COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0952-CR **Cir. Ct. No. 03CM001662**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN T. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Following the denial of his motion to suppress, Nathan T. Moore pled guilty to possession of drug paraphernalia in violation of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

WIS. STAT. § 961.573(1).[2] On appeal, Moore argues that the arresting officer did not have reasonable grounds to conduct a protective search of his person during a temporary stop pursuant to WIS. STAT. § 968.24 and ***Terry v. Ohio***, 392 U.S. 1 (1968).[3] As subsets to that argument, Moore additionally contends that the trial court: (1) erroneously determined that the arresting officer was a credible witness, and (2) erroneously relied on unpublished opinions of the court of appeals in denying the motion to suppress. We reject Moore's arguments and affirm the judgment of conviction.

BACKGROUND

¶2 The evidence regarding the initial stop and detention of Moore are not disputed. On July 21, 2003, shortly after midnight, Officer Gregory Baldukas and a fellow officer were on patrol in the city of Racine when they observed two persons, later identified as Moore and Charles Edwards, exiting a golf course property. Edwards was carrying a forty-ounce bottle of beer. Baldukas' partner made contact with Edwards while Baldukas made contact with Moore. Baldukas described the area as "a high-crime, high-drug area part of the city."

¶3 At this point, the testimony of Baldukas and Moore differ. Baldukas testified that Moore had his hands closed. Concerned that Moore might have a weapon, Baldukas ordered Moore to approach him and to open his hands. Moore

[2] Moore's appeal is taken pursuant to WIS. STAT. § 971.31(10) which allows an appeal from an adverse ruling on a motion to suppress notwithstanding that the judgment of conviction was entered upon a plea of guilty.

[3] Moore does not challenge the temporary stop and detention pursuant to WIS. STAT. § 968.24. Rather, his challenge is limited to the search conducted incident to the temporary stop pursuant to WIS. STAT. § 968.25

did not immediately comply, and Baldukas had to issue several more similar commands before Moore obeyed. Moore then approached Baldukas and opened his closed fists, revealing that he did not have a weapon. Baldukas then performed a pat-down search of Moore and discovered a marijuana pipe in a pocket of the gym shorts that Moore was wearing. The search did not reveal any weapon.

¶4 On cross-examination, Baldukas conceded that he routinely performs a pat-down search in these types of situations. He also was uncertain as to whether his request for Moore's name and address occurred before or after the protective search. At one point in his testimony, he also stated that he approached Moore, instead of Moore approaching him.

¶5 Moore testified that he and Edwards were walking down the street and had not exited the golf course property. He also stated that he did not have his fists closed, that he did recall Baldukas asking him to open his hands, and that he immediately approached Baldukas when asked to do so.

¶6 In its ruling, the trial court first correctly observed that the law governing a temporary stop applies to forfeiture offenses as well as criminal offenses. *See* ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991). The trial court made this statement because Baldukas believed that Moore and Edwards may have been trespassing on the golf course property. If true, this was a civil forfeiture offense under the ordinances of the city of Racine. The court then noted that the applicable test is whether the officer had an articulable suspicion to detain the suspect and to conduct a protective search. As to the search specifically, the court noted Baldukas' testimony that Moore had his "hands clenched, tightly closed, refused to open them." Based on Moore's conduct, the "late night" time of the event, and the "high-crime" and drug reputation of the

area, the court concluded that Baldukas' pat-down search of Moore was supported by an articulable suspicion that he might have a weapon. Accordingly, the court denied Moore's motion to suppress.

DISCUSSION

Baldukas' Credibility

¶7 We begin with Moore's challenge to the trial court's determination that Baldukas was a credible witness. Specifically, Moore challenges Baldukas' testimony that Moore had his hands closed and failed to comply with his several commands that he open his fists and approach Baldukas. Moore argues that Baldukas' testimony was inconsistent as to when he asked Moore to provide his name and address and whether Moore approached him or he approached Moore.

¶8 When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony. The trier of fact is in a far better position than an appellate court to make this determination because it has the opportunity to observe the witnesses and their demeanor on the witness stand. ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). In ***State v. Owens***, 148 Wis. 2d 922, 436 N.W.2d 869 (1989), the supreme court said:

> Different witnesses' testimony may be contradictory and at times one witness's testimony may be inherently inconsistent. The trial judge not only hears the testimony, but also sees the demeanor of the witness and the body language. As a result, the trial judge hears the emphasis, volume alterations and intonations. The trial judge also has a superior view of the total circumstances of the witnesses' testimony. Consequently, the trial court's findings of fact are only upset when clearly erroneous.
>
> ….

> Confronted with the conflict of testimony, it was the trial court's obligation to resolve it. The fact finder does not only resolve questions of credibility when two witnesses have conflicting testimony, but also resolves contradictions in a single witness's testimony. In ***Thomas v. State***, 92 Wis. 2d 372, 381, 284 N.W.2d 917 (1979), the court stated: "Where there is conflict in a witness' testimony it is the province of the trier of fact, the court in this case, to determine the weight and credibility to be given her testimony."

Owens, 148 Wis. 2d at 929-30.

¶9 As this standard of review infers, a fact finder may opt for some, all, or none of the testimony of a witness who has been impeached. Here, despite isolated inconsistencies in Baldukas' testimony, the trial court nonetheless determined that Baldukas was a credible witness. We do not upset that determination because Baldukas' testimony was not inherently incredible and the trial court was in a far better position than we to gauge the truthfulness and persuasiveness of that testimony.

¶10 Moore also points to Baldukas' testimony that he routinely performs a pat-down search in similar situations. From this, Moore reasons that the search in this case was more of the same. Undoubtedly, Baldukas' routine procedure might well offer grounds for suppression of evidence in a given case since WIS. STAT. § 968.25 does not allow for protective searches in all ***Terry*** situations. Instead, the statute allows for such searches only where the officer "reasonably suspects that he or she or another is in danger of physical injury." Sec. 968.25. Or, as stated in ***Terry***, "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." ***Terry***, 392 U.S. at 27.

¶11 Here, despite Baldukas' testimony concerning his routine procedure, he also testified that under the particular circumstances in this case, he was concerned for his own safety. We note the following exchange during the cross-examination of Baldukas:

> [Defense counsel] But you had no particular reason to fear that this particular individual under those circumstances had a weapon on him; is that correct?
>
> [Baldukas] No. I feared he did have a weapon because he wasn't complying. He was told several times— He was given several comments to obey. He refused to at first.

¶12 Baldukas' testimony about his usual procedure and his testimony about the particular circumstances of this case required the trial court to resolve whether the protective search in this case was premised upon the former or the latter. As with Moore's other challenges to Baldukas' testimony, this again called for the trial court as the fact finder to make a credibility assessment. As noted, we accord substantial deference to a trial court's resolution of such a fact-driven question. ***Owens***, 148 Wis. 2d at 929-30.

¶13 We uphold the trial court's determination that Baldukas was a credible witness.

Validity of the Search

¶14 Moore argues that under the totality of the circumstances, Baldukas did not have the necessary reasonable suspicion as required by WIS. STAT. § 968.25 and ***Terry*** to conduct the protective search of his person. As noted, ***Terry*** permits such a limited search when "a reasonably prudent [person] in the circumstances would be warranted in the belief that [the person's] safety or that of others was in danger." ***Terry***, 392 U.S. at 27. Also as noted, § 968.25, which

codifies ***Terry***, states that such a search is proper when the officer "reasonably suspects that he or she or another is in danger of physical injury." In assessing the validity of a protective search, we apply an objective standard. ***State v. Kyles***, 2004 WI 15, ¶10, 269 Wis. 2d 1, 675 N.W.2d 449. A police officer's subjective "inchoate and unparticularized suspicion or 'hunch'" will not support a search incident to a temporary stop. ***Terry***, 392 U.S. at 28. The ultimate question of the constitutionality of such a search presents a question of constitutional law that we review de novo. ***Kyles***, 269 Wis. 2d 1, ¶7.

¶15 In challenging the protective search, Moore principally relies on ***Kyles*** where the supreme court held that the totality of the circumstances was not sufficient to create reasonable suspicion to justify a protective search for weapons. ***Id***., ¶2. In ***Kyles***, the defendant was a passenger in a vehicle stopped for a traffic violation at 8:45 p.m. in an area described as "pretty active" in terms of criminal activity. ***Id***., ¶¶11, 17. The defendant appeared "a little nervous." ***Id***., ¶55. When he exited the vehicle, the defendant had his hands in the pockets of his large coat suitable for the cold winter weather that night. ***Id***., ¶¶13-14. The officer told the defendant to remove his hands from his pockets. ***Id***., ¶14. The defendant complied, but then again placed his hands in his pockets as he was walking to the rear of the car. ***Id***. Once again, the officer directed the defendant to remove his hands from his pockets and again the defendant complied. ***Id***. The officer then performed a pat-down search of the defendant revealing the presence of marijuana. ***Id***., ¶15.

¶16 Based on those facts, the supreme court held that the pat-down search was invalid. In doing so, the court rejected the State's request for a per se rule that an individual's "hands in pockets" or the wearing of a bulky coat automatically constitutes reasonable suspicion of the presence of a weapon under

WIS. STAT. § 968.25. ***Kyles***, 269 Wis. 2d 1, ¶48-53. Instead, the court held that these facts were but part of the totality of circumstances bearing on reasonable suspicion to conduct a protective search. ***Id***.

¶17 In assessing the totality of the circumstances, the supreme court noted the following. The stop and frisk occurred at 8:45 p.m., "an hour in which it is common for people to be traveling" and the stop was for a traffic violation, not a crime. ***Id***., ¶69. The defendant had immediately complied with the officer's two commands to remove his hands from his coat pockets. ***Id***., ¶70. The officer described the defendant's actions as a "nervous habit" and that he did not "feel any particular threat" when he frisked the defendant. ***Id***., ¶71. From this, the court concluded that the officer's belief that the defendant was armed and dangerous was more "an inchoate and unparticularized suspicion or 'hunch.'" ***Id***., ¶72.

¶18 This case has a similarity to ***Kyles*** in that Moore and Edwards were temporarily detained for a possible civil trespassing violation, not a criminal offense. However, despite this similarity, it does not follow that the trial court's ruling was wrong under ***Kyles***. We first note that the predominant holding of ***Kyles*** was a rejection of the State's argument for the adoption of per se rules that if certain facts exist (i.e. "hands in pockets" or a large bulky coat), reasonable suspicion under WIS. STAT. § 968.25 exists as a matter of law. In response, the supreme court said, "Circuit courts are aptly positioned to decide on a case-by-case basis, evaluating the totality of the circumstances, whether an officer had reasonable suspicion to effectuate a protective search for weapons in a particular case." ***Kyles***, 269 Wis. 2d 1, ¶49.

¶19 Here, the circuit court performed the very exercise mandated by the supreme court in ***Kyles***, and the circuit court's analysis sets this case off from

Kyles. The court noted the hour—around midnight—not a time as in ***Kyles*** when "it is common for people to be traveling." ***Id***., ¶69. While the locations of the temporary stops in both cases were associated with criminal activity, the supreme court noted that the area in ***Kyles*** was one in which "it is common for people to be traveling." ***Id***. Given the early morning hour of the events in this case, the same cannot be said. Finally, and most importantly, the court noted Moore's equivocal conduct under those circumstances:

> In this case the officer testified that initially Mr. Moore had his hands clenched, tightly closed, refused to open them. The officer did not know under those circumstances whether or not there may have been a weapon involved. Under those circumstances when an officer is confronted with a situation where it's late at night, a high-crime area and the … potential that a weapon is present, when an individual refuses to open their hands to show that they do not have a weapon, under those circumstances … the officer acted appropriately in this particular case.
>
> I don't want to be standing there at quarter after twelve or twelve-thirty in the morning in a high-crime area confronting a couple of guys who may, in fact, have a weapon without first assuring myself that there is no weapon present.

¶20 Objectively assessing the totality of the circumstances, we conclude, as did the trial court, that Baldukas had reasonable suspicion to believe that Moore might be harboring a weapon.

¶21 Moore also argues that Baldukas' failure to first ask him for his identification and address, which would have revealed that he lived only a short distance away, is fatal to the protective search. We disagree. While WIS. STAT. § 968.24 governing a temporary stop authorizes the officer to demand the name and address of the suspect, we observe that WIS. STAT. § 968.25 governing a protective search during a temporary stop does not state that the search can only

occur after the officer has asked for such information. Moreover, imposing such a requirement would defeat the purpose of the protective search, which is to protect the safety of the officer and others. In addition, even if Baldukas had first obtained this information, we fail to see how, under the facts of this case, such would have mitigated the reasonable suspicion that otherwise existed.

Reference to Unpublished Opinions

¶22 Last, Moore complains that the trial court alluded to some unpublished opinions to support its ruling.[4] While the parties' debate of this issue makes for interesting discussion, we do not deem it dispositive since the core question before us is whether the trial court applied the correct law, regardless of whether that law is recited in published or unpublished opinions. As our analysis has indicated, the court applied the correct law and reached the correct conclusion. As such, we do not address this issue further.

CONCLUSION

¶23 We hold that Baldukas had reasonable suspicion as required by WIS. STAT. § 968.25 to conduct a protective search of Moore. We uphold the trial court's denial of Moore's motion to suppress and we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

[4] WISCONSIN STAT. RULE 809.23(3) states that "[a]n unpublished decision is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority …."

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