COURT OF APPEALS DECISION DATED AND FILED

October 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-1048

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

IN THE INTEREST OF DAVID J.M.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DAVID J.M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

SNYDER, P.J. David J.M. appeals from a delinquency order in which his motion to suppress drug and drug paraphernalia evidence was denied. We conclude that there was a sufficient basis for the officer's investigatory stop, that the evidence was legally obtained and that David's incriminating statements were admissible. We affirm the order.

City of Elkhorn Police Officer Joel Christensen was the only witness to testify at the suppression hearing. He stated that on May 8, 1997, at approximately 11:40 a.m., he was in uniform and on his routine high school lunch hour bicycle patrol. Christensen observed David, whom he described as "a younger male," walk around a corner with something in his right hand. Upon sighting Christensen, David immediately put his right hand in his front pants pocket. Christensen confronted David, who told the officer that he had put a cigarette in his pocket and that he was sixteen years old. Christensen concluded that he had probable cause to arrest David for possession of tobacco by a minor[1] and asked David to empty his pockets.

David produced a package of Marlboro Light cigarettes, a Bic lighter and a burnt cigarette from his right front pocket and gave the items to Christensen, who then asked David to pull his pockets inside out. David complied at first but kept his hands in a fist while clenching onto his pockets. As David placed his hands back into his pockets, Christensen again asked him to empty his pockets. David then pulled out and opened both of his hands. In David's right hand Christensen observed a small plastic sandwich-type bag containing a green substance that Christensen thought was marijuana and a small brass pipe which he believed was used to smoke marijuana. David was transported to the police station where he was read the ***Miranda*** warnings, admitted obtaining the cigarettes and acknowledged ownership of the marijuana and the pipe.

David first contends that the evidence should be suppressed because Christensen lacked legal justification to stop or detain him. In reviewing an order

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[1] *See* § 938.983(2)(c), STATS.

regarding suppression of evidence, we will uphold the trial court's findings unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Richardson,*** 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether a stop meets statutory and constitutional standards is a question of law which we review de novo. *See* ***id.*** at 137-38, 456 N.W.2d at 833.

The validity of an investigative stop is governed by ***Terry v. Ohio***, 392 U.S. 1 (1968), as codified by § 968.24, STATS. Law enforcement officers may infringe on an individual's right to be free from a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts that the individual has committed a crime. *See* ***State v. Guzy,*** 139 Wis.2d 663, 675, 407 N.W.2d 548, 554 (1987). "The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of the circumstances ...." ***Richardson,*** 156 Wis.2d at 139, 456 N.W.2d 834.

Under § 968.24, STATS., a law enforcement officer may stop a person in a public place for a reasonable period of time, detaining and questioning the person in the vicinity of the stop, when the officer reasonably suspects that the person is committing, is about to commit or has committed a crime. Based upon Christensen's undisputed testimony, the trial court found that David was startled by seeing Christensen, that David immediately made a suspicious gesture by putting his hand in his pocket and that "at that point the officer has every reason to investigate further by way of an investigative stop." David contends that those observations by Christensen are not enough to trigger a § 968.24 investigatory stop. We disagree.

Christensen was an experienced police officer, in uniform, who testified that he was assigned to patrol the public area in question during the high school lunch hours. His personal observations of David and David's actions were specific and raised a reasonable suspicion that David was attempting to hide something after seeing a police officer. David's reaction raised a reasonable inference that what he was trying to hide concerned a law violation. It is not necessary that the officer suspected that David was involved in criminal activity. A police officer may validly perform an investigative stop pursuant to § 968.24, STATS., when a person's activity may constitute a crime, a civil forfeiture or even be innocent. *See* ***State v. Krier,*** 165 Wis.2d 673, 678, 478 N.W.2d 63, 65 (Ct. App. 1991). The trial court's finding that the stop and detention of David were lawful is not contrary to the great weight and clear preponderance of the evidence.[2]

We next address David's contention that he was unlawfully searched. While Christensen's testimony supports the State's position that David was not searched by the officer but merely consented to Christensen's investigative requests to empty his pockets, we will assume a search occurred. Christensen requested that David empty his pockets and disclose the contents after David had told him that he was sixteen and possessed a cigarette. We agree with the trial court that Christensen had probable cause to arrest David at the time he admitted to a violation of § 938.983(2)(c), STATS., prohibiting minors from possessing tobacco. The trial court properly noted that after David admitted possessing tobacco, the discovery of the contents of David's pockets was

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[2] Because we hold that David's stop and detention were lawful under § 968.24, STATS., we do not address whether this was a consensual encounter. Only the dispositive issue need be addressed. *See* ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

inevitable, regardless of whether it occurred before or after the arrest for possession of tobacco.

We agree with the State that it is not required that a search incident to arrest take place after a formal arrest. In ***State v. Swanson,*** 164 Wis.2d 437, 441, 475 N.W.2d 148, 154 (1991) (citing ***Rawlings v. Kentucky***, 448 U.S. 98, 111 (1980)), our supreme court held that "where the formal arrest immediately follows the challenged search, it is irrelevant that the search preceded the arrest rather than vice versa, so long as the fruits of the search were not necessary to support probable cause to arrest." David was subject to arrest for being a minor possessing tobacco prior to the request that he empty his pockets and disclose the contents. The marijuana and pipe were not necessary to support David's arrest for a violation of § 938.983(2)(c), STATS. We are satisfied that David's rights were not impinged by the procedure used by Christensen.

David contends that he was not placed under arrest and did not believe that he was under arrest until after the search that revealed the pipe and marijuana was completed. The test for a search incident to arrest is whether a reasonable person would have considered himself or herself to be in custody. *See* ***Swanson,*** 164 Wis.2d at 446-47, 475 N.W.2d at 152. We are satisfied that David's startled response to the presence of the police officer, his actions in response to the direct confrontation by the officer, his admissions as to his age and to the tobacco violation and his reactions to the officer's continuing inquiries during the confrontation show a sufficient restraint and objectively support David reasonably believing that he was in custody as a juvenile offender.

David further argues that even if Christensen had probable cause to arrest him for tobacco product possession, that would not justify the later search

incident to arrest revealing the drug contraband without a prior de facto arrest for the tobacco violation. *See **id.*** at 444, 475 N.W.2d at 151 ("A search incident to arrest is justified by the fact of the arrest.") He contends that because a precipitating arrest for the tobacco violation never occurred, a search incident to arrest did not occur. We are not persuaded.

David voluntarily advised Christensen that he was sixteen and possessed tobacco products in violation of § 938.983(2)(c), STATS. Christensen was then authorized to take David into custody under § 938.19(1)(d)3, STATS., because he had reasonable grounds to believe that David had violated a state law. Christensen concluded that he had probable cause to arrest David. We have determined above that David had reason to believe that he was in the custody of Christensen during the confrontation, and especially so after revealing the tobacco product possession. Under ch. 938, STATS., custody is not arrest except, inter alia, for the purpose of determining whether the obtaining of evidence is lawful. *See* § 938.19(3). In determining whether the obtaining of David's marijuana and pipe evidence was lawful, we read § 938.19(3) to say that a juvenile who reasonably believes that he or she is in police custody is under arrest for purposes of determining whether a search occurred incident to arrest. We therefore conclude that David was under arrest for purposes of a search incident to arrest after he admitted to his age and to his possession of a tobacco product and that the subsequent search revealing the marijuana and pipe was a legal search incident to arrest.

Last, David contends that his incriminating admissions to the police were the "poisonous fruit" of an unlawful stop and search. The trial court found that David had been properly advised of his rights and that his admissions were

free and voluntary.[3] The trial court then stated, "[A]s I found the stop and the arrest and the search to be reasonable, ... there's no fruit of the poisonous tree to cause the statement to be suppressed." We agree and need not add further comment.

By the Court.—Order affirmed.

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

[3] David has abandoned any contentions that he was not properly advised of his rights against self-incrimination or that his statements were not knowing and voluntary in this appeal.