weiss was on probation. The court then went on to state that DeRosier did not know for sure that Weiss was or was not impaired. Based upon the above, the court determined that the search was permissible.

We admit that this case is a very close call. At the time the officer conducted the frisk of Weiss, the following facts were known: the reported vehicle was registered to Weiss; the store employee intimated that Carr was the driver of the van; Carr was agitated and acting strangely, and he reported that Weiss had been driving and that Weiss was in the bathroom; when DeRosier made contact with Weiss, they were the lone occupants in a confined space, and DeRosier was standing between Weiss and the bathroom door during the contact; Weiss placed his hands in his pockets, digging deeper and deeper, until he was asked to remove them from his pockets; Weiss promptly complied with DeRosier's request to remove his hands from his pockets; and Weiss was on probation for "drug-related offenses."

We liken this case to ***State v. Mohr***, where we concluded that the officer lacked reasonable suspicion to frisk Mohr. *See* ***State v. Mohr***, 2000 WI App 111, ¶16, 235 Wis. 2d 220, 613 N.W.2d 186. In ***Mohr***, the defendant refused to follow commands from the officer, including requests to remove his hands from his pockets more than once, was acting nervous and resistive, and was stumbling and smelled strongly of intoxicants. ***Id.***, ¶¶6-7. The officer, assisted by another officer present at the scene, proceeded to handcuff the defendant for officer safety. ***Id.***, ¶7. Thereafter, Mohr was frisked by one of the the officers "for his safety." ***Id.***, ¶15. The court found that a reasonably prudent person in the officer's position would not have believed his or her safety to be in danger. ***Id.***, ¶16. The court determined "the most natural

conclusion is that the frisk was a general precautionary measure," not based on the conduct or attributes of Mohr. ***Id.***, ¶15. In reaching this conclusion the court considered that there were "backup units … on the scene"; and "that the frisk occurred approximately twenty-five minutes after the initial traffic stop." ***Id.***, ¶¶15-16; *see also* ***Sumner***, 312 Wis. 2d 292, ¶32 (distinguishing that ***Mohr*** "does not stand for a rule that time necessarily diminishes suspicion or risk").

Here, Weiss was even more compliant than the defendant in ***Mohr***. Although "[a]n individual's failure to obey the direction of an officer to keep his hands in the officer's sight" is "a significant factor to consider in determining the reasonableness of an officer's suspicion that an individual might be armed and dangerous," Weiss obeyed DeRosier's directions and immediately put his hands in DeRosier's sight upon being asked. *See* ***Kyles***, 269 Wis. 2d 1, ¶40. While we recognize that there was no extended passage of time as in ***Mohr***, nor was Vierkandt present in the bathroom with DeRosier, these factors are not significant. *See* ***Mohr***, 235 Wis. 2d 220, ¶15. Furthermore, we recognize that the defendant in ***Mohr*** was a passenger in the traffic stop and not an original suspect whereas here the van was registered to Weiss. ***Id.***, ¶6. Given that this case involves a non-violent offense, we do not find this difference to be significant either.

In fact, Weiss adhered to all instructions by DeRosier and complied with all of DeRosier's requests. Weiss answered DeRosier when he called him by name in the stall. Weiss stepped out to speak with DeRosier and complied immediately when DeRosier asked him to remove his hands from his pockets. DeRosier made no mention of Weiss showing signs of nervousness, agitation or impairment, and acknowledged that Weiss was not acting strangely. Furthermore, DeRosier had no information that Weiss was suspected of a crime associated with

weapons possession, and DeRosier had no prior contact with Weiss suggesting that he was dangerous. The store employee had implied that the impaired person reported over dispatch was Carr.

Further, Vierkandt, while not in the bathroom with DeRosier, was also present inside the gas station. While DeRosier may have subjectively felt concern for his safety, as stated before, "[t]he reasonableness of a protective search for weapons is an objective standard." ***Kyles***, 269 Wis. 2d 1, ¶10. The only objective indicators providing DeRosier with any safety concern with Weiss was the fact Weiss was on probation for "drug-related offenses" and Carr stating Weiss had been driving the vehicle. However, those facts do not give rise to an inference that Weiss was armed and dangerousness.

We conclude that, under the totality of the circumstances, DeRosier did not have reasonable suspicion to frisk Weiss for officer safety. Accordingly, the frisk was an unreasonable warrantless search, in violation of the Fourth Amendment, and the circuit court erred by denying Weiss's suppression motion. We therefore reverse Weiss's judgments of conviction and remand for further proceedings consistent with this summary order.

Upon the foregoing,

IT IS ORDERED that the judgments are summarily reversed and causes remanded for further proceedings consistent with this summary order. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals