

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1940-CR

Cir. Ct. No. 2009CF3516

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROOSEVELT J. RAYFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Roosevelt J. Rayford appeals from a judgment of conviction entered upon his guilty plea to possessing a firearm as a felon. He contends that the police lacked probable cause to arrest him, and therefore the circuit court erred when it denied his motion to suppress the evidence found

incident to his arrest. Because we conclude that the police had probable cause to arrest Rayford for carrying a concealed weapon, we affirm.

BACKGROUND

¶2 Milwaukee Police Officer Ryan Heidemann and his partner, Officer Todd Smolen, arrested Rayford for carrying a concealed weapon. The officers later discovered that Rayford was a convicted felon. After the State charged him with possessing a firearm as a felon, he moved to suppress the evidence of his identity and the statements that he gave at the time of his arrest, arguing that his arrest was unlawful.

¶3 The testimony presented at the suppression hearing forms the basis for Rayford's claim on appeal that the police lacked probable cause to arrest him because he did not conceal the gun he carried. Heidemann was the sole witness at the hearing. He testified that he and Smolen were patrolling a Milwaukee neighborhood in a marked squad car at 8:27 a.m. on July 29, 2009. Heidemann described driving northbound when he saw a person subsequently identified as Rayford walking southbound towards the squad car. Heidemann testified that he could see Rayford's hands and that Rayford was not carrying anything. As the squad car neared him, Rayford "went up onto a porch. As he did that, he produced a silver handgun from the right side of his person." Heidemann testified that he saw Rayford place the gun on the porch and then "jump back down the [porch] stairs." According to Heidemann, he first saw a handgun in Rayford's possession when Rayford went up onto the porch and that "[i]n order for [Rayford] to have had a gun on him, it had [to] be concealed somewhere on his person." The officers therefore stopped Rayford, and a few seconds later Heidemann found a

silver handgun behind a pillar on the porch where he had seen Rayford place a gun. The officers arrested Rayford.

¶4 At the conclusion of the hearing, the circuit court denied the suppression motion, determining that the officers had probable cause to believe that Rayford carried a concealed weapon. Rayford later resolved the pending criminal case with a guilty plea to the charge of possessing a firearm as a felon, and this appeal followed.¹

DISCUSSION

¶5 A warrantless arrest is lawful only when supported by probable cause to believe that the arrestee committed a crime. *See State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. In this case, Rayford contends that the police arrested him without probable cause to believe that he carried a concealed weapon. *See* WIS. STAT. § 941.23 (2009-10).² He believes that the evidence discovered after his arrest must therefore be suppressed. *See State v. Knapp*, 2005 WI 127, ¶22, 285 Wis. 2d 86, 700 N.W.2d 899.

¶6 When we review an order denying a motion to suppress evidence, we uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *State v. Dubose*, 2005 WI 126,

¹ A circuit court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² After Rayford's arrest in 2009, the legislature amended WIS. STAT. § 941.23. *See* 2011 Wis. Act 35, §§ 50-56. Neither party suggests that the amendments are applicable here. *See id.* at § 101.

¶16, 285 Wis. 2d 143, 699 N.W.2d 582. Whether a given set of facts constitutes probable cause to arrest presents a question of law that we review *de novo*. See *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

¶7 Probable cause is a flexible, commonsense standard requiring “only that the facts available to the officer would warrant a person of reasonable caution to believe that an offense likely was committed.” *State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125. Probable cause requires “more than a possibility or suspicion that [the] defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” *State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). Further, probable cause does not require a police officer to rule out innocent explanations before making an arrest. See *Nieves*, 304 Wis. 2d 182, ¶14 (officer is not required to draw an inference of innocence when a reasonable inference also exists that favors probable cause). “The process deals with probabilities, not hard certainties.” *Id.*

¶8 Here, the police arrested Rayford after concluding that he committed the crime of carrying a concealed weapon. The elements of this offense are: (1) a person other than a peace officer went armed with a dangerous weapon; (2) the person was aware of the presence of the weapon; and (3) the weapon was concealed. See *State v. Dundon*, 226 Wis. 2d 654, 660-61, 594 N.W.2d 780 (1999). Rayford contends that the testimony at the suppression hearing did not

establish probable cause to believe that he committed this offense because, he says, the State did not show that he concealed the gun that he carried.³

¶9 We conclude that probable cause existed to arrest Rayford. Heidemann observed Rayford as the two men approached each other on a summer morning, and Heidemann did not see a gun. When Rayford veered onto a porch, Heidemann saw Rayford produce a handgun from the right side of his body. The circuit court determined that “the officer saw nothing in the hand then all of a sudden he saw something in the hand, it’s a reasonable conclusion that the item was concealed.” We agree. A weapon need not be completely hidden to be concealed. *Id.* at 662. “The test is, was [the weapon] carried so as not to be discernible by ordinary observation.” *State v. Walls*, 190 Wis. 2d 65, 70, 526 N.W.2d 765 (Ct. App. 1994) (citation omitted).

¶10 Rayford complains that “if a person is not able to see a gun at a particular time that does not mean that the gun is hidden from ordinary view.” Heidemann, however, was not required to search for an innocent reason that might explain why he failed to see a gun when he began watching Rayford. *See Nieves*, 304 Wis. 2d 182, ¶14. Heidemann could instead reasonably infer that the weapon was hidden from ordinary observation. *See id.* “When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.” *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

³ In the circuit court, Rayford also argued that his arrest lacked probable cause because the police took him into custody before determining that he had a gun. On appeal, he states that he is not pursuing that argument. Therefore, we do not consider it. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

¶11 Accordingly, the circuit court correctly concluded that the evidence presented during the suppression hearing demonstrated probable cause for the arrest. Because Rayford fails to demonstrate that his arrest was unlawful, he presents no basis for suppressing the evidence discovered as a consequence of that arrest. We affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

